

**JUDICIAL RESOLUTION OF CONFLICTS BETWEEN  
TRADE AND THE ENVIRONMENT**

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## **JUDICIAL RESOLUTION OF CONFLICTS BETWEEN TRADE AND THE ENVIRONMENT ... (GATT/WTO AND MEA'S)**

World Trade Organization (WTO)<sup>1</sup> and General Agreement on Tariffs and Trade (GATT).<sup>2</sup> is monumental in the realm of international law and generally enjoys considerable support.<sup>3</sup> The regime, however, is outdated to the extent it continues to ignore modern international concerns - environmental protection is but one example.<sup>4</sup> In essence, the GATT/WTO perspective is narrow, concerned almost exclusively with trade objectives. It does not account for the fact that trade measures often serve legitimate and socially desirable ends.<sup>5</sup>

The regime's history and importance can be traced. In 1930, the United States Congress passed the Smoot-Hawley Tariff Act, increasing tariffs on foreign imports.<sup>6</sup> The Act led to retaliatory tariff increases throughout the world, a decrease in international trade, and ultimately contributed to the global depression of the 1930s.<sup>7</sup> In part, the formulation of the GATT 1947 was a response to these world events. The agreement arose out of a

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<sup>1</sup> Agreement Establishing the World Trade Organization, art. I, reprinted in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. See also WTO Agreement Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), reprinted in 33 I.L.M. 1125, at 1226- 47 (1994) [hereinafter DSU]. The DSU is WTO's enforcement mechanism.

<sup>2</sup> General Agreement on Tariffs and Trade (1947), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S 1700, 55 U.N.T.S. 187 [hereinafter GATT]. GATT 1947 was readopted by the World Trade Organization as Annex 1A of the WTO Agreement. See 33 I.L.M. 1125, at 1154 [hereinafter GATT 1994], which reads: "The General Agreement on Tariffs and Trade 1994 (GATT 1994) shall consist of: (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act ... as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement."

<sup>3</sup> GATT is the primary world trade regime, and relative to other international agreements, it is particularly influential. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 Wash & Lee L. Rev. 1227, 1230 (1992).

<sup>4</sup> International health and labor issues are also affected by GATT/WTO. For a discussion of trade and health issues, see Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, 32 Int'l Law 901 (1998).

<sup>5</sup> See Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 Minn. J. Global Trade 287, 288 (1998).

<sup>6</sup> Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930).

<sup>7</sup> See Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. Pa. J. Int'l Econ. L. 769, 776-77 (1998).

newly discovered interest in international economic stability and growth, infused by the post-depression and World War II era.<sup>8</sup>

The GATT/WTO is a landmark in international law and policy because of its breadth, both in terms of the number of participants and in terms of its impact on international trade.<sup>9</sup> International law is often criticized as servile and impotent; the GATT/WTO regime does not comport with this characterization.<sup>10</sup> If there was a weakness in the original GATT, it was its institutional vacuum.<sup>11</sup> This vacuum was erased by the WTO Agreement in 1994.<sup>12</sup> Further, global commitment to the GATT 1947 and its original provisions was reaffirmed at the Uruguay Round.<sup>13</sup> Weakening the regime is not a possibility.

The objective of the GATT is to liberalize trade among its contracting Parties. It seeks to gain the purported benefits associated with comparative advantage, an economic theory holding that the world economy can achieve greater economic efficiency through trade liberalization.<sup>14</sup> It postulates that nations, able to rely on an open market, will be more willing to specialize in the production of goods they are best adapted to produce. Specialization then increases efficiency by decreasing costs. This article will not engage in a detailed discussion of comparative advantage, suffice it to say the theory is a lynchpin of the GATT/WTO's trade liberalization objective.

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<sup>8</sup> See *id.* at 776-77.

<sup>9</sup> Average tariffs have been reduced from approximately 40% to below 4%. The number of signatory countries to the GATT has increased from 23 to 133 and now represents over 80% of world trade in goods. See David M. Gould & William C. Gruben, *Will Fair Trade Diminish Free Trade?*, *Bus. Econ.*, Apr. 1997, at 7.

<sup>10</sup> One academic describes that "the most significant and widespread rule-system for international trade is the GATT system, which includes GATT and over 200 ancillary treaties, as well as a number of related arrangements and decisions." Jackson, *supra* note 17, at 1230.

<sup>11</sup> Originally, the GATT was to include the International Trade Organization, which was to be the institutional body that ensured enforcement of the GATT provisions. However, this entity was never adopted.

<sup>12</sup> See WTO Agreement, *supra* note 1, at 1144.

<sup>13</sup> See GATT, *supra* note 2; WTO Agreement, *supra* note 1, at 1154.

<sup>14</sup> The theory of Comparative Advantage was developed by David Ricardo in the eighteenth century. See 1 *Works of David Ricardo, Principles of Political Economy* 128-41 (P. Strafa ed., 1975).

## The Emergence of Multilateral Environmental Agreements

Over the past thirty years there has been a growing commitment to global environmental protection,<sup>15</sup> partly corresponding to recent achievements in science and technology that now permit us to make substantial changes, often harmful, to the environment. It has become apparent that many threats to the global environment are real, possibly imminent, and may only be abated through international cooperation.

Today, there are MEAs covering almost every facet of environmental protection, though the creation of MEAs has been slower and more gradual as compared to trade liberalization, which took a giant leap in 1947.

International law is often characterized as soft law; its enforcement is less direct relative to domestic or municipal law.<sup>16</sup> As a generalization, international environmental law follows this pattern; it lacks organization, financial support and legal status, and is fragmented.<sup>17</sup> MEA trade measures are considered an effective means for overcoming these obstacles.<sup>18</sup> MEAs utilize trade measures in three ways: (1) to control trade which itself causes environmental harm; (2) to protect states from substances harmful to the domestic environment; or (3) to support agreements to protect the global commons.

An example of a MEA which includes the first type of trade restriction is the Convention on International Trade in Endangered Species (CITES). This treaty employs restrictions on the import and export of various threatened or endangered species listed in its appendices.<sup>19</sup> The justification underlying CITES's trade measures is that "International trade is a substantial factor in the loss of species and ecosystems. To combat this loss,

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<sup>15</sup> See Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea: Justice in Trade and Environment Disputes*, 25 *Ecology L.Q.* 189, 191 (1998). This is evidenced by the rise of international environmental law, which in turn, corresponds to the growth of international law generally over the past century.

<sup>16</sup> For a discussion of national sovereignty and the inherent weakness of international law, relative to domestic or municipal law, in the realm of international environmental law, see Cyrille de Klemm & Clare Shine, *Biological Diversity Conservation and the Law* 1 (1993).

<sup>17</sup> See Guruswamy, *supra* note 5, at 191-92.

<sup>18</sup> See *id.* at 192. For a comprehensive analysis of various MEAs and their respective trade measures, see Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 *Geo. Int'l L. Rev.* 1 (1993).

<sup>19</sup> See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Mar. 3, 1973, 12 *I.L.M.* 1085, 1096 *Appendices I-II* (1973) [hereinafter CITES]. It includes import restrictions under its certification scheme corresponding with its export restrictions. For a discussion of how CITES's trade measures protect species.

international agreements restrict trade in endangered species and their products."<sup>20</sup> The Basel Convention on Hazardous Wastes prohibits import and export of hazardous materials.<sup>21</sup> It is illustrative of the second category of trade measures utilized by MEAs - those protecting nations from harmful substances.<sup>22</sup> The convention seeks to limit the transboundary movement of hazardous wastes into nations with relatively weaker environmental standards.<sup>23</sup>

The 1987 Montreal Protocol seeks to decrease the production and use of substances that contribute to ozone depletion.<sup>24</sup> It restricts trade in substances that deplete the ozone layer, as well as products that are produced in an ozone-depleting manner. The agreement's success, in terms of its speed of implementation and number of participants, can largely be attributed to trade measures.<sup>25</sup> It illustrates the third form of MEA trade measures - those designed to protect the global commons.

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<sup>20</sup> Michael B. Saunders, Comment, Valuation and International Regulation of Forest Ecosystems: Prospects for a Global Forest Agreement, 66 Wash. L. Rev. 871, 880-81 (1991) (citations omitted).

<sup>21</sup> See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (1989) [hereinafter Basel Convention].

<sup>22</sup> see Jill Lynn Nissen, Achieving a Balance Between Trade and the Environment, 28 Law & Pol'y Int'l Bus. 901, 902-04 (1997) at 913.

<sup>23</sup> See Basel Convention, supra note 51. Often the nations targeted by the Basel Convention for weak environmental standards are developing nations.

<sup>24</sup> See Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (1987).

<sup>25</sup> See Annick Emmenegger Brunner, Conflicts Between International Trade and Multilateral Environmental Agreements, 4 Ann. Surv. Int'l & Comp. L. 74, 75-76 (1997) at 77. Trade measures were used to persuade members into joining the Montreal Protocol.

## **THE TRADE AND ENVIRONMENT CONFLICT AFTER ADOPTION OF THE WTO AND THE DECISION IN SHRIMP-TURTLES**

### **WTO Efforts to Resolve the Trade and Environment Conflict**

The GATT was signed and ratified over fifty years ago. When it was implemented it was understandably lacking in content dealing with international environmental protection because there were no MEAs to speak of. Times have changed, and for the most part the GATT has not. In fact, one observer argues the GATT was intended to be non-responsive to evolving social concerns. In effect it was meant to be "self-contained."<sup>26</sup>

In 1994, the GATT 1947 was subsumed at the Uruguay Round by the adoption of the WTO Agreement. The then new WTO Agreement kept the substantive provisions of the original GATT intact, while making some additions.<sup>27</sup> The newly formed institution, the World Trade Organization, is now charged with administering GATT/WTO rules. Like the original GATT agreement, the WTO Agreement makes only cursory mention of environmental protection concerns. The preamble to the WTO Agreement includes rhetoric about sustainable development and refers to the need to protect the environment. Nevertheless one observer writes, "While taking a positive step in recognizing the relationship between trade and the environment, the Uruguay Round failed to clarify the appropriate relationship between existing multilateral environmental agreements and the WTO." In the early 1990's, the GATT's Group on Environmental Measures and International Trade (GEMIT),<sup>28</sup> created to foster a resolution to the trade and MEA dispute, declined to formulate new rules to protect MEAs. Instead it chose the status quo, a case-by-case jurisprudential approach.<sup>29</sup>

At the WTO Ministerial Conference in Singapore in December of 1996, members of the WTO adopted the Report of the Committee on Trade and the Environment (CTE).<sup>30</sup> The

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<sup>26</sup> See Guruswamy, *supra* note 5, at 288, 327.

<sup>27</sup> The most significant substantive addition was the Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A [hereinafter TBT Agreement].

<sup>28</sup> See Report of the Chairman of the Group on Environmental Measures and International Trade presented to the Contracting Parties at the Forty-Ninth Session, GATT B.I.S.D. (40th Supp.) (1992).

<sup>29</sup> Bill O'Connor, Trade and Environment: An Update on the GATT Agenda, 4 Eur. Env'tl. L. Rev. 20, 21 (1995).

<sup>30</sup> See CTE Report, *supra* note 12. For a detailed discussion of why the CTE failed, see Ignacia S. Moreno et al., Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future, 12 Tul. Env'tl. L.J. 405, 457-59 (1999), where the author explains that differences of opinions on the CTE prevented it from making progress in resolving the trade and environment dispute.

CTE considered the relationship between the WTO/GATT regime and MEAs, and made a number of findings in its report. The CTE was possibly the WTO's best opportunity to take decisive action to resolve the trade and environment dispute. It did, in fact, recognize that the GATT/WTO and MEAs represent shared goals of the international community, and that the former can accommodate the latter.

Beyond this, however, the results of the CTE and its report are dubious at best. In short, it accomplished little and its findings are rather conservative. For instance, it asserts that trade and environment disputes might be overcome by mere negotiation at the national level, or institutional cooperation between the GATT/WTO and MEAs. It emphasizes the importance of the MEAs' dispute settlement mechanisms for resolving disputes but offers little advice in the realm of GATT/WTO reform. Commentators point out that "actions taken by parties to specific environmental agreements cannot bind nonparties to those agreements. As a result, action by the WTO parties would be a more effective resolution to conflicts between environmental agreements and GATT/WTO rules, because such action would establish rules for all parties having trading rights."

The CTE Report's non-aggressive and uninspiring approach drew criticism from those interested in the security of MEAs. A joint statement by ten non-governmental entities (NGOs) criticized the CTE's failure to offer a real solution to the problem, and requested that the CTE reaffirm the legitimacy of MEAs to ensure that they are not preempted by the WTO/GATT provisions.<sup>31</sup>

Why did the CTE fail? One commentator notes, "given that its deliberations were governed by trade concerns, effectively ignoring the existence of, and need for, environmental standards, it not surprising that the CTE failed to make any concessions to multilateral trade agreements." Moreover, the Report, at best, is merely a set of recommendations. Without subsequent action it becomes meaningless.

### **WTO Appellate Body's Decision in Shrimp-Turtles**

In 1989, the US Congress enacted Section 609 of Public Law 101-162, which called for restrictions on imports of shrimp and shrimp products from nations failing to take adequate steps to protect endangered sea turtles.<sup>32</sup> After the United States sought to enforce the measure, several nations challenged it under substantive GATT rules, and a WTO panel convened and eventually rejected the measure under Article XI of GATT.<sup>33</sup>

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<sup>31</sup> BNA Inc., Ministers Adopt Trade/Environment Report Renew Committee to Look at the Issue, 20 Int'l Env't Rep. 3 (1997).

<sup>32</sup> Section 609 is found at Pub. L. No. 101-162, Title VI 609, 103 Stat. 988, 1037-38 (1989) (codified at 16 U.S.C. 1537) [hereinafter Section 609].

<sup>33</sup> Report of the Panel on United States-Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832, PP 7.8-7.17 [hereinafter WTO Panel Report on Shrimp-Turtles].

In addition, the panel found that the measure, as enforced, did not meet requirements of Article XX's "chapeau." The United States appealed the panel's decision to the WTO Appellate Body. Ultimately, however, Shrimp-Turtles can also be viewed as yet another case in which the GATT/WTO tribunal rejected an environmental trade measure. The Appellate Body held that Section 609's method of enforcement amounted to an "economic embargo" that required all exporting members to adopt policies identical to US domestic policy. Further, it ruled that Section 609's enforcement treated nations differently because the period of time to phase in turtle safeguards varied among nations. This lack of flexibility and differential treatment, in the Appellate Body's opinion, did not comport with Article XX's "chapeau."

## **APPROACHES TO RECONCILIATION**

Thus far this article has sought to frame the trade and environment issue and provide the necessary context to analyze potential solutions. The discussion now looks to potential solutions, evaluating their relative strengths and weaknesses.

### **1. Amending the GATT**

Amendment of the GATT would likely entail the addition of a specially tailored, formal exception that explicitly condones, or even bolsters, MEAs that comport with Article XX of GATT.<sup>34</sup> The provision could create a presumption of legitimacy for measures derived from MEAs. One commentator observes that such a provision must be carefully drafted and use expansive language to account for existing treaties and to prevent prejudicing future MEAs.<sup>35</sup> The amendment process seeks to circumvent problems associated with reinterpretation of Article XX by creating a provision that clearly demonstrates the Parties' intent to except MEA trade measures from GATT obligations.

### **2. Application of Criteria to Guide Adjudication**

GATT Parties could create a set of criteria to guide adjudication. The criteria might be factored into WTO panels' directives for considering disputes in which MEAs are involved. It has also been suggested that a set of criteria could be used "for drafting new multilateral environmental agreements so as to avoid conflict with GATT and WTO."<sup>36</sup>

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<sup>34</sup> See Brunner, *supra* note 25, at 95. For a detailed discussion of the amending the GATT approach, see also Nissen, *supra* note 14, at 917-28.

<sup>35</sup> See Brunner, *supra* note 25, also including an example of such a provision.

<sup>36</sup> See Brunner, *supra* note 25, at 98.

### **3. Cooperation and Coordination of Trade and Environment Policymaking**

Inconsistencies arise between the GATT/WTO and MEAs because the two regimes evolved largely in isolation from one another. It seems sensible that any sort of meaningful resolution will entail at least the preliminary step of bringing the various interests together for negotiation. This approach does not have well-defined boundaries, rather it might encompass any number of strategies based on the premise that coordination and cooperation are prerequisites to effecting a fair reconciliation.

One ambitious strategy might involve representatives of trade, environmental protection, and developing as well as developed nations attending a series of negotiations. Or, it could entail environmental officials and experts participating in trade negotiations.<sup>37</sup> Alternatively, drafters of MEAs could consult with trade experts when formulating trade measures, or future negotiations could include NGOs, which may help facilitate compromise.

Some form of negotiation, whether formal or informal, large or small, would at least compel all parties to acknowledge problems, and hopefully reduce polarization. Each party would have the opportunity to explain its position and concerns. Talking about the problem, however, will not solve it, but is a necessary and preliminary step to reaching the ultimate goal of reconciliation.

### **4. Procedural Changes to Dispute Settlement Under the GATT/WTO**

Assuming for a moment that GATT/WTO is the proper forum for adjudication of trade and environment disputes, there are ways to make future WTO tribunals more conducive to fair and informed decision-making. The first entails the selection of panelists. WTO's DSU mandates that panelists be "well-qualified" individuals, and that members should be selected with the objective of creating "a sufficiently diverse background and a wide spectrum of experience." Thus one could make the case that WTO tribunals should include experts in the realm of environmental protection. Similarly, the WTO Director-General could specially appoint a judge who is cognizant of both trade and environmental protection concerns.

As mentioned in the above discussion of the Shrimp-Turtles Appellate Body Report, the DSU allows individuals and organizations to submit amicus briefs to WTO tribunals. Tribunals also have authority to create an advisory panel for scientific and technical matters. This could prove very useful in disputes involving environmental trade measures, which often require complicated factual findings.

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<sup>37</sup> See Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future*, 219, 220 (Institute for International Economics ed., 1994).

## **5. Change of Forum**

One approach, largely overlooked by academics, is to change the forum for adjudication of trade and environment disputes. GATT/WTO panel rulings have unanimously rejected environmental trade measures, and with the exception of the Appellate Body's Report in the Shrimp-Turtles case, the rulings consistently ignore non-trade interests. If disputes were adjudicated in a different forum, adjudication might become more objective as the GATT/WTO would be forced to compete on a more level playing field.

Disputes could be referred to the International Court of Justice (ICJ), or the settlement body of the MEA involved. The CTE Report itself suggested that MEA settlement bodies become more involved in trade and environment disputes. However, MEAs, in many instances, do not have a dispute settlement body, or may include a provision referring the dispute to arbitration or the ICJ.

## **The Law of Environmental "PPMs" (Processes and Production Methods) and Tariffs**

Processes and Production Methods (PPMs) are the subject of one of the most knotty controversies in the debate over "trade and environment."<sup>38</sup> A central disagreement is whether the rules of the WTO's General Agreement on Tariffs and Trade (GATT) prohibit PPMs per se, or whether they are permitted in certain circumstances. These PPMs can be contrasted to an import ban that has no connection to production methods. While the TBT Agreement uses the term "regulation" for "mandatory" provisions, the taxonomy laid out in this Article uses the term "standard" rather than "regulation" for two reasons: first, while some environmental PPMs are regulations applied equally to foreign and domestic products, many PPMs are import bans that may not come within the scope of TBT; second, the term "regulation" has a connotation of jurisdiction to prescribe individual behavior that does not fit PPMs, which set conditions for entry or sale that the exporter may or may not seek to meet. Even without explicit language, however, GATT rules may still prohibit environmental PPMs. The U.S. import ban was a government policy standard aimed at foreign laws. Furthermore, the Commission administering an environmental treaty can authorize non-product-related PPMs. To scrutinize PPMs, the WTO will assess the validity of the environmental purpose underlying the trade measure.

The reality of international trade law is different. PPMs affecting trade are not prohibited per se. . Recognizing the correct legal status of PPMs is a precondition to achieving a much needed reconciliation between the World Trade Organization and environmentalists.

One of the best known examples of a PPM-based restriction is the U.S. trade ban on shrimp from countries that have not been certified as having regulatory regimes in place

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<sup>38</sup> For background on the trade and environment debate, including the role of PPMs, see generally Agriculture, Trade, & the Environment (Maury E. Bredahl et al. eds., 1996); Asian Dragons and Green Trade (Simon S.C. Tay & Daniel Esty eds., 1996); International Trade, Investment and The Environment (Ralf Buckley & Clyde Wild eds., 1994); Trade, Environment, and the Millennium (Gary P. Sampson & W. Bradnee Chambers eds., 1999); Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America (Peider K<um o>nz et al. eds., 2000); Trade, Global Policy, and the Environment (Per G. Fredriksson ed., 1999, World Bank, Discussion Paper No. 402); Daniel C. Esty, Greening the GATT (1994); James R. Lee, Exploring the Gaps: Vital Links Between Trade, Environment, and Culture (2000); Ernst-Ulrich Petersmann, International and European Trade and Environmental Law after the Uruguay Round (1995); C. Ford Runge, Freer Trade, Protected Environment (1994); Gary P. Sampson, Trade, Environment, and the WTO: The Post-Seattle Agenda (2000); Peter Uimonen & John Whalley, Environmental Issues in the New World Trading System (1997); David Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy (1995); Richard A. Westin, Environmental Tax Initiatives and Multilateral Trade Agreements: Dangerous Collisions (1997); Special Issue: Trade and Environment, 5 Env't & Dev. Econ. 341 (2000); Michael Reiterer, The International Legal Aspects of Process and Production Methods, 17 World Competition, June 1994, at 111.

to prevent the killing of sea turtles in the course of shrimping.<sup>39</sup> The U.S. government imposed a ban on shrimp imports from countries that federal officials believed were not doing enough to prevent shrimp trawlers from killing endangered sea turtles. The enforcement of the U.S. ban led to a high-profile dispute in the World Trade Organization when four countries - India, Malaysia, Pakistan, and Thailand - brought a case against the United States.<sup>40</sup> This famous WTO dispute is known as the "Shrimp-Turtle" case.<sup>41</sup>

Shrimp-Turtle demonstrates the cloud of suspicion surrounding the application of PPMs. This Article argues that rather than a covert tool of protectionism, a PPM can be an appropriate instrument of environmental policy. A number of international instruments already bear witness to this fact. For example, the World Charter for Nature, approved by the United Nations General Assembly in 1982, calls on governments to "establish standards for products and manufacturing processes that may have adverse effects on nature, as well as agreed methodologies for assessing these effects."<sup>42</sup> In fact, the WTO treaty acknowledges the importance of production methods for environmental policy. The WTO Agreement on Agriculture - in prescribing criteria for domestic support measures that remain exempt from reduction - states that payments under environmental programs must be dependent on specific conditions such as "conditions related to production methods or inputs."<sup>43</sup> Of course, neither the World Charter for Nature nor the Agreement on Agriculture provides an explicit endorsement of a PPM affecting trade. So long as a government applies PPMs only to domestic producers, no other government is likely to

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<sup>39</sup> This trade ban is carried out pursuant to section 609 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990. 16 U.S.C. 1537 (2001). Many people assume that section 609 is part of the Endangered Species Act because the codifiers placed a historical and statutory note in that part of the U.S. Code. See, e.g., *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1016 (Ct. Int'l Trade 2000) ("Section 609 is part of the Endangered Species Act."). This is an incorrect assumption, however, despite the obvious relationship between the goals of section 609 and the Endangered Species Act. A provision of federal law cannot become part of the Endangered Species Act unless the Congress amends the Act to put it there; the Congress has not done that in this case.

<sup>40</sup> See Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 *Loyola L.A. Int'l & Comp. L. Rev.* 1 (1999).

<sup>41</sup> Notwithstanding its formal name in the WTO as "United States - Import Prohibition of Certain Shrimp and Shrimp Products," this lawsuit is widely known as the Shrimp-Turtle case. Even the WTO website uses this shorthand designation: "India etc. versus US: "Shrimp-Turtle," available at <http://www.wto.org/english/tratop<uscore>e/envir<uscore>e/edis08<uscore>e.htm>. When it originally captioned the case in 1997, the WTO Secretariat missed the opportunity to demonstrate its understanding that a key issue in the case was the conservation of turtles. The WTO's name for the case reflects an assumption that the United States had been banning shrimp imports to protect its shrimping industry. In an effort to show the bias in how the WTO Secretariat styled the case, Robert Howse renames it the "Turtles panel." For his critique of the WTO panel report, see Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 *J. World Trade*, Oct. 1998, at 73.

<sup>42</sup> World Charter for Nature, U.N. Doc. A/RES/37/7, Nov. 9, 1982, P 21(b), 22 *I.L.M.* 455, 459 (1983).

<sup>43</sup> Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, P 12(a), Legal Texts, *supra* note 3, at 52. Domestic support includes direct payments (or foregone revenue) provided to agricultural producers.

complain at the WTO. Trade conflicts are likely to arise, however, upon application of a PPM to imported products or to Foreign Service suppliers.

With the goal of promoting the resolution of such potential trade conflicts, this Article presents a new taxonomy of PPM-based restrictions. PPMs that focus on the manner of production are preferable to PPMs that focus on the country of production. Recognizing that form matters can allow the WTO and the environmental community to communicate, thus enabling environmentalists to articulate their demands in a manner consistent with the principles of non-discriminatory trade embodied in the WTO.

Several WTO agreements already recognize the validity of PPMs that clearly affect trade.<sup>44</sup> The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) states that governments shall allow a reasonable interval between the publication of a regulation and its entry into force in order to allow time for producers "to adapt their products and methods of production to the requirements of the importing Member."<sup>45</sup> The Agreement on Technical Barriers to Trade (TBT) has a similar provision.<sup>46</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires governments to establish a procedure enabling the holder of an intellectual property right to ask customs authorities to detain goods produced with a counterfeit trademark or "pirated" copyright.<sup>47</sup> In all of these agreements, however, the foreign production process is of concern only because of its impact on the importing country.

The quarrel with PPMs is not about this kind of measure; rather, it is about the use of trade measures with an outwardly directed purpose. The U.S. import ban on shrimp was outwardly directed in that it sought to save turtles being killed hundreds or thousands of miles away. Such measures respond to the fact that activities by the nationals of one country can adversely affect the global commons.

Of course, PPMs are not always inspired by altruism. A government that has imposed a regulatory burden on its domestic producers may seek to impose a similar burden on foreign producers to keep them from gaining a competitive advantage. PPMs may also be

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<sup>44</sup> Aaron Cosby, *The WTO and PPMs: Time to Drop a Taboo*, *Bridges Between Trade and Sustainable Development*, Jan.-Apr. 2001, at 11, available at <http://www.ictsd.org>.

<sup>45</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, Legal Texts, *supra* note 3, at 68 [hereinafter SPS Agreement]. "Member" means a state or other entity that has joined the WTO. The SPS Agreement supervises government measures to protect domestic human, animal, or plant life or health from risks such as pests, disease, food additives, and toxins. For example, a measure banning the importation of anthrax spores would be governed by SPS rules.

<sup>46</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, art. 2.12, Legal Texts, *supra* note 3, at 124 [hereinafter TBT Agreement]. The TBT Agreement supervises government-set product standards and promotes harmonization.

<sup>47</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, art. 51, Legal Texts, *supra* note 3, at 344 [hereinafter TRIPS Agreement].

contrived to shield domestic producers and workers from import competition. For example, a government might seek to put a special tariff on imports manufactured under lower environmental standards than a like domestic product.

The use of environmental PPMs is controversial for two main reasons. First, a PPM can restrict trade or make it harder and costlier for an exporter to supply a foreign market. Second, PPMs are a signal from importing countries to exporting countries about the environmental practices and laws that the importing country thinks the exporting country should have. The transmission of values through trade is not new and has occurred since antiquity. PPMs are different, however, because they employ government-set trade restrictions to transmit values. These two features alone would suffice to make PPMs contentious; yet the latent controversies are intensified by one further point. The user of the PPM is almost always a rich country, and the target country is often a developing country. This factor has led to the charge that environmental PPMs are a tool of eco-imperialism: the rich country may be viewed as trying to coerce the poor country into placing a higher value on the environment than the poor country considers appropriate.

The international debate on PPMs is understandably heated. Both proponents and opponents of PPMs are convinced that they are right, and no compromise has emerged in the past several years. This debate is worth examining because it reflects different assumptions about what the WTO law is. A central disagreement is whether the rules of the WTO's General Agreement on Tariffs and Trade (GATT) prohibit PPMs per se, or whether they are permitted in certain circumstances. The GATT is one of the central agreements in the WTO treaty system. GATT rules supervise government restrictions on trade in goods. The GATT also contains exceptions in Article XX that may be used to justify environmental measures.<sup>48</sup>

This Article explicates and appraises the WTO law of PPMs. A better understanding of the law and of how PPMs operate could help governments and stakeholders improve the management of outwardly directed PPMs. Right now, governments have divergent views about WTO rules. This has led to an inside out debate from which a political consensus cannot easily emerge.

The law of PPMs received a useful clarification in October 1998 when the WTO Appellate Body handed down its decision in the *Shrimp-Turtle Case*.<sup>49</sup> The Appellate Body's decision seemed to imply that PPMs could be legal under the WTO. Ironically, turtles remained a flash point with the public thirteen months later when some of the anti-

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<sup>48</sup> GATT Article XX is discussed extensively below. For the relevant portions of Article XX, see text accompanying infra note 99.

<sup>49</sup> WTO Appellate Body Report on United States Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), available at <http://www.wto.org> [hereinafter Appellate Body Shrimp-Turtle Report]. The U.S. government made the importation of shrimp contingent on whether exporting country governments had in place a regulatory program (addressing the incidental killing of sea turtles) that was comparable to the U.S. regulatory program. The Appellate Body ruled that the manner in which the law was being applied violated WTO rules because there was arbitrary and unjustifiable discrimination against the complaining governments.

WTO protestors in Seattle dressed up as turtles to complain about the WTO's ruling.<sup>50</sup> Even today, a pervasive myth exists that the WTO forbids PPMs. If this were true, it would put the WTO at odds with environmental policy. As discussed below, however, this interpretation of WTO law is flawed.

The myth that PPMs are illegal under WTO law has had three harmful consequences. First, it has fed some of the public protests against the WTO. In his careful study of trade-related environmental measures in 1995, Howard Chang warned of this danger:

The creation of barriers to environmental protection in the name of free trade has eroded respect for GATT institutions in particular and political support for free trade in general... . The GATT panels were understandably concerned about the potential for protectionist abuse of Article XX. Their crude but sweeping rules against trade restrictions, however, make no attempt to distinguish between legitimate environmental concerns and protectionism, and in the process do the cause of free trade a great disservice: the political backlash against free trade may also fail to make the same distinction.<sup>51</sup>

Although the GATT jurisprudence on Article XX has improved substantially since 1995, the public is not yet aware of this development.<sup>52</sup> Thus, the second negative effect of the myth that PPMs are illegal under WTO law is that the divergence of views on the legality of PPMs has impeded potential progress in the ongoing work of the WTO Committee on Trade and Environment. Finally, the third harmful consequence of the myth of illegality is that without a shared comprehension of the legal baseline, it is impossible to develop new disciplines to prevent inappropriate PPMs.

This Article focuses on environmental PPMs. Although the taxonomy can be applied to all PPMs, the legal and policy conclusions reached here are not necessarily applicable to other kinds of trade PPMs, such as labor standards or restrictions based on human rights or animal welfare. This point is noted at the start to forestall the inevitable complaint that countenancing environmental PPMs will open the door to less justifiable PPMs.<sup>53</sup>

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<sup>50</sup> Joan Lowy, *Protesters Have Long List of Complaints Against World Trade Group*, Chattanooga Free Press, Dec. 2, 1999, at A7.

<sup>51</sup> Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 *Geo. L.J.* 2131, 2209 (1995). When he refers to "GATT panels," Chang means the panels appointed by the GATT as an organization before it was absorbed into the WTO in 1994.

<sup>52</sup> See Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 *Harv. Envtl. L. Rev.* 563, 589 (2000) (noting that activists seem unaware of the improvement in WTO jurisprudence); Michael M. Weinstein, *Greens and Globalization: Declaring Defeat in the Face of Victory*, *N.Y. Times*, Apr. 22, 2001, 4, at 18 (contrasting developments in WTO jurisprudence with the views of the anti-WTO protestors).

<sup>53</sup> See, e.g., Magda Shahin, *Trade and Environment: How Real is the Debate?*, in *Trade, Environment, and the Millennium*, supra note 1, at 35, 46 (expressing concern that environmental PPMs could be an opening

## THE WTO LAW OF PPMs

Many commentators contend that WTO rules do not permit importing governments to make distinctions based on the production process. The quotations below demonstrate how widespread the view is that PPMs are illegal under trade rules.<sup>54</sup> This list is balanced in containing commentators who favor the WTO's anti-PPM stance and those who oppose it.

This [shrimp] ban was a unilateral trade measure, in clear contradiction of the WTO principle that production and processing methods are not valid reasons for product differentiation.<sup>55</sup> The traditional understanding of the provisions of the GATT is that they recognize only the physical characteristics of a product, not how it is made. There is a sound economic reason for this.<sup>56</sup> GATT rules require that imported and domestically produced goods be treated equally and that foreign goods not be subject to import restrictions on the basis of "production processes and methods" - PPMs - used in their manufacture.<sup>57</sup>

One of the basic principles of the WTO is that member countries may not discriminate between "like products." This has hitherto normally been interpreted as preventing discrimination between goods on the basis of how they are produced. To allow discrimination on the basis of production and processing methods (PPMs), there would have to be a re-interpretation of the crucial term "like product."<sup>58</sup> We noted, WTO law

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for the enactment of PPMs aimed at improving labor standards, human rights, good governance, and all sorts of other social measures that are more properly matters for domestic political decision and have hardly any relationship with the WTO).

<sup>54</sup> Not all commentators were so quick to assume that PPMs violate GATT rules. In his treatise of 1989, John Jackson suggests that the Article XX exceptions imply a focus on the product itself, and not on the production process. But he goes on to add that it might be possible to argue the contrary, and that the issue has not been squarely posed in dispute settlement. John Jackson, *The World Trading System* 209 (Paperback Edition, 1992). It should be noted that many trade law analysts have stated that PPMs are legal under WTO rules.

<sup>55</sup> Maria Amparo Alban, *Trading Sovereignty: Ecuador's Strategic Silence on the Shrimp Ban*, 2 *Bridges Between Trade and Sustainable Development*, Apr.-May 1998, at 13.

<sup>56</sup> Alan Oxley, *Poor Environmental Policy: The Fundamental Problem in the "Trade and Environment" Debate*, in *The Next Trade Negotiating Round: Examining the Agenda for Seattle* 63, 71 (Jagdish Bhagwati ed., 1999).

<sup>57</sup> I.M. Destler & Peter J. Balint, *The New Politics of American Trade: Trade, Labor, and the Environment* 35 (1999).

<sup>58</sup> House of Lords Select Committee on European Communities, *The World Trade Organisation: The EU Mandate After Seattle*, June 13, 2000, PP 223-24.

does not allow countries to discriminate against like products, whatever their different environmental impacts. This prohibition makes little environmental sense. The way a product is produced is one of the three central questions for an environmental manager.<sup>59</sup>

The WTO agreed in the Uruguay Round that, although states can control the import of final products that are damaging to health and environment, they cannot restrict the import of goods on the grounds that they have been produced using harmful process and production methods (PPMs).<sup>60</sup> WTO rules do not allow its members to discriminate between so-called "like products." This is widely interpreted as implying they cannot discriminate between goods on the basis of non-product related process and production methods (PPMs).<sup>61</sup> Expressed in the "like product" norm, where products are seen to be equivalent, their origin - or their production processes and methods (PPMs) background - may not constitute any grounds for discriminating treatment through national policy.<sup>62</sup>

The position of most developing countries is that the TBT Agreement prohibits the use of standards based on non-product-related PPMs because its definition of standards does not include those that are based on such PPMs and product differentiation on these grounds is not allowed by GATT/WTO jurisprudence.<sup>63</sup>

What is the authority for this widely-shared opinion? Certainly, the text of the GATT does not forbid national regulations, taxes, tariffs, or import bans based on the production process. On the contrary, the GATT allows governments to discriminate against imports made in prohibited ways. For example, governments can take customs action against an imported article made using a subsidy, or whose producer prices it too low, or whose producer does not have the requisite intellectual property licenses.<sup>64</sup> The consumer may

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<sup>59</sup> U.N. Environment Programme & International Institute for Sustainable Development, *Environment and Trade: A Handbook* 43 (2000).

<sup>60</sup> Bill Jordan, *Building a WTO That Can Contribute Effectively to Economic and Social Development Worldwide*, in *The Role of the World Trade Organization in Global Governance* 243, 254 (Gary P. Sampson ed., 2001).

<sup>61</sup> European Commission, *Towards Sustainable Trade, Trade Policy Dialogue with Civil Society, Ad-Hoc Meeting on PPMs, 31 May 2001, Draft Agenda*, available at <http://europa.eu.int/comm/trade/csc/drafttagd<uscore>ppm.htm>.

<sup>62</sup> Martin Weber, *Competing Political Visions: WTO Governance and Green Politics*, 1 *Glob. Envtl. Pol.* 92, 99 (2001) (internal citation omitted).

<sup>63</sup> Jose Maria Figueres Olsen, Jose Manuel Salazar-Xirinachs, & Monica Araya, *Trade and Environment at the World Trade Organization: The Need for a Constructive Dialogue*, in *The Role of the World Trade Organization in Global Governance*, supra note 88, at 155, 174. The three authors, from Costa Rica, are reporting opinions expressed by others.

<sup>64</sup> GATT, supra note 3, arts. VI:3, VI:2, XX(d). Article VI:3 implicitly authorizes countervailing duties against imports produced with the help of government subsidies. Article VI:2 authorizes antidumping duties against dumped products. Article XX(d) implicitly authorizes trade measures to protect patents, trademarks, and copyrights.

not agree with the governmental decision that these methods of production should be attacked with trade measures. The subsidized, low-cost imported fish will taste as good as the higher-cost domestic fish. Nevertheless, the GATT permits governments to impose PPMs of this sort despite the fact that the behavior being complained about has no effect on the product as such.

Even without explicit language, however, GATT rules may still prohibit environmental PPMs. As noted above, many commentators so contend. Over the years, the GATT Secretariat has taken both sides of the debate. When it first addressed the matter in 1971, the Secretariat explained:

A shared resource, such as a lake or the atmosphere, which is being polluted by foreign producers, may give rise to restrictions on trade in the product of that process justifiable on grounds of the public interest in the importing country of control over a process carried out in an adjacent or nearby country.<sup>65</sup>

Twenty years later, after environmental concerns grew in importance, the GATT Secretariat shifted its stance and asserted that "in principle, it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting country."

### **Structure of GATT Obligations**

The structure of GATT obligations is as follows: A PPM could violate GATT Article I (most-favored-nation), or GATT Article III (national treatment), or GATT Article XI (elimination of quantitative restrictions). If so, it would be reviewed under the General Exceptions in Article XX when there is an applicable exception.<sup>66</sup> GATT Article I

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<sup>65</sup> GATT, Industrial Pollution Control and International Trade, GATT Studies in International Trade No. 1, July 1971 (emphasis added).

<sup>66</sup> GATT Article XX (General Exceptions) provides in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... .

(b) necessary to protect human, animal or plant life or health... .

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

... .

requires parties to treat a product of another party no less favorably than the like product of any other party. GATT Article III requires treating imported products from a party no less favorably than like domestic products. GATT Article XI prohibits import and export bans and quotas (subject to certain exceptions not relevant here). GATT Article XX provides for General Exceptions to the entire Agreement.

The relationship between the GATT disciplines and Article XX is subject to different interpretations. One school of thought is that GATT Articles I, III, and XI impose disciplines on governments, and that GATT Article XX provides exceptions to those disciplines. Whether a national measure is in conformity with the GATT can only be determined by looking at both the disciplines and the exceptions in tandem. Viewed in this way, when a measure fails to provide national treatment, it should not be called a GATT violation merely because it violates Article III; a determination of GATT status requires a review of Article XX too.

The opposing school of thought is that GATT Articles I, III, and XI grant (or delineate) "rights" of a WTO member country to have the exports of its private actors accepted by other WTO member countries. Viewed in this way, the Article I, III or XI rights of the exporting country will need to be weighed against the Article XX rights of the importing country to rely upon one of the listed exceptions. Acting inconsistently with Article I constitutes a GATT violation, but it might be excusable by Article XX.

The WTO Appellate Body aligns itself with the second school. In the *U.S. Gasoline Case*, the Appellate Body held that "if those [Article XX] exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the parties claiming the exception and the legal rights of the other parties concerned."<sup>67</sup>

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(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;  
... .

<sup>67</sup> Report of the Appellate Body Concerning United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 21-22 (Apr. 29, 1996) available at <http://www.wto.org> [hereinafter Appellate Body Gasoline Report].

## **A DETAILED CASE STUDY OF GATT/ WTO AND PPM REGULATIONS**

Nevertheless, as shown below, adjudicatory panels considering Article III have objected to PPMs in the few cases where such measures were reviewed. During the GATT era (1947-94), there were four cases, all against the United States. Since the advent of the WTO, two cases have arisen, but other decisions may bear on how Article III would be applied to PPMs.

The earliest GATT case, decided in 1991, is known as the Tuna-Dolphin I Report.<sup>68</sup> At that time, the United States imposed a "primary" import ban on tuna from countries that did not have a regulatory regime to protect dolphins comparable to the U.S. regime.<sup>69</sup> Mexico, one of the embargoed countries, complained that this law violated Article III.<sup>70</sup> The U.S. import ban was a government policy standard aimed at foreign laws.<sup>71</sup> Indeed, the law also contained a fishery-practice standard by requiring Mexico to keep its overall dolphin killing rate no more than 25 percent higher than the United States' annual rate.<sup>72</sup> The panel ruled that Article III "covers only those measures that are applied to the product as such." Therefore, the U.S. measure regarding dolphins did not fit within the confines of Article III because this PPM "could not possibly affect tuna as a product."<sup>73</sup> The panel went on to say that if the U.S. measure were covered by Article III, such a measure would constitute a violation because the United States treatment of Mexico cannot be predicated on whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of U.S.-flag vessels.<sup>74</sup> When the matter was debated before

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<sup>68</sup> United States - Restrictions on Imports of Tuna, Sept. 3, 1991, GATT, B.I.S.D. (39th Supp.) at 155 (1991) (not adopted) [hereinafter Tuna Dolphin I Report]; see Henry L. Thaggert, A Closer Look at the Tuna-Dolphin Case: "Like Products" and "Extrajurisdictionality" in the Trade and Environment Context, in *1 Trade and the Environment: The Search for Balance* 69-95 (James Cameron et al. eds., 1994).

<sup>69</sup> Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 4. The current law contains a different prohibition.

<sup>70</sup> Tuna Dolphin I Report, *supra* note 86, P 3.16.

<sup>71</sup> *Id.* PP 2.5-6.

<sup>72</sup> *Id.* The U.S. import ban on tuna is not a producer characteristics standard because no solitary producer can meet it on its own. It is also not a how-produced standard since the import ban is country-wide. Implicitly, then, the import ban calls on each foreign country to impose a government policy standard.

<sup>73</sup> *Id.*, P 5.14. In a recent commentary, Robert Hudec states that the panel's suggestion that Article III does not cover process-based regulations "is just plain wrong." Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in *New Directions in International Economic Law* 187, 198 (Marco Bronckers & Reinhard Quick eds., 2000).

<sup>74</sup> Tuna Dolphin I Report, *supra* note 86, P 5.15. The panel's overall ruling was that the United States was imposing a quantitative restriction in violation of GATT Article XI and that therefore the U.S. trade ban violated GATT rules.

the Council in 1992, the European Commission called for the adoption of the Tuna-Dolphin report as "a necessary first step in clarifying the relationship between environmental policies and GATT provisions."<sup>75</sup> Nevertheless, this judgment was not adopted by the GATT Council and today carries no legal weight in the WTO.<sup>76</sup>

The U.S. Alcoholic Beverages decision came a few months later.<sup>77</sup> This dispute involved numerous causes of action by Canada, only one of which is discussed here. Canada complained about an excise tax credit in the State of Minnesota for small beer breweries, regardless of whether they were domestic or foreign.<sup>78</sup> Canada argued that this tax measure discriminated against its large breweries. The panel held that beer from micro-breweries is a like product to beer from large breweries, and so a tax that distinguishes the two violates Article III:2.<sup>79</sup> This tax credit is an example of a producer characteristics PPM.

The second Tuna-Dolphin decision came in 1994 and it too was not adopted.<sup>80</sup> The plaintiffs were the European Communities and the Netherlands acting for the Netherlands Antilles. This panel's Article III holding was similar to that of the first Tuna-Dolphin panel. The second panel contended that Article III did not apply to laws "related to policies or practices that could not affect the product as such."<sup>81</sup>

The last pre-WTO decision was U.S. Automobile Taxes, and it too was not adopted.<sup>82</sup> The European Communities lodged several complaints, one of which was that the U.S. Corporate Average Fuel Economy (CAFE) regulation violated Article III:4 because it was based on a fleet averaging method that treated domestic and foreign-made autos

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<sup>75</sup> GATT Council, Minutes of Meeting held on 18-20 February 1992, GATT Doc. C/M/254, March 10, 1992, at 23.

<sup>76</sup> The Appellate Body has stated that unadopted GATT or WTO panel reports have no legal status in the WTO Appellate Body Japanese Alcoholic Beverages Report, *supra* note 97, at 15.

<sup>77</sup> United States - Measures Affecting Alcoholic and Malt Beverages, March 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1992) [hereinafter U.S. Alcoholic Beverages Report].

<sup>78</sup> *Id.* P 5.19. For purposes of its decision, the panel assumed that the Minnesota tax credit was available to Canadian producers.

<sup>79</sup> *Id.* From the report of the case, the U.S. Trade Representative seems to have made little effort to defend Minnesota's law and to provide a non-protectionist rationale for it.

<sup>80</sup> United States - Restrictions on Imports of Tuna, June 16, 1994, 33 I.L.M. 839 (1994) (not adopted) [hereinafter Tuna-Dolphin II Report]. The facts and complaints in the two Tuna-Dolphin cases were the same, although the second case focused more on the intermediary embargo. Under the intermediary embargo provisions, the U.S. government was banning tuna imports from countries that had not stopped buying tuna from countries subject to the U.S. primary embargo. *Id.* P 2.15.

<sup>81</sup> Tuna-Dolphin II Report, *supra* note 98, P 5.8.

<sup>82</sup> GATT Dispute Settlement Panel Report on United States Taxes on Automobiles, 33 I.L.M. 1397-1461 (October 11, 1994) (not adopted) [hereinafter U.S. Automobile Taxes Report].

separately.<sup>83</sup> The panel issued a broad ruling that "Article III:4 does not permit treatment of an imported product less favorable than that accorded to a like domestic product, based on factors not directly relating to the product as such."<sup>84</sup> Thus, fleet averaging violated Article III because this method was "based on the ownership or control relationship of the car manufacturer" and therefore "did not relate to cars as products." This was a producer characteristics PPM. The panel found that this Article III violation did not qualify for GATT's environmental exception, and it therefore held that the CAFE law violated the GATT.

The first WTO panel decision - the *U.S. Gasoline Case* - involved a producer characteristics PPM regulation for gasoline composition.<sup>85</sup> Venezuela and Brazil complained that the U.S. regulation, which required reduction from a pollution baseline, was discriminatory because it assigned foreign producers a standard baseline while giving domestic refiners an individual baseline.<sup>86</sup> The regulation was not based on the chemical composition of a particular shipment of gasoline, but rather on the entire output of a domestic refinery or entire output of a foreign refinery that was to be exported to the United States. The complaining governments argued that because foreign gasoline was generally higher-polluting, the assignment of a standard baseline required some of those producers to undertake greater reductions in polluting ingredients than if they had been given an individual baseline.

The U.S. regulation was undoubtedly a violation of the national treatment rule. Yet in so holding, the U.S. Gasoline panel went farther, issuing a broad decision that built on the U.S. Alcoholic Beverages and Automobile Taxes decisions. Noting that the U.S. regulation had been defended on the ground that data from foreign producers was unverifiable, the panel held that Article III:4 "does not allow less favorable treatment dependent on the characteristics of the producer and the nature of the data held by it." More generally, the panel suggested that the identification of like products in Article III:4 needs to be done "on the objective basis of their likeness as products" and not according to "extraneous factors" like those in the U.S. Gasoline dispute. This Article III:4 holding was not appealed and was the backbone of the WTO decision that the U.S. measure violated the GATT.

The second WTO case was *Indonesia Automobile*. The panel found an Article III:2 violation because the tax measures were based on nationality and origin, and "other

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<sup>83</sup> Id. P 3.272. In fleet averaging, the U.S. government sets fuel economy standards based on the average achieved by a foreign manufacturer for all its autos shipped to the United States. Id. PP 2.14-15.

<sup>84</sup> Id. P 5.54.

<sup>85</sup> WTO Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline, Report of the Panel, WT/DS2/R (Jan. 29, 1996), available at <http://www.wto.org> [hereinafter U.S. Gasoline Panel Report].

<sup>86</sup> Id. PP 3.12, 6.3.

factors not related to the product itself."<sup>87</sup> This was similar to the panel's ruling on Article I.

The third case, *Japan Alcoholic Beverages*, did not consider a PPM, but in rejecting the so-called "aim-and-effect" test, its holding makes it more likely that PPMs will be found to violate GATT Article III.<sup>88</sup> Aim-and-effect was a treaty interpretation developed in GATT caselaw and commentary during the 1990s, which sought to define product likeness more narrowly so as to prevent Article III from unnecessarily infringing on national regulatory autonomy.<sup>89</sup> As the U.S. Alcoholic Beverages panel explained in 1992, "once products are designated as like products, a regulatory product differentiation, e.g., for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not "applied ... so as [to] afford protection to domestic production."<sup>90</sup> In other words, if two products I and D are deemed "like" products, then taxing or regulating them differently, even when based on an objective environmental distinction, could be found to violate Article III if I is taxed more or treated less favorably than D. To avoid such a holding, the proponents of the "aim-and-effect" test sought to have panels consider whether the disputed tax or regulation had a protective aim or effect, and, if it did not, then products I and D, treated differently based on the tax or regulation, could perhaps avoid characterization as like products.

The first time this test was invoked in a WTO proceeding, in the Japan Alcoholic Beverages dispute, the panel rejected such a test in an Article III:2 case.<sup>91</sup> The Appellate

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<sup>87</sup> Indonesia Automobile Panel Report, supra note 117, PP 14.112-113.

<sup>88</sup> See WTO Dispute Panel Report on Japan - Taxes on Alcoholic Beverages, WT/DS8/R, PP 6.17-18 (July 11, 1996), available at <http://www.wto.org> [hereinafter Japan Alcoholic Beverages Panel Report]. The plaintiffs were the United States, the European Community, and Canada. These governments complained that Japan imposed higher excise taxes on imported liquors, such as vodka and whisky, than on the domestically produced liquor Shochu. The case centered on whether these were like products, directly competitive or substitutable products, or neither of these. The panel found that vodka was a like product and that other imports were directly competitive or substitutable to domestic Shochu. Because Shochu was taxed less, the panel held that GATT Article III was being violated. The Appellate Body upheld the panel's reasoning with minor modifications.

<sup>89</sup> Robert E. Hudec, GATT/WTO Constraints on National Regulation: Requiem for an "Aims and Effects" Test, 32 Int'l L. 619 (1998). One intellectual foundation of this test is discussed in Frieder Roessler, The Constitutional Function of the Multilateral Trade Order, in *Essays on the Legal Structure, Functions, & Limits of the World Trade Order* 109, 127-30 (2000). See also Rambod Behboodi, Legal Reasoning and the International Law of Trade - The First Steps of the Appellate Body of the WTO, *J. World Trade* 55, 87-88 (Aug. 1998) (supporting the decision by the Appellate Body to clear up the "mess" and dismiss the aim-and-effect test); Aaditya Mattoo & Arvind Subramanian, Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Solution, 1 *J. Int'l Econ. L.* 303 (1998) (contrasting the textual and contextual approach to ascertaining like products).

<sup>90</sup> U.S. Alcoholic Beverages Report, supra note 138, P 5.72.

<sup>91</sup> Japan Alcoholic Beverages Panel Report, supra note 155, PP 6.17, 6.23. One stated reason for rejecting the aim-and-effect test was that if protection of health could be accomplished without violating Article III, that could "circumvent" Article XX, which requires governments to show that a health measure is

Body upheld the panel and, in a later decision, the *European Communities (EC) Bananas Case*, the Appellate Body stated its rejection of "aim-and-effect" explicitly with respect to GATT Article III:1.<sup>92</sup>

Although it was not propounded as a way to defend PPMs, the aim-and-effect test could have provided a doctrinal basis for distinguishing two otherwise like products that differ only in conformity to the PPM. Without the aim-and-effect test, a PPM-compliant domestic product may be easily deemed a "like" product to a PPM-non-compliant imported product. If so, an Article III violation will occur when government action denies the imported product an equal opportunity to compete in the domestic market.

The most recent Article III panel decision came in the *European Communities Asbestos Case*.<sup>93</sup> In response to a complaint by Canada, the panel found that a French import ban on asbestos violated Article III:4 because Canadian asbestos fiber was a "like" product to European substitute fiber that was permitted.<sup>94</sup> The panel held that the risk to human health or life from the product could not be a factor in determining whether two products were "like" under Article III because that would allow a government "to avoid the obligations in Article XX."<sup>95</sup> This was not a PPM decision since the French ban was based on the dangers of the product to the user; but if the decision had been upheld, it would have had negative implications for PPMs.

The Appellate Body reversed on this point, stating that "the health risks associated with a product may be pertinent in an examination of likeness under Article III:4 of the GATT

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necessary. Id. P 6.17. The panel did not explain why a non-violation of Article III circumvents Article XX. In its interpretation of GATT Article XX(g) in the U.S. Gasoline case, the Appellate Body declared that this exception (relating to the conservation of exhaustible natural resources) "may not be read so expansively as seriously to subvert the purpose and object of Article III:4." Appellate Body Gasoline Report, supra note 100, at 17. The Appellate Body did not explain why Article III should delimit Article XX.

<sup>92</sup> Appellate Body Japanese Alcoholic Beverages Report, supra note 97; WTO Appellate Body Report on European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, P 241 (Sept. 9, 1997), available at <http://www.wto.org> (making clear that the Appellate Body had rejected this test). But see Howse & Regan, supra note 44, at 266 (suggesting that the Appellate Body reject a test, but not reject wholesale the consideration of aims and effects in determining likeness of products).

<sup>93</sup> WTO Dispute Panel Report on European Communities - Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/R (Sept. 18, 2000), available at <http://www.wto.org> [hereinafter EC Asbestos Panel Report]. The panel held that the French import ban did not violate the GATT because it qualified for the Article XX(b) exception. The Appellate Body affirmed the panel's judgment and overturned the panel's ruling on Article III.

<sup>94</sup> Id. PP 8.144, 8.150, 8.157, 8.158.

<sup>95</sup> Id. P 8.130. Canada argued that "the toxicity of a product is not recognized as a criterion for the evaluation of likeness." Id. P 8.118.

1994."<sup>96</sup> The Appellate Body said that it disagreed with the panel's suggestion that recourse to Article III could nullify Article XX.<sup>97</sup> On the contrary, according to the Appellate Body, "Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own." The Appellate Body went on to say that the fact that an interpretation of Article III:4 "implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of effet utile."<sup>98</sup>

The Appellate Body's decision articulates the proper application of Article III. The Appellate Body points out that even when two products are deemed "like," there is no violation of Article III:4 unless the imported product is accorded "less favourable treatment." In other words, a regulator "may draw distinctions between products which have been found to be 'like,' without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products." The pivotal point will be whether there is "protection" of domestic products in the marketplace. The Appellate Body also makes clear that a determination of product "likeness" goes beyond the physical characteristics of the product. How this ruling affects PPMs remains to be seen.

In summary, the textual ambiguities in Article III have been resolved unfavorably to PPMs. A producer characteristics standard was held to be a violation of Article III in the U.S. Alcoholic Beverages, U.S. Gasoline, and Indonesia Automobile decisions. No how-produced standard has been tested, but WTO jurisprudence points to the likelihood that such a standard would be deemed a national treatment violation.

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<sup>96</sup> WTO Appellate Body Report on European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, P 113 (Mar. 12, 2001), available at <http://www.wto.org> [hereinafter Appellate Body Asbestos Report]; see also id. P 192(b) (reversing the panel finding that a consideration of the health effects of the product was inappropriate). On the larger dimensions of the case, the Appellate Body upheld the panel's decision that France's import ban did not violate GATT rules. Id. P 193. For a discussion of the Appellate Body report, see Sydney M. Cone III, *The "Asbestos" Case and Dispute Settlement in the World Trade Organization: The Uneasy Relationship Between Panels and the Appellate Body*, 23 *Mich J. Int'l L.* 2 (forthcoming 2002).

<sup>97</sup> Appellate Body Asbestos Report, *supra* note 163, P 115.

<sup>98</sup> Id. "Effet utile" means useful effect. In making this point, the Appellate Body seems to be retreating from its holding in the U.S. Gasoline case that Article XX "may not be read so expansively as seriously to subvert the purpose and object of Article III:4." Appellate Body Gasoline Report, *supra* note 100, at 17.

## GATT ARTICLE XX - GENERAL EXCEPTIONS

GATT Article XX lists ten exceptions to GATT disciplines.<sup>99</sup> The first Article XX case on PPMs was *U.S. Automotive Spring Assemblies* in 1983.<sup>100</sup> In this case, Canada complained about an import exclusion order against certain automotive spring assemblies produced in violation of a valid U.S. patent and without a license from the patent holder. This was a non-product-related how-produced standard. The panel ruled that the exclusion order met the necessary standard under the Article XX(d) exception and met the terms of the chapeau. Therefore, no violation was found.

In the *Tuna-Dolphin Cases*, the two panels held that the PPM-based import bans did not qualify for an Article XX exception. Both decisions were popular among most WTO governments, and both were opposed by the United States. Neither decision was adopted.

The first Tuna-Dolphin decision (1991) focused on an import ban on tuna from Mexico. The panel asserted that Article XX(b) did not cover such an "extrajurisdictional" measure to safeguard dolphins outside the United States.<sup>101</sup> According to the panel, if Article XX(b) were applied in this way, the importing government "could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."<sup>102</sup>

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<sup>99</sup> See Jessica Mathews, *Dolphins, Tuna and Free Trade*, Wash. Post, Oct. 18, 1991 ("Even within a broad treaty, trade sanctions are an effective tool to discourage free riders, countries that would like to enjoy a treaty's benefits without conforming to its requirements."); see also *International Environmental Law*, supra note 130, at 1534 (discussing the free rider problem and its effect on international agreements to protect the global commons).

<sup>100</sup> Endangered Species Act, 7 U.S.C. § 136, 16 U.S.C. §§ 460l-9, 460k-1, 668dd, 715a, 715i, 1362, 1371, 1372, 1402, 1531-1544, 3375 (1988); the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988) (foreign notification provisions); the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. §§ 620-620j (1988 & Supp. II 1990); and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988) (foreign notification provisions).

<sup>101</sup> See Divine Porpoise, *The Economist*, Oct. 5, 1991, at 31. The Mexican Government, not willing to jeopardize the Free Trade Agreement, agreed not to present the decision to the full GATT Council for approval. The Government of Mexico also took out advertisements in several national newspapers proclaiming its new measures taken to protect dolphins. See *A Longstanding Commitment Just Got Deeper*, Advertisement, N.Y. Times, Sept. 27, 1991, at A13. The Tuna/Dolphin decision has not been canceled, however, and environmental groups have expressed dissatisfaction with the limited scope of the measures the Government of Mexico did take. See Auerbach, supra note 175, at D1 (noting environmental groups called the changes cosmetic). See also supra note 166 (discussing the EC's bringing its own challenge to the MMPA's embargo provisions before the GATT).

<sup>102</sup> 19 U.S.C. §§ 2191, 2903(b) (1988 & Supp. II 1990) [hereinafter "the fast track procedures"]. The fast track procedures apply to "implementing bills" for trade agreements negotiated by the President under section 1102(b) and (c) of the Omnibus Trade and Competitiveness Act 19 U.S.C. § 2902 (1988 & Supp. II 1990). They provide, inter alia, that negotiations be carried out by the Executive, and that after a maximum of 45 days of consideration by the appropriate committees of the House and Senate, an agreement be voted

The second decision (1994) honed in on the intermediary import ban of tuna from certain European countries. This tuna was being barred because the so-called intermediary governments had not prohibited the importation of tuna from Mexico (and other primary targets of the U.S. regulation). As the U.S. import ban was predicated on the foreign law, it was a government policy standard. The panel pointed out that tuna imports were prohibited "whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins." The primary embargo had the same fault, said the panel, and both types of embargo "were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction."<sup>103</sup> The panel then said that Article XX(g) did not permit such a measure because if it did, "the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired."<sup>104</sup> Furthermore, in describing the task before it, the panel said that it had to resolve whether the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes.

The panel assumed that an exporting country has a "right of access" to the U.S. market, and that this right has independent valence in the implementation of Article XX. Furthermore, the panel made the assumption that in the pre-GATT period, states lacked a right to use trade embargoes for health and conservation purposes and that the GATT had omitted to accord such rights to them. The rejoinder is that such rights are inherent to sovereignty and that the governments writing the GATT did not relinquish them. As Richard J. McLaughlin has pointed out, with Article XX in the GATT, governments

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on without any alteration within 15 days of its presentation to the full House and Senate, see *id.* §§ 2191(d) and (e), and after only 20 hours of floor discussion, see *id.* §§ 2191(f) and (g).

<sup>103</sup> Letter from Congressmen Richard A. Gephardt, Sander M. Levin, Jim Moody, Donald Pease, and Ron Wyden to Carla Hills, USTR 4 (Oct. 23, 1991) (on file with Columbia Law Review) (calling the Draft Border Environmental Plan, released for public review in August, "little more than a smoke screen for the status quo," and calling the Draft Environmental Review released in October, 1991, "little more than a paper exercise, full of false assurances").

<sup>104</sup> See John Vidal, *Global Conservation Threatened as GATT Declares War*, *The Guardian*, Sept. 6, 1991, at 29 ("The Bush Administration went through the motions of defending its tuna ban laws in Geneva but its superior and overriding commitment to free trade certainly coloured its defense."); see also George Lobenz, *Administration Seeking Changes to Dolphin Protection Law*, UPI, Sept. 27, 1991, available in LEXIS, Nexis Library, UPI File. "The ruling against the dolphin protection law has heightened environmental concerns about a U.S.-Mexico free trade agreement and other similar international pacts. A key concern is that the administration might compromise U.S. environmental and food safety laws to ensure trade peace." *Id.*

As a result of concerns about NAFTA weakening U.S. environmental standards following the outcome of the Tuna/Dolphin Decision, *supra* note 2, the United States, Mexico and Canada agreed to create special trilateral panels to arbitrate trade issues involving environmental concerns. Keith Bradsher, *Bargaining on Trade Is Snagged*, *N.Y. Times*, Aug. 8, 1992, at 37. These panels will be made up of trade experts from all three countries with environmentalists and scientists as advisers, and the panels' decisions will take precedence over those of GATT panels. See *id.*

"have an expectation that they will be able to restrict trade in order to conserve exhaustible natural resources or to protect the health of humans, animals, and plants."<sup>105</sup>

In the *U.S. Gasoline case*, the Appellate Body concluded that the U.S. baseline rule fit within the terms of paragraph (g), but found that the application of the Gasoline regulation violated the Article XX chapeau.<sup>106</sup> This was the first adopted GATT or WTO decision stating that an environmental PPM could fit within one of the Article XX paragraphs. The measure at issue was a producer characteristics PPM.<sup>107</sup> The marketability of the gasoline depended on the foreign or domestic status of the producer and on achieving reductions from an assigned baseline.

In complying with the WTO decision, the U.S. government changed its regulation to allow foreign refiners the option of applying for and using an individual baseline.<sup>108</sup> The ability to sell gasoline is still based on producer characteristics, but the blatant discrimination against foreign producers was removed. To assure compliance, foreign

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<sup>105</sup> See H.R. 2152, 102d Cong., 1st Sess. (1991); see also Michael M. Phillips, House Committee Approves Bill to Punish Driftnet Offenders, States News Service, Oct. 3, 1991, available in LEXIS, Nexis Library, Wires File (reporting that the proposed bill "would deny driftnet fishing vessels access to U.S. ports and bar imports of fish, fish products and sport-fishing equipment from offending countries"). The House bill is accompanied by a companion bill from the Senate, S. 884, 102d Cong., 1st Sess. (1991).

<sup>106</sup> The House and Senate have since approved the International Dolphin Protection Act of 1992, H.R. 5419, 102d Cong., 2d Sess. (1992), and it now awaits the President's signature to become effective. The bill, prompted by the Tuna/Dolphin Decision, amends the MMPA by allowing the Secretary of the Treasury to lift the ban on imports of yellowfin tuna or yellowfin tuna products from countries that agree to impose at least a five-year moratorium, beginning March 1, 1994, on harvesting tuna by using purse seine nets deployed on or encircling schools of dolphins or other marine mammals. See *id.* § 305(a)(1). The Act also requires countries that sign such an agreement to reduce the incidental taking of dolphins in the period prior to imposition of the moratorium by a "statistically significant" margin compared to 1991. See *id.* § 305(a)(3), (4). Observers will be placed on all vessels over 400 tons that fish with purse seine nets, see *id.* § 305(a)(2), and if it is discovered that a signatory country fails to enforce these conditions, the United States may ban up to 40% of imports of fish and fish products from that country. See *id.* § 305(b)(2)(B). The Act also creates a fund to be used to develop new tuna fishing technologies that will result in zero set-caused mortality. See *id.* § 303(a). If no other countries sign an agreement with the United States, the Act mandates that the U.S. unilaterally lower its incidental taking of dolphins from a maximum of 1,000 in 1992 to levels approaching zero by 1999. See *id.* § 306(a)(4).

The International Dolphin Protection Act of 1992 at least creates an avenue for raising the trade bans currently in effect. It relies, however, on the threat of these bans to compel countries to sign bilateral and multilateral agreements imposing a moratorium on fishing for tuna with purse seine nets. The presidents of Mexico and Venezuela, two countries with large purse seine fishing fleets, had announced last February that they would agree to an international pact containing a five-year moratorium, even though such an agreement could lead to the loss of 30,000 jobs in Mexico. See Michael Parrish, U.S. Approves Pact to Protect Pacific's Dolphins, L.A. Times, Oct. 9, 1992, at D2.

<sup>107</sup> See U.S. Const. art. VI, cl. 2.

<sup>108</sup> See 2 Restatement (Third) of Foreign Rel. Law of the United States, pt. VIII, ch. 1, at 265 intro. note (1987) [hereinafter Restatement (Third)] ("Despite some attempts by Congress to distance itself from the [GATT], its status as a commitment of the United States is not in doubt, and courts in the United States assume its binding character.").

refiners had to agree to a set of enforcement measures including unannounced inspections by U.S. regulators. Under the new regulation, the ability to sell a particular gallon of gasoline depends on whether the producer has met its baseline requirements. Thus, gasoline from one producer could be barred while identical gasoline from another producer is permitted.

The *Shrimp-Turtle case* involved an import ban on shrimp from countries that did not have a turtle-conservation regime comparable to that of the United States.<sup>109</sup> The U.S. law was complex: it blended a government policy standard and a review of the actual performance of the foreign shrimping fleet in safeguarding turtles.<sup>110</sup> At the time of the panel proceeding, the first three of the complaining countries were under a shrimp embargo linked to a requirement that they enforce comprehensive regulations regarding the use of turtle excluder devices by their fishing vessels.<sup>111</sup> Thus, in this adjudication, the U.S. measure was framed as a government policy standard.<sup>112</sup>

The WTO panel held that the import ban could not be justified by Article XX. In summarizing its overall holding, the panel explained that it did "not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate"

The Appellate Body upheld the panel's conclusion that the U.S. import ban violated the GATT, but put forward a different reason than the panel. The Appellate Body found that the import ban did fit within the scope of Article XX and was provisionally justified by

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<sup>109</sup> Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 Stan. J. Int'l L. 479, 502 (1990). Brand shows that Congress has long been ambivalent about its acceptance of GATT provisions. He notes that in the Trade Act of 1974, for example, Congress authorized payment of the U.S. share of GATT expenses for the first time (previously these had been paid out of the State Department "Conferences and Contingency Fund") and also recognized several GATT provisions as "international obligations of the United States." *Id.* at 485. The Act, however, included language stating that it did not imply approval or disapproval of "all articles" of the GATT. *Id.* The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901(b) (1988), however, shows acceptance of the GATT's place in U.S. law because there is no language qualifying the effect of the legislation in relation to the GATT itself, and numerous positive references to obligations under it. See Brand, *supra*, at 501-02. Brand refers to the GATT's status in U.S. law as a "valid congressional-executive agreement." *Id.* at 481. According to the Restatement (Third), a congressional-executive agreement is an agreement that deals "with any matter that falls within the powers of Congress and the President under the Constitution" and that is made "by the President, with the authorization or approval of Congress." Restatement (Third), *supra* note 198, § 303(2).

<sup>110</sup> See Brand, *supra* note 199, at 504 & n.139 (citing *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), *aff'd* on other grounds, 67 U.S. (2 Black) 481 (1862)) ("[The] Tariff Act of 1842 [was] held to displace 1832 commercial treaty with Russia that contained most-favored-nation clause barring rates of duty on imports from Russia higher than on like goods imported from other countries.").

<sup>111</sup> See generally *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the [treaty and statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other . . .").

<sup>112</sup> 1971 Pelly Amendment to the 1967 Fisherman's Protective Act, 22 U.S.C. § 1978(1), (2), (4) (1988).

XX(g). Specifically, the Appellate Body stated that the "means and ends relationship" of banning shrimp imports and protecting turtles was "close and real," and the trade measure used was "not disproportionately wide in its scope and reach."<sup>113</sup> Nevertheless, the U.S. measure was flawed, the Appellate Body said, because the measure as applied failed to meet the requirements of the Article XX chapeau.<sup>114</sup> One major flaw was that the U.S. certification process "does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."<sup>115</sup> Other flaws included inflexibility in administrative determinations and lack of opportunity for the embargoed government to appeal.

To restate the holding, the Appellate Body said that it is not necessarily a GATT violation to impose a government policy PPM on exporting countries but that in doing so the regulator must be sensitive to the conditions in each country, and the administrative process must meet minimum standards of transparency and procedural fairness. This result does not conflict with the GATT *Belgian Family Allowances judgment*, which was not an Article XX case. But the new ruling shows a sophisticated consideration of discrimination not present in the Family Allowances decision.

Although the Appellate Body did not say that PPMs are legal under the GATT, the inferences in the decision imply the legality of PPMs. The first-level panel had asserted that a shrimp-turtle style of PPM fell outside the scope of Article XX, and the Appellate Body reversed that conclusion. Then the Appellate Body found that the import ban fit paragraph (g), yet failed to comply with the chapeau. Had the Appellate Body believed that the GATT prohibits all non-product-related PPMs, then it could have so stated. The fact that the Appellate Body reviewed the PPM carefully and gave specific criticisms of how the U.S. government was applying the law demonstrates that PPMs can be justified under Article XX. When the WTO Dispute Settlement Body adopted the Appellate Body report, the delegate from Pakistan (one of the plaintiff governments) recognized the significance of the decision, and stated that, "Effectively, the Appellate Body's decision permitted Members to discriminate against products based on non-product related PPMs."

In complying with the WTO decision, the U.S. Department of State revised its regulation to accord more due process and provide more flexibility to foreign governments and to permit shrimp imports so long as the shrimp are harvested under conditions that do not adversely affect sea turtles. Thus, it became possible under the new regulations for U.S. imports to acquire shrimp from countries that had not received a country-wide certification under the government policy standard. In effect, this provision carved out a

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<sup>113</sup> See generally 16 U.S.C. § 1826 (1988 & Supp. II 1990) (§ 1826(f) calls for certification of a country engaging in driftnet fishing for the purposes of the Pelly Amendment, 22 U.S.C. § 1978 (1988)).

<sup>114</sup> See 16 U.S.C. § 1371(a)(2)(E) (1988 & Supp. II 1990) (banning imports of fish caught with driftnets).

<sup>115</sup> See *id.* § 1371(a)(2)(E) (1988 & Supp. II 1990).

how-produced standard as an alternative to the government policy standard prescribed in U.S. law.

The Appellate Body decision was handed down as this Article was being prepared for publication, and confirms the thesis herein that PPMs do not violate WTO rules. This decision marks the first time that an environmental PPM was declared WTO-compliant. In making its initial decision in Shrimp-Turtle in 1998, the Appellate Body assumed, for purposes of its analysis, that the turtles involved traversed U.S. waters.<sup>116</sup> The issue of what WTO rules dictate concerning PPMs aimed at achieving ecological objectives in the global commons was not reached in this decision. It will take an affirmative judgment in a dispute involving such "extrajurisdictional" conservation to exorcize the demons in the first Tuna-Dolphin decision that so shocked environmentalists in 1991.

The *EC Asbestos case* does not involve a PPM, but it was the first ruling by a WTO panel that an import measure could be justified by Article XX(b). In applying this exception, the panel held that a health measure could be deemed "necessary" under this provision if there were no other measures consistent (or less inconsistent) with the GATT that could achieve the defendant government's health policy objectives.

The next development in Article XX jurisprudence occurred in the *Korea Beef case*. The Australian and U.S. governments complained about a Korean government requirement that foreign beef be segregated and sold separately in Korea.<sup>117</sup> The WTO panel found this regulation to be a violation of GATT Article III:4. Reviewing Korea's regulation under Article XX(d), the panel concluded that the dual retail system was a "disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices," and therefore "not justified by Article XX(d) of GATT." Thus, the panel found Korea to be in violation of WTO rules.

In summary, the Article XX exceptions apply to PPMs. An examination of the GATT and WTO caselaw contradicts the views expressed at the beginning of Part III, all of which came after the Appellate Body decision in the first phase of the Shrimp-Turtle dispute. No adopted GATT or WTO decision has suggested that PPMs are outside the scope of Article XX. The decisions in the U.S. Gasoline and Shrimp-Turtle cases against environmental measures did not turn on their PPM status. Although the Shrimp-Turtle panel criticized the coerciveness of a government policy standard, the Appellate Body did not perceive the use of PPMs as legally fatal. None of the GATT/WTO environmental cases has involved a how-produced standard.

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<sup>116</sup> See Clyde V. Prestowitz, Jr. et al., *The Last Gasp Of GATTism*, Harv. Bus. Rev., Mar.-Apr. 1991, at 130, 135.

<sup>117</sup> 22 U.S.C. § 1978 (1988).

## **RESTATEMENT OF THE LAW**

For environmental PPMs, the most important WTO law is found in GATT Article XX and can be restated as follows: The WTO/GATT does not prohibit environmental PPMs as such. PPM-based import bans may be inconsistent with GATT Articles I, III, or XI, yet if undertaken for an environmental purpose, such measures still may qualify for an Article XX exception. Both the government policy standard and the producer characteristics standard are potentially justifiable under Article XX, but both standards will receive scrutiny as to procedural fairness and environmental justification. A how-produced standard might be subject to less scrutiny because its means are more clearly related to its policy ends.

In its first two Article XX environmental decisions (*U.S. Gasoline and Shrimp-Turtle*), the Appellate Body breathed life into the Article XX chapeau, which can serve as a bulwark against unfair and protectionist measures. By contrast, the chapeau played no part in the Tuna-Dolphin reports. The rigorous chapeau review in *Shrimp-Turtle* may develop as a key foundation of the new law of PPMs.

### **Broader Implications**

This Article has focused on environmental PPMs, but the question arises whether the same conclusion - that the WTO does not prohibit environmental PPMs - applies to other kinds of PPMs. For example, what would be the legal status of an import ban on apparel made by exploited children, or on fur from a country that permits leg-hold traps, or on pharmaceuticals tested on animals? For such issues, no authoritative answer exists as of yet. In *Shrimp-Turtle*, the Appellate Body saw a "nexus" between the locus of the environmentally-harmful shrimping and the U.S. interest in conserving migratory sea turtles.<sup>118</sup> Such a nexus should be easy to find where the dispute involves an ecosystem shared by the litigant countries. But for social or moral issues, the required nexus may not exist. Furthermore, the Appellate Body found that the U.S. trade measure on shrimp was "reasonably related to the ends" of conserving an endangered species. Non-environmental PPMs would be subject to analogous scrutiny as to whether the means relate reasonably to the ends. The Appellate Body also stated that the "actual contours and contents" of the Article XX chapeau will vary "as the kind of measure under examination varies."

It should also be noted that PPMs address only one part of the product cycle, and the legal conclusions presented here might not be applicable to regulations that extend beyond production. Importation can be made contingent on a variety of post-production practices. For example, goods that are stolen, mislabeled, or packaged in certain ways might be stopped at the border. Similarly, importation can be contingent on how a

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<sup>118</sup> See GATT, *supra* note 1, art. XXX(1); see also John H. Jackson & William J. Davey, *Legal Problems of International Economic Relations* 310 (2d ed. 1986) [hereinafter Jackson & Davey].

product is to be used or what disposal methods are readily available. Importation can also be contingent on whether exportation is legal in the country of export. Note that the common feature in all of these requirements is that two otherwise like products are treated differently.

Although this Article addresses only regulations imposed on imports, many of the same legal issues arise in export restrictions.

To summarize, Part III explicates the WTO law of PPMs and demonstrates the falsity of the myth that PPMs are illegal under the WTO. This is a significant finding since, as Part I explains, PPMs are sometimes needed for environmental policymaking. The last part of the Article will discuss how a better appreciation of WTO law can help governments make progress in resolving tensions between trade and environmental interests.

### ***Debunking the Myth and Moving Forward***

The argument that environmental PPMs violate the WTO has not had its intended effect. Rather than inhibiting PPMs, it has prevented a reasoned discourse about how to distinguish appropriate from inappropriate PPMs. Little is being done to deal with the root causes of such trade restrictions.

When negotiators do not share a common legal understanding about the subject of a negotiation, a successful resolution will be difficult to achieve. It is hard to bargain in the shadow of the law when governments have sharply divergent views on what the law is. Because the governments most opposed to PPMs believe (incorrectly) that they are illegal, they have adopted an implacable and adversarial stance toward PPMs that has undermined any resolution of the conflict.

But it is not just opponents of PPMs who are victims of the myth that PPMs are illegal. Some of the people who recognize the need for PPMs are also confused about WTO law. Therefore, these individuals and groups tend to frame their proposals as amending the WTO to permit certain kinds of PPMs. Yet because WTO decisionmaking is consensual, such action will be impossible, and the lack of movement at the WTO reinforces the perception that "trade and environment" issues are irresolvable.

The continuing debate about the status of PPMs erodes support for the WTO. Developing country officials, who may believe the myth that the WTO prohibits PPMs, perceive the continued use of PPMs by the United States as proof that the WTO remains power-based rather than rule-based. Conversely, proponents of environmental PPMs worry that the WTO will attack such measures. This has detrimental effects for the trading system, since alienated environmentalists will undermine public support for the WTO. Moreover, the schism between environmentalists and the trading system is also bad for environmental policy. Until the status of PPMs is properly understood, many environmentalists are not going to pay much attention to the ways in which WTO rules and trade itself can promote

opportunities for better environmental policy. Therefore, win-win opportunities are being missed.

If stakeholders shared a common understanding of the WTO law of PPMs, it might be possible to begin to bridge the gap between commerce and conservation. The proponents of PPMs should admit that they sometimes impose disproportionate costs on particular countries, and the opponents should admit that PPMs sometimes generate global benefits. When a foreign practice has an adverse environmental impact at home, the WTO should not demand that citizen-consumers accept foreign products of that process in the interest of promoting greater trade. What the WTO can do, however, is to erect effective disciplines for assuring that PPMs have an environmental justification and are applied in a justifiable manner.<sup>119</sup> The next two sections make suggestions for disciplining and managing PPMs. Disciplines are needed to screen out improper PPMs that are unfair to exporting countries, particularly developing countries. Better global management is needed to resolve the transborder problems that give rise to PPMs.

### *Disciplining PPMs*

Disciplines are needed against ill-conceived environmental PPMs applied to imports. International rules should strongly discourage PPMs that prescribe inappropriate policies for foreign countries, or those that are implemented unfairly. Much of what ought to be done lies within the competence of the trade regime. But complementary action in other regimes will also be required.

Although many commentators claim that the key distinction is that of multilateral versus unilateral PPMs, the reality is more complex, with many different shades of multilateralism. A treaty can require a PPM - for example, the Montreal Protocol on Ozone forbids the importation of controlled substances from States that are not party to the Protocol (or have not agreed to be bound by it). A treaty can authorize a PPM - for example, the Wellington Convention on Driftnets states that each Party may take measures consistent with international law to prohibit the importation of fish caught using a driftnet.<sup>120</sup> A treaty can authorize trade measures in response to actions that undermine the treaty - for example, the Anadromous Stocks Convention directs the Parties to take appropriate measures to prevent trafficking in anadromous fish taken in violation of the Convention. Furthermore, the Commission administering an environmental treaty can

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<sup>119</sup> 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 1, art. XX.

<sup>120</sup> Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, opened for signature Mar. 21, 1986, 25 I.L.M. 543 [hereinafter 1986 Vienna Convention].

authorize non-product-related PPMs. For example, on several occasions the International Commission for the Conservation of Atlantic Tunas has recommended that Parties take "non-discriminatory trade restrictive measures" on specified fishery products from listed countries that are adjudged to be violating the Convention. While all of these examples might be called multilateral, they are also unilateral (except for the Montreal Protocol) because the PPM-using country is encouraged but not required to use the trade measure. Moreover, under some of the treaties, the trade action is (or can be) directed at non-parties, so it is not consensually based.

Despite these complexities, the degree of multilateral approval for the PPM ought to be a factor in evaluating its appropriateness. If several countries are applying the PPM, then it is much less likely to be protectionist or arbitrary. This factor can also be expressed as multilateral disapproval. A treaty can admonish against a unilateral trade ban or even preempt it. For example, the Inter-American Convention for the Protection and Conservation of Sea Turtles directs parties to act in accordance with GATT Article XI with respect to the subject matter of the Convention. This seems to imply no import bans since Article XX is not mentioned.

When unilateral PPMs are under review, GATT Article XX will often be the decisive law. If product Y is banned to safeguard a resource Z, the WTO will need to analyze the facts underlying the relationship between Y and Z. For instance, in the *Shrimp-Turtle case*, the Appellate Body considered shrimping regulation, turtle conservation, and how shrimping affected turtles.

To scrutinize PPMs, the WTO will assess the validity of the environmental purpose underlying the trade measure. This may proceed with some deference, however. As the Appellate Body pointed out in the U.S. Gasoline case, WTO Member governments retain "a large measure of autonomy to determine their own policies on the environment." The Appellate Body also stated that Article XX decisions need to be made on a case-by-case basis.

In judging PPMs, the WTO should not tolerate an economic motivation for imposing a PPM on imports. For example, it is one thing for the United States to demand that the shrimp it imports be caught in a turtle-safe way so as to safeguard turtles. Yet it is an entirely different matter to seek to "level the playing field" by insisting that foreign producers use the same production practice as U.S. shrimpers so as to offset any regulatory cost differences between domestic and foreign producers. This latter motivation should not be shielded by GATT Article XX.<sup>121</sup>

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<sup>121</sup> GATT Article X, Publication and Administration of Trade Regulations, states:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . requirements, restrictions or prohibitions on imports or exports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or a governmental agency of any other contracting party shall also be published.  
GATT, supra note 1, art. X.

The WTO should discourage the most troublesome types of PPM. The government policy standard should be disfavored because it is coercive and abides origin-based discrimination.<sup>122</sup> The producer characteristics standard should be disfavored because such a standard is too easy to tilt against foreign producers.

In addition to examining the PPM itself, the WTO should also examine why it is invoked and how it is applied. The first Appellate Body decision in the Shrimp-Turtle case lays down helpful markers for steps that should be taken to pursue multilateral cooperation and to accord due process to the exporting country. Some commentators have been critical of these points, particularly as they relate to international negotiations. For example, Lakshman Guruswamy contends that the Shrimp-Turtle decision "constitutes a violation of the principle of state sovereignty by attempting to second-guess the manner in which the United States should have conducted treaty negotiations." Virginia Dailey argues that the language of Article XX should not be interpreted to require governments to attempt to negotiate a treaty as a precondition for using a trade measure. John O. McGinnis and Mark L. Movsesian argue that the WTO should not establish a duty to negotiate because that "would require the Appellate Body to make sensitive judgments about the desirability of various regulatory options and thereby inexorably move it toward shaping international standards." These commentators are right to flag this issue, but their conclusions may be going too far. Prior efforts to negotiate a treaty can be relevant to Article XX review in order to see whether unilateralism is justified. Moreover, it is not clear whether the Appellate Body is suggesting a general duty to negotiate or, more narrowly, a duty to avoid discrimination in negotiations.

Although better disciplines for PPMs can emerge through WTO adjudication, some of the criteria suggested here are not in GATT Article XX and should not be read into it. Thus, rather than relying on evolutionary interpretation, it would be better for the WTO to negotiate new rules so that all governments could participate in this exercise. Moreover, the opportunities for lawmaking through interpretation are limited by the content and flow of the cases. Such negotiations could bring to bear other solutions - for example, capacity building for environmental management - that would require action outside the WTO. Achieving this result need not require any change in Article XX itself. Rather, governments could negotiate an Understanding on Article XX analogous to the seven GATT Understandings negotiated during the Uruguay Round.

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<sup>122</sup> GATT Article XI(2)(c)'s concluding paragraph states:

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned. GATT, *supra* note 1, art. XI(2)(c).

## **Improving WTO Management of PPMs**

To improve management of PPMs, the following steps should be taken. First, the WTO should promote greater transparency of PPMs. This might be done through the Trade Policy Review Mechanism (or through another WTO subsidiary body) with input from relevant international organizations.<sup>123</sup> A WTO review of a particular PPM - written outside the context of dispute settlement - might give some impetus to self-examination by the demandeur government. One should not assume that the only way to get a government's attention is to convict it of a WTO violation.

Second, a new trade and environment conflict is a signal of inadequate international environmental cooperation, and that signal should be transmitted into a recommendation by the WTO to appropriate multilateral environmental institutions.

Third, the WTO should make it easier for developing countries to comply with PPMs. The WTO might begin by holding hearings to investigate the costs of controversial PPMs. The hearings could bring to light less expensive ways to achieve the intended environmental purpose. At such hearings, the government using the PPM might be asked what financial or technological assistance it is making available to the adversely affected countries. The WTO treaty contains some imprecise obligations regarding assistance to developing countries that could serve as a basis for such an examination. For example, the TBT Agreement directs governments to "take account of the special development, financial and trade needs" of developing countries with a view toward ensuring that regulations "do not create unnecessary obstacles to exports from developing country Members." The TRIPS Agreement directs industrial countries to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer" to less developed countries. These provisions may be too vague to be enforced through dispute settlement, but they are specific enough for governments to inquire about implementation.

Fourth, the WTO needs to clarify that its disciplines do not prohibit process-related mandatory labeling.<sup>124</sup> PPM labeling offers a potential avenue to avoid trade restrictions by leaving the choice to consumers.<sup>125</sup> This is a market friendly response, and truthful labels should not be discouraged by the WTO.

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<sup>123</sup> See Brownlie, *supra* note 137, at 646 (stating that "[c]ertain multilateral conventions contain rules which are generally accepted as declaratory of general international law").

<sup>124</sup> For example, note the apparent success of the South Pacific Driftnet Convention in helping to bring pressure on countries to ban fishing with driftnets. See *South Koreans May End Use of Driftnets*, *supra* note 118, at A6 (stating that "South Korea apparently doesn't want to be left as the sole major supporter of driftnet fishing").

<sup>125</sup> This amendment would also make the Pelly Amendment useful again, because trade restrictions imposed against countries "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species" would once again be GATT consistent. See 22 U.S.C. § 1978(a)(2) (1988).

Finally, although the above steps would help, new trade and environment disputes are inevitable. When they occur, the WTO Director-General should be more active in offering mediation and conciliation services. Another idea - suggested by Gabrielle Marceau - is for the WTO to establish an Environmental Advisory Body. This Body would seek a solution to trade and environment conflicts short of formal dispute settlement.<sup>126</sup> The composition of such a Body could include experts from industry and non-governmental organizations.

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<sup>126</sup> A study made by the Brundtland Commission estimated that in 1980 developing countries would have incurred \$ 14 billion in pollution control costs if they had to meet the environmental standards then prevailing in the U.S. See Tuna/Dolphin Hearings, *supra* note 94 (testimony of Steven Shrybman). Furthermore, since then there has been a dramatic rise in the level of U.S. environmental standards, making compliance even more costly.

## **CONCLUSION**

This Article develops a new approach to the PPM problem that views PPMs as a symptom of governance dysfunction. To remedy this dysfunction, policymakers should address the root causes of conflict. Sometimes governments use PPMs because that is the only way to respond to a global or transborder environmental harm occurring in another country. In those situations, the right role for the WTO may be to stand aside. Sometimes governments use PPMs to counter a loss of competitiveness arising out of domestic regulation. In those situations, the right role for the WTO may be to seek withdrawal of the PPM. Outside the WTO, there will be a need for international environmental institutions to step in with technical assistance and other efforts to spur environmental cooperation. With proper oversight by the WTO, PPMs may help solve the problems that elicit their use by catalyzing governments to improve environmental policy.

The judicial resolution of legal conflicts between trade and the environment is likely to have three effects on the broader trade and environment debate.

First, calls from environmental critics for a political agreement that either codifies or improves on the judicial resolution are likely to decrease. Many critics, especially those who have proposed reforms to rather than dismantlement of the trade regime, will recognize that WTO members are not going to be able to reach a political agreement that is better than the judicial resolution, and are very unlikely to reach one as good. The clearest indication of the degree to which the political debate among governments is lagging behind the judicial resolution is the November 2001 Doha Declaration setting the agenda for the next round of WTO talks, which commits the members to negotiations on the relationship between WTO rules and MEAs, but limits the scope of the negotiations to conflicts among MEA parties. As discussed above, this is perhaps the most obviously resolved issue in the entire spectrum of conflicts between trade and the environment.

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Pressure for a political resolution will grow only if trade/environment legal conflicts emerge that the Appellate Body does not resolve to governmental or popular satisfaction. Such conflicts might arise from future efforts to restrict trade in products whose production contributes to climate change.

A second likely effect of the judicial resolution is that it will lead environmental critics to shift their attention to potential conflicts between environmental laws and other aspects of the legal framework for economic integration, such as international investment agreements. That shift is already well underway with respect to Chapter 11 of NAFTA, which provides certain protections to foreign investors, including the right to take claims of expropriation and discrimination to an arbitral tribunal. Several of the first claims to be taken to arbitration under Chapter 11 have been directed at environmental laws and have attracted enormous attention from environmentalists who fear that the procedure will undermine domestic environmental protection.

A third possible effect is that the judicial resolution of trade/environment legal conflicts may help to refocus attention on the general relationship between economic integration and environmental protection.

There is agreement within and around the WTO that the trade and environment debate should be folded into the broader debate about how to achieve sustainable development. Trade officials have long argued that liberalizing trade benefits sustainable development because it increases wealth, which in turn leads, eventually, to higher levels of environmental protection. But they are now beginning to think about more specific ways that the WTO could help reach that end. For example, WTO members have paid increasing attention to reducing subsidies to unsustainable industries, which could promote sustainable development at the same time it reduces trade barriers.

The trade and environment debate has produced--as virtually its only concrete political achievements--international institutions that could be models for how to promote such sustainable development. To make NAFTA more palatable to environmental critics, the North American governments created the CEC, the Mexico-U.S. Border Environment Cooperation Commission ("BECC"), and the North American Development Bank ("NADBank").

The importance of such institutions will become clearer as environmental critics and government officials turn their attention from the increasingly sterile debate over legal conflicts, and as broader trade/environment issues are subsumed into the search for sustainable development--in short, as the debate moves beyond trade and the environment.