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ENVIRONMENTAL TRADE MEASURES, THE SHRIMP-TURTLE RULINGS, AND THE ORDINARY MEANING OF THE TEXT OF THE GATT

*Howard F. Chang*¹

The World Trade Organization (WTO) Appellate Body issued the most important rulings to date on the status of environmental trade measures under the General Agreement on Tariffs and Trade (GATT)² in its 1998 report³ and 2001 report⁴ in the “shrimp-turtle” dispute. At issue in this case was section 609 of Public Law 101-162,⁵ a U.S. statute that the U.S. Court of International Trade had interpreted as a ban on shrimp imports from countries not certified by the United States as having adopted “a regulatory program governing the incidental taking of . . . sea turtles . . . that is comparable to that of the United States.”⁶ The United States adopted such a program to promote the conservation of sea turtles, which are endangered species. This program includes a requirement that U.S. trawlers use turtle excluder devices (TEDs) to protect sea turtles from

¹ Professor of Law, University of Pennsylvania Law School. Copyright © 2005 by Howard F. Chang. Parts of this article have appeared previously in a shorter essay by Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31 (2000). I wish to thank Robert Howse and participants at the Chapman University symposium, at a United Nations Development Programme (UNDP) seminar at Renmin University in Beijing, China, at the Association of American Law Schools (AALS) Conference on Environmental Law in Portland, Oregon, and at a symposium sponsored by the Association for Comparative Studies of Legal Cultures in Tokyo, Japan, for their helpful comments.

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 187 [hereinafter GATT].

³ Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999) [hereinafter 1998 Appellate Body].

⁴ Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter 2001 Appellate Body].

⁵ Sea Turtle Conservation Amendments to the Endangered Species Act, Public Law 101-162, sec. 609, 103 Stat. 988, 1037 (Nov. 21, 1989) (codified at 16 U.S.C. § 1537 note (1984)).

⁶ *Id.* sec. 609(b)(2)(A), 103 Stat. at 1038; see *Earth Island Institute v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996), *vacated*, *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998).

incidental capture and drowning in shrimping nets. India, Malaysia, Pakistan, and Thailand complained that the U.S. ban on shrimp imports violated GATT Article XI,⁷ which prohibits quantitative restrictions on imports, and requested that a WTO panel settle their dispute with the United States.

Given the hostile attitude toward environmental trade measures reflected in past panel decisions under the GATT, the WTO Appellate Body's 1998 ruling in the shrimp-turtle case represented a significant step toward more liberal treatment of these measures under the GATT. In stark contrast to the consistent pattern in those past decisions, the Appellate Body upheld the statute in dispute and objected only to very specific aspects of its implementation. The Appellate Body endorsed the general type of case-by-case review that I had proposed in my writings and thereby brought GATT case law much closer to a reasonable balance between environmental and trade interests.⁸ The 1998 Appellate Body decision, as I have noted in prior writing about that ruling, suggests that countries can defend unilateral import bans as permissible environmental measures under the GATT as long as they avoid unfair discrimination.⁹ The result was a decision much more sensitive to environmental interests than observers had expected.

To comply with the Appellate Body's decision, the U.S. State Department issued new guidelines in 1999 that addressed the problems identified by the Appellate Body in its 1998 report.¹⁰ Malaysia nevertheless complained that the United States had not brought its policies into conformity with the 1998 ruling. Malaysia brought this complaint before the WTO, and in 2001, the Appellate Body held that the United States had complied with the 1998 Appellate Body decision, confirming that the U.S. import ban was consistent with the GATT despite the ban's reliance on environmental standards unilaterally prescribed by the United States.

The Appellate Body's rulings in this dispute, however, have generated some confusion regarding the standard that WTO panels should apply to environmental trade measures in the

⁷ GATT, *supra* note 2, art. XI, 61 Stat. pt. 5, at A32, 55 U.N.T.S. at 224.

⁸ See generally Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309 (1997) [hereinafter Chang, *International Externalities*]; Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995) [hereinafter Chang, *Trade Measures*].

⁹ See Chang, *supra* note 1. This article updates and expands upon the analysis that I presented in that essay.

¹⁰ See Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946, 36,948 (1999).

future. In this article, I will suggest that the 2001 ruling by the Appellate Body confirms an interpretation of the 1998 shrimp-turtle decision that preserves broad leeway for the use of environmental trade measures. I will argue that a more restrictive interpretation of the shrimp-turtle rulings would be inconsistent with the Appellate Body's close attention to the "ordinary meaning" of the text of the GATT in its legal reasoning.

First, in Part I of this article, I will review the Appellate Body's decisions in the shrimp-turtle cases, summarizing the Appellate Body's rulings in both its 1998 and 2001 reports. Unlike prior dispute-settlement reports addressing environmental trade measures under the GATT, the Appellate Body in the shrimp-turtle cases emphasized the "ordinary meaning" of the text of the GATT. This explicit focus on the treaty text implies better legal reasoning and more liberal treatment for environmental trade measures than we have seen in the past. Second, in Part II, I consider three questions of interpretation that have generated disagreements among readers of the Appellate Body reports. With respect to each issue, I argue that fidelity to the "ordinary meaning" of the text of the GATT requires the interpretation of those reports that gives WTO members greater freedom to use environmental trade measures.

I. THE SHRIMP-TURTLE RULINGS

The United States defended its ban on shrimp imports as a measure falling within GATT Article XX, which sets forth general exceptions from the obligations set forth elsewhere in the GATT. In particular, 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:

....

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

....

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

....¹¹

In May 1998, the WTO panel nevertheless ruled against the

¹¹ GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

United States.¹²

When the United States lost before the WTO panel in the shrimp-turtle case, it was the third time in a row that a dispute-settlement panel had held that the United States had violated the GATT by banning imports harvested in a manner harmful to marine life. Pursuant to the Marine Mammal Protection Act (MMPA),¹³ the United States has banned imports of tuna from countries that have not adopted programs to protect dolphins comparable to the U.S. program. In 1991, and again in 1994, dispute-settlement panels held that the MMPA violated the GATT.¹⁴ Both those GATT panels, like the WTO panel in the shrimp-turtle case, ruled against the United States on grounds so general and sweeping that they left little scope for trade measures to protect the global environment. The GATT Council, however, adopted neither of the “tuna-dolphin” panel reports, which therefore never became legally binding.

A. The 1998 Appellate Body Ruling

In the shrimp-turtle case, the United States appealed the panel’s ruling to the WTO Appellate Body, which in October 1998 also ruled against the United States, but on much narrower grounds than the panel below. In its ruling, the Appellate Body used much better legal reasoning than we have seen in past panel decisions, with much closer attention to the ordinary meaning of the language in GATT Article XX. For example, in the shrimp-turtle case the panel below required that any measure allowed under Article XX must not be “a type of measure” that would “undermine the WTO multilateral trading system” if adopted by others,¹⁵ a requirement that echoes a concern expressed by both the 1991 and 1994 tuna-dolphin panels.¹⁶ In a striking departure from the pattern established by those past decisions, the Appellate Body explicitly rejects this requirement as “a test that finds no basis . . . in the text” of Article XX.¹⁷ The Appellate Body criticized the panel below for failing to examine “the ordinary meaning of the words of Article

¹² See Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998), 37 I.L.M. 832 (1998) [hereinafter 1998 Panel].

¹³ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h (1994).

¹⁴ See Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS29/R (May 20, 1994), 33 I.L.M. 839 (1994) [hereinafter 1994 Panel]; Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Aug. 16, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter 1991 Panel].

¹⁵ 1998 Panel, *supra* note 12, para. 7.44.

¹⁶ See 1994 Panel, *supra* note 14, para. 5.26; 1991 Panel, *supra* note 14, para. 5.27.

¹⁷ 1998 Appellate Body, *supra* note 3, para. 121.

XX.”¹⁸ The Appellate Body stressed that “[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted,” looking beyond that text only “[w]here the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired.”¹⁹ Thus, as John Knox has observed, the Appellate Body “decided that its starting point would always be the ordinary meaning of the text” and that it would “follow the ordinary meaning of the text before it as far as possible.”²⁰ This emphasis on the “ordinary meaning” of the treaty text is itself significant, because each of the prior panel decisions ruled against the United States based on requirements that the panels invented without any support in the text of Article XX.²¹ Critics of those past decisions, including this author, have urged a more literal reading of Article XX, which implies a broader reading of the Article XX exceptions.²²

Turning to the question of whether section 609 is a measure “relating to” conservation within the meaning of Article XX(g), the Appellate Body in the shrimp-turtle case found the “general design and structure” of section 609 to be “reasonably related” to a “legitimate policy” of conservation.²³ The Appellate Body noted that section 609 “is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”²⁴ The requirement that “a country adopt a regulatory program requiring the use of TEDs,” according to the Appellate Body, “is . . . directly connected with the policy of conservation of sea turtles.”²⁵ Thus, the Appellate Body concluded that section 609 “is a measure ‘relating to’ the conservation of an exhaustible natural resource within the meaning of Article XX(g).”²⁶

¹⁸ *Id.* para. 115.

¹⁹ *Id.* para. 114.

²⁰ John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 50 (2004).

²¹ See Chang, *Trade Measures*, *supra* note 8, at 2145; Carrie Wofford, Note, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563, 573 (2000) (“Through a more literal interpretation of the text of Article XX, the Appellate Body has abandoned several tests . . . that prior panels had imposed . . . that had no basis in the actual language of Article XX.”).

²² See, e.g., Chang, *Trade Measures*, *supra* note 8, at 2172-75; Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, J. WORLD TRADE, Oct. 1998, at 73.

²³ 1998 Appellate Body, *supra* note 3, para. 141.

²⁴ *Id.*

²⁵ *Id.* para. 140.

²⁶ *Id.* para. 141. Some observers have read the Appellate Body’s analysis to suggest a requirement of “proportionality,” so that a broader import ban might be “disproportionately wide” and thus fail to qualify as a measure “relating to” conservation

The Appellate Body carefully identified problems *only* in the way in which the executive branch *applied* this law to countries exporting shrimp. In particular, the Appellate Body held that the executive branch applied section 609 “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries,” which violates the requirements set forth in the preamble, or “chapeau,” of Article XX.²⁷ Thus, the Appellate Body avoided the use of any general *per se* rules against environmental trade measures like the sweeping rules announced by panels in the past. Instead, the Appellate Body endorsed a case-by-case analysis that relies on the requirements explicit in the chapeau of Article XX to guard against the abuse of the Article XX exceptions,²⁸ much as critics of past panel decisions, including this author, have proposed.²⁹ Given its case-specific approach, the opinion is explicit regarding precisely which particular features of the application of the trade measure in question were “a means of arbitrary or unjustifiable discrimination.” Furthermore, each objection pertains to a *discriminatory* aspect of the U.S. policy and is thus tied to the actual text of Article XX:³⁰

(1) First, although section 609 permits some flexibility in determining whether an exporting country’s regulatory program is “comparable” to the U.S. program, in practice U.S. officials

under Article XX(g). See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 503 & n.33 (2002). Others have inferred that the Appellate Body may require a “direct connection” between conservation and the measure in question. See Petros C. Mavroidis, *Trade and Environment after the Shrimp-Turtles Litigation*, 34 J. WORLD TRADE, Feb. 2000, at 73, 84-85. It would be inappropriate, however, to infer any additional requirements stricter or more demanding than the modest requirement actually set forth in the text of Article XX(g). While the Appellate Body praises certain features of the section 609 import ban, it never states that these features are required by Article XX(g). Given the ordinary meaning of the treaty language, “relating to” conservation, the features praised are certainly sufficient but hardly necessary to show that the measure satisfies that simple requirement. The Appellate Body does not present its analysis as setting forth a new litmus test for measures “relating to” conservation. Instead, the Appellate Body praises these features merely to underscore how easily section 609 qualifies as a measure related to conservation.

²⁷ GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60, 55 U.N.T.S. at 262.

²⁸ See 1998 Appellate Body, *supra* note 3, para. 159 (endorsing a balance that “moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ”).

²⁹ See, e.g., Chang, *Trade Measures*, *supra* note 8, at 2172-75; Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 513-15 (1993).

³⁰ Although this attention to the text of Article XX represents an improvement over past panel decisions, some critics complain that the Appellate Body distorted the meaning of the term “discrimination.” See, e.g., Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 445 (1999) (arguing that the Appellate Body “expanded the term ‘discrimination’ . . . to encompass all of its criticisms of the U.S. measure, including criticisms that have no relation to the plain meaning of ‘discrimination’”).

only looked at whether the country's policies are "essentially the same" as U.S. policies.³¹ Officials did not take into account other policies and measures that the country may have adopted, nor did they consider different conditions that may exist in that other country.³² Because this rigid approach to certification could result in a ban on imports from a country with a different yet comparable program, the Appellate Body held that this inflexibility amounted to "arbitrary discrimination" among countries with comparable programs in violation of the chapeau of Article XX.³³

(2) Second, the United States failed to engage in "serious" negotiations with *all* affected countries before imposing its import ban.³⁴ The United States did negotiate with *some* countries to produce the Inter-American Convention for the Protection and Conservation of Sea Turtles, concluded in 1996, but not with other countries.³⁵ The result was "unjustifiable" discrimination.³⁶

³¹ 1998 Appellate Body, *supra* note 3, para. 163.

³² *See id.* para. 164.

³³ *Id.* para. 177. For a critique of this interpretation of the phrase "arbitrary or unjustifiable discrimination," see Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 784-90 (2001). *See id.* at 784 (arguing that the Appellate Body ruled against the United States "because it *refused to discriminate* in trade treatment between countries where *different* conditions may prevail," which "is the exact converse of the chapeau language"); Simmons, *supra* note 30, at 443 (arguing that "there is no affirmative duty to *discriminate* where conditions between countries are different"). The Appellate Body identified only the *potential* for discrimination among countries with equally effective conservation programs; it did not find such discrimination in actual practice as a matter of fact. Gaines argues that "[a]t the very least, the Appellate Body needed to make a robust finding of fact that the shrimp fishing and sea turtle conditions in South Asian waters were different from those in the Caribbean or western Atlantic in ways that were significant for policies to reduce sea turtle mortality." Gaines, *supra*, at 786. Furthermore, Gaines argues that the United States could justify any discrimination resulting from an inflexible certification approach based on "considerations of administrative capacity," which militate in favor of a "simplified approach." *Id.* at 788.

³⁴ 1998 Appellate Body, *supra* note 3, para. 166.

³⁵ *See id.* para. 171.

³⁶ *Id.* para. 172. For a critique of this interpretation of the term "discrimination," see Gaines, *supra* note 33, at 805-07, 817-18. First, Gaines argues that we should read the word "discrimination" in the Article XX chapeau to mean "only discrimination in *trade*." *Id.* at 807. Second, Gaines argues that any discrimination in negotiations caused "absolutely no discrimination in trade," *id.* at 806, because the "negotiations had no effect on trade embargo decisions under Section 609," *id.* at 817. Furthermore, Gaines complains that the Appellate Body's interpretation of the Article XX chapeau implies that "the WTO sits in judgment of the wisdom of a member's particular foreign policy strategy." *Id.* at 815. Lakshman Guruswamy argues that the Appellate Body's holding violates "the principle of state sovereignty by attempting to second-guess the manner in which the United States should have conducted treaty negotiations," because "States possess the freedom to negotiate treaties as they deem proper" as "an essential attribute of sovereignty that gives rise to the corollary duty of other States or international organizations not to interfere with this power." Lakshman Guruswamy, *The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation*, 30 ENVTL. L. REP. 10,261, 10,267 (2000).

(3) Third, the United States gave fourteen countries a three-year phase-in period (1991-1994). The United States did not impose an import ban on others until 1996, when it did so with only four-months notice.³⁷ The shorter phase-in period was not only more burdensome but also accompanied by less effort by the United States to transfer TED technology to the exporting countries.³⁸

The Appellate Body held that the foregoing problems in the application of the statute “considered in their cumulative effect” were “unjustifiable discrimination” in violation of Article XX.³⁹ The phrase “in their cumulative effect” indicates that one of these defects standing alone would not necessarily render the U.S. policy inconsistent with the GATT. Thus, had the United States discriminated among exporting countries only in terms of phase-in periods or efforts to transfer technology, those discriminatory practices standing alone might not amount to “unjustifiable discrimination” within the meaning of Article XX.

(4) Finally, the Appellate Body complained that the U.S. certification process was not “transparent”: that is, there is “no formal opportunity for an applicant country to be heard, or to respond to arguments . . . made against it,” “no formal written, reasoned decision” with reasons for a denial of certification, and “no procedure for review of, or appeal from, a denial.”⁴⁰ Thus, the United States denied certification without a process to ensure that the statute is “applied in a fair and just manner.”⁴¹ The Appellate Body concluded that denials under this procedure amount to “arbitrary discrimination” against those countries denied certification.⁴²

³⁷ See 1998 Appellate Body, *supra* note 3, para. 174.

³⁸ See *id.* para. 175.

³⁹ *Id.* para. 176.

⁴⁰ *Id.* para. 180. For an insightful analysis of the requirement of transparency, see Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1057-67 (1999).

⁴¹ 1998 Appellate Body, *supra* note 3, para. 181.

⁴² *Id.* para. 184; see *id.* para. 181. For a critique of this interpretation of the term “discrimination,” see Gaines, *supra* note 33, at 824-25. “Those who received certification were, after all, subject to the same non-transparent process as the others. There is no claim of discrimination in the procedures followed or decision criteria applied; the only difference is the result.” *Id.* at 824; see Knox, *supra* note 20, at 58 (“[I]t is hard to see how these procedures necessarily discriminated among applicant countries if . . . they were applied to all countries equally.”). Although this process may have created the *potential* for arbitrary discrimination among countries with equally effective conservation programs, the Appellate Body did not find such discrimination in the administration of the statute as a matter of fact. Gaines argues that “it was incumbent upon the Appellate Body to establish that there was discrimination in practice, not merely the procedural possibility” of “abusive discrimination.” Gaines, *supra* note 33, at 824; see Axel Bree, *Article XX GATT – Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report*, 17 DICK. J. INT'L L. 99, 128 (1998) (“The existence of procedural

B. The 2001 Appellate Body Ruling

To comply with the 1998 Appellate Body ruling in the shrimp-turtle case, the United States began efforts to negotiate with the four complainants in the case, seeking an agreement on the conservation of sea turtles in the Indian Ocean region, as well as efforts to provide technical assistance to those countries to assist in the development of TED programs. The U.S. State Department also issued new guidelines in 1999 to ensure consideration of evidence that an exporting country's program for protecting sea turtles is comparable to the U.S. program in light of different conditions or the use of methods other than TED requirements and also to provide greater transparency and due process for nations seeking certification under section 609.⁴³ Malaysia nevertheless brought a complaint to the WTO claiming that section 609 violated the GATT despite these U.S. efforts to comply with the 1998 Appellate Body ruling. The WTO panel reviewing U.S. implementation of that 1998 decision ruled in favor of the United States in 2001,⁴⁴ and Malaysia appealed to the Appellate Body.

First, Malaysia argued that to avoid unjustifiable discrimination, the United States had to conclude an international agreement before imposing an import ban.⁴⁵ The Appellate Body rejected this suggestion, holding instead that the United States must show "good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other."⁴⁶ These "negotiations need not be identical" or "lead to identical results."⁴⁷ Instead, "the negotiations must be comparable in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement."⁴⁸ The Appellate Body looked to the Inter-American Convention for comparison and found the United States had

flaws . . . does not automatically indicate arbitrariness.").

⁴³ See Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999).

⁴⁴ Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001) [hereinafter 2001 Panel].

⁴⁵ See 2001 Appellate Body, *supra* note 4, para. 115. Some commentators took a similar view of the 1998 Appellate Body decision. See, e.g., Gary P. Sampson, *Effective Multilateral Environmental Agreements and Why the WTO Needs Them*, 24 WORLD ECONOMY 1109, 1126 (2001) (claiming that the Appellate Body "found that . . . the failure to have established an environmental agreement . . . had resulted in unilateralism which was discriminatory and unjustifiable").

⁴⁶ 2001 Appellate Body, *supra* note 4, para. 122.

⁴⁷ *Id.*

⁴⁸ *Id.*

made comparable efforts in the Indian Ocean region.⁴⁹

Second, Malaysia argued that the U.S. import ban still violated the GATT because it still required exporting countries to meet standards “unilaterally” prescribed by the United States.⁵⁰ The Appellate Body, however, found no problem with the United States “conditioning market access on the adoption of a programme *comparable in effectiveness*” to that adopted unilaterally by the United States.⁵¹ To require “a programme *comparable in effectiveness*” rather than “essentially the same programme” allows “sufficient flexibility . . . so as to avoid ‘arbitrary or unjustifiable discrimination.’”⁵² By finally placing its stamp of approval on a unilateral import ban, the Appellate Body underscored how thoroughly it had rejected the reasoning advanced in the past by the tuna-dolphin panels.

II. THE INTERPRETATION OF THE APPELLATE BODY RULINGS

Given the ease with which the United States brought its unilateral import ban into compliance with the 1998 Appellate Body ruling, without even amending section 609,⁵³ one might expect environmentalist critics of the tuna-dolphin decisions to celebrate the dramatic changes in the interpretation of GATT Article XX evident in the Appellate Body’s analysis. Some critics, however, perceive little improvement in the prospects for environmental trade measures under the GATT. Sanford Gaines, for example, argues that the 1998 Appellate Body ruling “continues the tradition of trade jurisprudence that has almost completely closed off the policy space Article XX should leave open for national trade measures designed to protect the environment.”⁵⁴ The Appellate Body, he maintains, “gave little ground for hope that the WTO will tolerate *any* real-world unilateral use of trade leverage in furtherance of environmental protection objectives reaching beyond national boundaries.”⁵⁵ Gaines even claims that his “pessimistic assessment is confirmed

⁴⁹ *Id.* para. 133.

⁵⁰ *Id.* para. 135.

⁵¹ *Id.* para. 144.

⁵² *Id.*

⁵³ To satisfy the Appellate Body regarding the flexibility of the U.S. certification criteria, for example, the United States needed to make only minor changes in its guidelines for the implementation of section 609. As Sanford Gaines notes, the United States only had to leave open “the possibility and the process for an exporting country to rebut” the “presumption” in favor of the “same” regulatory approach as that of the United States. Gaines, *supra* note 33, at 794. “That possibility was, in fact, always there in the U.S. program. The revised guidelines simply state it more explicitly.” *Id.*

⁵⁴ Gaines, *supra* note 33, at 773. He complains that the Appellate Body’s interpretation of the Article XX chapeau creates tests for non-discrimination that “become a proverbial ‘eye of the needle’ through which hardly any national environmental measures will be able to pass.” *Id.*

⁵⁵ *Id.* at 743-44 (emphasis added).

by the 2001 report of the WTO panel in the follow-on proceeding,”⁵⁶ despite the fact that the 2001 panel upheld the section 609 import ban, an example of the type of “real-world unilateral use of trade leverage” about which he worries. Even the 2001 Appellate Body ruling, which “takes some of the hard edges off the panel’s conclusions and . . . limits some of the damage,” according to Gaines, “imposes extraordinary preconditions on member governments before they resort to Article XX for environmental measures.”⁵⁷

While the shrimp-turtle rulings may well have imposed some unwarranted “preconditions” on the use of environmental trade measures, I will suggest that at least some of the concerns of environmentalist critics derive from an unduly broad interpretation of the “preconditions” set forth by the Appellate Body. Ambiguities in the 1998 and 2001 Appellate Body reports have generated disagreements among observers regarding the correct interpretation of those decisions. In particular, I will address three questions left open by those decisions and argue that in each case, fidelity to the “ordinary meaning” of the text of Article XX militates decisively in favor of the interpretation that leaves greater scope for the use of environmental trade measures.

A. The Jurisdiction of the Importing Country

The Appellate Body agreed that section 609 was a measure “relating to the conservation of exhaustible natural resources.”⁵⁸ Therefore, the Appellate Body concluded that the statute came within the exception in Article XX(g) despite the fact that section 609 called for a unilateral ban on imports based on the process by which they were made or harvested outside the United States. These types of attempts to influence production and process methods (PPMs) outside the jurisdiction of the importing country have been anathema to many in the GATT community, and some have since expressed alarm that the Appellate Body decision apparently allows the use of these process standards. Thailand, for example, complained that the decision “will result in an explosive growth in the number of environmental . . . measures applied to PPMs and justified pursuant to Article XX.”⁵⁹

Expressing similar concerns, the 1991 tuna-dolphin panel ruled that the MMPA could not come within the Article XX exceptions because it sought to protect dolphins from fishing

⁵⁶ *Id.* at 744.

⁵⁷ *Id.* at 745.

⁵⁸ 1998 Appellate Body, *supra* note 3, para. 145

⁵⁹ Daniel Pruzin, *WTO Formally Adopts Shrimp-Turtle Ruling as Thailand Fears Victory May Be Pyrrhic*, 15 Int’l Trade Rep. (BNA) 1884, 1885 (Nov. 11, 1998).

fleets outside the jurisdiction of the United States.⁶⁰ The Appellate Body holding in the shrimp-turtle case rejects that particular jurisdictional requirement, so it does not rule against the U.S. import ban because it seeks to protect sea turtles from activities outside U.S. jurisdiction. The opinion, however, leaves open the question of whether there may be *some* jurisdictional limitation implicit in Article XX(g):

We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).⁶¹

The opinion hints that it might be relevant that sea turtles migrate through U.S. territory, and consequently several commentators have suggested that such a nexus may be necessary to justify an environmental trade measure under Article XX(g).⁶²

The Appellate Body, however, expressly declines to rule on whether such a nexus is actually required, and the reasoning in the opinion militates against any such jurisdictional requirement. Such a requirement would be inconsistent with the Appellate Body's emphasis on the ordinary meaning of the text of Article XX. In fact, the 1994 tuna-dolphin panel explicitly rejected any limitation on the scope of the Article XX(g) exception based on the location of the natural resources protected by the trade measure in question, because the panel found no such limitation in the text of Article XX(g).⁶³ In the future, WTO dispute settlement panels and the Appellate Body should similarly reject any such jurisdictional requirement as a test with absolutely no basis in the text of Article XX.⁶⁴

⁶⁰ See 1991 Panel, *supra* note 14, paras. 5.25, .32, at 198, 200-01.

⁶¹ See 1998 Appellate Body, *supra* note 3, para. 133.

⁶² See, e.g., Hansen, *supra* note 40, at 1057 ("States may permissibly use trade measures to protect resources outside their territorial jurisdiction so long as . . . the state has a sufficient 'nexus' with those resources . . ."); Nancy L. Perkins, *Introductory Note, World Trade Organization: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 38 I.L.M. 118, 119 (1999) (suggesting that states may use trade measures to protect environmental resources in the global commons "so long as there is at least *some* jurisdictional relationship between those resources and that WTO Member"); Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 INT'L & COMP. L.Q. 199, 204 (1999) (reading the Appellate Body opinion as "stipulating the need for a nexus between the State and the object of environmental concern"); Simmons, *supra* note 30, at 440 ("[I]t remains unclear whether future panels will allow countries to implement measures protecting natural resources outside their jurisdiction."); Wofford, *supra* note 21, at 584 (suggesting that "a nation may still need to prove that its territory is affected by the environmental concern" to clear "the hurdle of jurisdiction").

⁶³ See 1994 Panel, *supra* note 14, paras. 5.15, .20.

⁶⁴ Robert Howse suggests that "[t]he question . . . of whether there is an implicit

As I have argued elsewhere, restrictions on imports produced by environmentally harmful processes may protect important resources wholly outside the jurisdiction of the importing country.⁶⁵ Some countries may regulate their own fishing fleets to ensure that they provide optimal protection for marine resources, but as long as these regulations raise costs for the regulated producers and reduce their output, then these countries must also support these regulations with trade measures against imports harvested using harmful practices. Otherwise, these imports would displace sales of domestic products harvested subject to environmental regulation. Furthermore, fishing operations may move to unregulated countries in order to avoid these environmental regulations. In the extreme, if imports displace sales by domestic producers entirely, then countries that regulate succeed only in destroying their domestic fishing industry without protecting the environment.

By not only regulating the domestic fishing industry but also shielding it against those foreign competitors that use practices that harm the environment, a country can ensure that its efforts to change the practices of its own producers will not be in vain. Moreover, these trade measures protect the environment by inducing foreign fishing fleets to reform their practices in order to gain access to regulated markets. Through these effects on both domestic and foreign fishing fleets, the application of a process standard to imports contributes to the protection of the global environment.

B. The Environmental Policies of the Exporting Country

In the shrimp-turtle case, however, the United States banned shrimp imports based not only on the processes used to harvest the particular shipment of shrimp in question but also on the environmental policies of the exporting country. Therefore, the panel below ruled against the United States because it was “conditioning access to its market . . . upon the adoption . . . of

territorial or jurisdictional limitation . . . may . . . be largely moot,” because “Article XX(g) by its explicit language only applies to environmental trade measures that are coupled with domestic environmental regulation.” Howse, *supra* note 26, at 504. The requirement in Article XX(g) that conservation measures be “made effective in conjunction with restrictions on domestic production or consumption,” however, does not render the question of territorial jurisdiction moot. Suppose, for example, the United States were to ban imports in an effort to protect an endangered marine species wholly outside U.S. territory. A complainant could raise the question of a jurisdictional requirement even if the United States were to make that import ban effective in conjunction with restrictions on domestic producers that threaten the species through their operations outside U.S. territory.

⁶⁵ See Chang, *Trade Measures*, *supra* note 8, at 2177-78.

certain policies” by the exporting country’s government.⁶⁶ The Appellate Body, however, explicitly and emphatically rejected this rationale as an “error in legal interpretation” with “no basis . . . in the text” of Article XX.⁶⁷ Indeed, in paragraph 121 of its report, the Appellate Body even went so far as to declare that import bans based on whether the governments of exporting countries have adopted policies “unilaterally prescribed” by the importing country will be “a common aspect” of Article XX measures.⁶⁸ In the same remarkable paragraph, the Appellate Body concluded that to consider such unilateral import bans “a priori incapable of justification” under Article XX would be “abhorrent to the principles of interpretation we are bound to apply,” because it would render “most, if not all, of the specific exceptions of Article XX inutile.”⁶⁹

Thus, the Appellate Body held that countries may *unilaterally* ban imports based not only on the process used in producing the particular units in question but also on the environmental policies of the targeted *countries*. In support of its 2001 complaint, Malaysia argued that paragraph 121 of the 1998 Appellate Body ruling was mere dicta, but the Appellate Body firmly and emphatically rejected this suggestion in its 2001 ruling.⁷⁰ In case there remained any doubt regarding the significance of paragraph 121 of the 1998 ruling, the Appellate Body quotes that paragraph at length and proclaims that it “expresses a principle that was central to our ruling” in the shrimp-turtle case.⁷¹ Thus, the Appellate Body leaves no doubt that GATT Article XX allows countries to impose a unilateral import ban broader than a mere process standard.

The 1994 tuna-dolphin panel cited the country-wide breadth of the import ban imposed by the MMPA as the reason that it ruled against the United States. The 1994 panel inferred that the United States banned tuna imports “so as to force other countries to change their policies” and held explicitly that those import bans therefore fell outside Article XX.⁷² The Appellate Body made a similar inference regarding the purpose of the U.S. ban on shrimp imports, but did not hold that the U.S. measure

⁶⁶ 1998 Panel, *supra* note 12, para. 7.45.

⁶⁷ 1998 Appellate Body, *supra* note 3, paras. 121-122.

⁶⁸ *Id.* para. 121.

⁶⁹ *Id.*

⁷⁰ 2001 Appellate Body, *supra* note 4, para. 138 (“Contrary to what Malaysia suggests, this statement is not ‘dicta.’”).

⁷¹ *Id.*; see *id.* para. 137 (quoting 1998 Appellate Body, *supra* note 3, para. 121, at length and adding emphasis).

⁷² 1994 Panel, *supra* note 14, para. 5.27.

therefore falls outside Article XX.⁷³ On the contrary, the Appellate Body instead declared that “a requirement that a country adopt a regulatory program requiring the use of TEDs” is “directly connected with the policy of conservation of sea turtles.”⁷⁴ Thus, consistent with the ordinary meaning of the text of Article XX, the Appellate Body’s opinion permits import bans designed to change the policies of other governments. In fact, the Appellate Body does not rule out the possibility that even trade sanctions imposed with respect to products completely unrelated to the marine resource in question may fall within Article XX if they are intended to induce other countries to improve their efforts at conservation of that resource.⁷⁵

Importing countries can promote important environmental objectives by requiring exporting countries to improve their conservation efforts as a condition for access to domestic market of the importing country.⁷⁶ When process standards alone are not effective in promoting more environmentally sound practices or policies, broader import bans are often useful in inducing other countries to join multilateral agreements and to comply with them.⁷⁷ Other countries who harm the environment must have some reason to come to the negotiating table and to sign an agreement, especially given the powerful economic incentives for them to “free ride” on the restraint exercised by the countries that do agree to regulate.⁷⁸ The types of trade measures condemned by past panels can create the incentives necessary for countries to join a multilateral agreement that imposes

⁷³ See Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT’L & COMP. L. REV. 1, 45 (1999) (noting that the Appellate Body “implicitly rejected” the reasoning of the 1994 panel).

⁷⁴ 1998 Appellate Body, *supra* note 3, para. 140; see Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case*, 10 COLO. J. INT’L ENVTL. L. & POL’Y 345, 345 (1999) (concluding that a WTO member may “impose its domestic environmental regulations on another member so long as certain safeguards are met”).

⁷⁵ For a defense of such trade sanctions, see Chang, *Trade Measures*, *supra* note 8, at 2199-207.

⁷⁶ For a comprehensive study of the role of import bans in promoting dolphin conservation, see Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict*, 12 GEO. INT’L ENVTL. L. REV. 1 (1999).

⁷⁷ Broader import bans may also discourage environmentally harmful production processes more effectively than process standards, even without changing the environmental policies of foreign governments, because broader import bans make it even more difficult for the producers using those harmful processes to find markets where they can sell their products at a profit. See Chang, *Trade Measures*, *supra* note 8, at 2178-84.

⁷⁸ We can reward countries that regulate with “carrots,” or we can threaten the use of “sticks” against those who do not. The prospect of “carrots,” however, would create perverse incentives to harm the environment. See Chang, *International Externalities*, *supra* note 8; Chang, *Trade Measures*, *supra* note 8, at 2150-60.

environmental regulations on them.⁷⁹

Despite the Appellate Body's endorsement of country-based import bans in paragraph 121 of its 1998 ruling, the shrimp-turtle litigation has left some doubts regarding the permissible scope of these import bans. The 1998 Appellate Body opinion acknowledges explicitly that while the dispute was before the panel and the Appellate Body, the United States excluded even shrimp caught using TEDs if the shrimp came from countries not certified by the United States, and the Appellate Body expresses some concern about this ban in paragraph 165 of its opinion, suggesting that "[t]he resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles."⁸⁰ Some observers have concluded that the U.S. import ban violated the GATT because it applied even to imports that themselves were harvested by environmentally friendly processes.

The question has been moot since 1998, when the U.S. State Department adopted a policy allowing shrimp imports if the individual shipment was caught with the use of TEDs, after the U.S. Court of Appeals for the Federal Circuit vacated on procedural grounds an earlier decision by the U.S. Court of International Trade that had prohibited such imports.⁸¹ The State Department issued final guidelines in 1999 that affirmed this "shipment-by-shipment exception."⁸² Environmentalists continued to advocate a "country-by-country" import ban, however, arguing that a "shipment-by-shipment" approach would be ineffective in protecting sea turtles,⁸³ and the U.S. Court of

⁷⁹ See Chang, *Trade Measures*, *supra* note 8, at 2146-60. There are, of course, devices other than trade measures that can induce the cooperation of foreign governments, and a GATT prohibition on import bans would not render the use of other sanctions illegal. Nevertheless, many of these other sanctions may sacrifice other important interests or often have little effect on the governments of particular countries. Because other sanctions on behalf of the environment may be costly or ineffective, trade restrictions have proven particularly useful instruments in protecting environmental interests. See *id.* at 2149; Chang, *International Externalities*, *supra* note 8, at 323-24.

⁸⁰ 1998 Appellate Body, *supra* note 3, para. 165.

⁸¹ See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094, 46,094-95 (1998); *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998), *vacating* *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996).

⁸² Rossella Brevetti, *State Department Issues Guidelines to Comply with WTO Shrimp Ban Ruling*, 16 Int'l Trade Rep. (BNA) 1183 (July 14, 1999).

⁸³ Rossella Brevetti, *USTR to Consult with Interested Parties on How to Respond to Shrimp Ruling*, 15 Int'l Trade Rep. (BNA) 1768, 1768-69 (Oct. 21, 1998). Critics of the shipment-by-shipment approach complain that it undermines "the incentive to create a national program" and encourages "countries with existing national programs to abandon their all-encompassing programs." Jennifer A. Bernaz, Note, *The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures*, 15 CONN. J. INT'L L. 207, 229 (2000).

International Trade ruled in favor of environmentalist plaintiffs again in 2000, holding that section 609 permits the importation of wild shrimp only from certified nations.⁸⁴ Malaysia claimed in its 2001 complaint that this ruling put the United States out of compliance with the GATT as interpreted by the 1998 Appellate Body decision, but both the panel and the Appellate Body rejected Malaysia's claim because the Court of International Trade did not issue an injunction pending appeal, so that the shipment-by-shipment exception continued to allow imports caught using TEDs.⁸⁵ Thus, Malaysia did not prevail with this claim, but the Appellate Body's basis for rejecting this claim in 2001 leaves open the substantive question of whether a country-based import ban would violate the GATT in the absence of a shipment-by-shipment exception.

Some commentators agree with Malaysia's reading of the 1998 Appellate Body ruling on this issue. Eric Richards and Martin McCrory, for example, claimed that by ruling against the shipment-by-shipment exception, the Court of International Trade could "sabotage United States compliance efforts."⁸⁶ They interpret the shrimp-turtle ruling to imply that the use of "trade leverage to force similar regulations on . . . trading partners" would "run afoul of GATT rules."⁸⁷ To support this claim, they quote passages in paragraph 161 of the 1998 ruling stating that "[p]erhaps the most conspicuous flaw" in the "application" of section 609 "relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments."⁸⁸ Adopting a similar view of this language from the 1998 ruling, Sanford Gaines complains that "[b]y disqualifying . . . any measure that has the result of applying the economic pressure of

⁸⁴ See *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005 (Ct. Int'l Trade 2000). The Federal Circuit would later overturn this decision on appeal in 2002 and uphold the shipment-by-shipment exception. See *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002), *reh'g en banc denied*, 299 F.3d 1373 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1748 (2003).

⁸⁵ 2001 Appellate Body, *supra* note 4, para. 151 (holding that "the Panel took into account the status of municipal law at the time, and reached the correct conclusion").

⁸⁶ Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 325 (2000).

⁸⁷ *Id.* at 333; see Brooks Ware, *Staying Out of the Grasp of the GATT: Attempts to Protect Animals at the Expense of Free Trade*, CURRENTS, Winter 1998, at 69, 73 ("Section 609 ran afoul of Article XX because the U.S. had been excluding shrimp caught with TEDs simply because the country where the shrimp were caught had not been 'certified' by section 609.").

⁸⁸ 1998 Appellate Body, *supra* note 3, para. 161; see Richards & McCrory, *supra* note 86, at 321. As a result of these passages, some observers consider the legality of a country-by-country import ban "not so clear." Rosella Brevetti, *U.S. Examining Ways to Make Restrictions on Shrimp Imports More Transparent*, 16 Int'l Trade Rep. (BNA) 309, 310 (Feb. 24, 1999) (quoting one source as stating that the Appellate Body's decision "is kind of grey" on this issue).

a trade restriction on other governments unless they change their resource conservation policies, the Appellate Body effectively nullified Article XX(g).⁸⁹ Sydney Cone also infers that the Appellate Body deemed a country-by-country import ban to be a violation of the GATT.⁹⁰ Therefore, Cone criticizes the Appellate Body, which he believes “seems to have lost sight of its own statement . . . that there is a reasonable relationship between the US rules . . . ‘and the legitimate policy of conserving an . . . endangered species.’”⁹¹

If we read the Appellate Body’s 1998 decision as criticizing the United States for imposing a country-by-country ban, then this criticism would indeed be inconsistent with earlier passages in the same opinion, including paragraph 121, which the Appellate Body would later emphasize so forcefully in 2001.⁹² If we read each of the Appellate Body’s critical sentences carefully in context, however, we find that each sentence is followed immediately by an explanation that makes clear that the 1998 ruling did not object to a country-by-country import ban *per se*. Instead, the Appellate Body’s specific complaint in paragraph 165 is that the United States applies this import ban to induce other countries to adopt “essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers” even though many of these countries “may be differently situated,” and the Appellate Body objects to the import ban on these narrower grounds instead.⁹³ Similarly,

⁸⁹ Gaines, *supra* note 33, at 804; see Bree, *supra* note 42, at 122 (“[I]t remains questionable whether the underlying rationale of pushing other countries to adopt policies is permissible.”).

⁹⁰ See Sydney M. Cone, III, *The Appellate Body, the Protection of Sea Turtles and the Technique of “Completing the Analysis,”* J. WORLD TRADE, Apr. 1999, at 51, 53, 55, 58.

⁹¹ *Id.* (quoting Appellate Body, *supra* note 3, para. 141). Cone complains that “the Appellate Body ignored the difficult question of whether vessel-specific (as opposed to country-by-country) enforcement of the US regulations would be too limited” to protect sea turtles. *Id.* at 58; see Bree, *supra* note 42, at 122-23 (“Case by case decisions about the import of particular shrimps depending on . . . how they are fished are not verifiable and enforceable, and thus would lead to the failure of the conservation objective . . .”); Neuling, *supra* note 73, at 47 (complaining that “the suggestion that the U.S. Government should not exclude shrimp caught with TEDs” will limit “the ability of the U.S. Government to influence environmental practices abroad” and that “any system relying on shipment-by-shipment inspections . . . would be vulnerable to fraud”).

⁹² See Howse, *supra* note 26, at 513 (“To say that the chapeau requires shipment-by-shipment inspection . . . would be to interpret the chapeau in a manner that is inconsistent with the [Appellate Body’s] overall understanding of the structure and purpose of Article XX, as articulated in paragraph 121 of its original ruling, and reaffirmed with emphasis in paragraph 138 of its [2001] ruling.”).

⁹³ Appellate Body, *supra* note 3, para. 165 (noting that “shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States” and concluding from this fact that “this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the

this inflexibility is the *particular aspect* of the “coercive effect” of the section 609 import ban that disturbs the Appellate Body in paragraph 161.⁹⁴

Thus, at most, the absence of a shipment-by-shipment exception is merely an aggravating circumstance that contributes to the “arbitrary and unjustifiable” nature of the discrimination that may result from an inflexible certification process.⁹⁵ That is, the absence of such an exception is *not* itself a violation of any requirement in Article XX. Observers have drawn a contrary conclusion only by taking isolated statements from the 1998 Appellate Body ruling out of context.⁹⁶

The Appellate Body has *never* claimed that Article XX requires a shipment-by-shipment exception.⁹⁷ The Appellate Body made no such claim, for the simple reason that such a claim would have no plausible basis in the ordinary meaning of the text of Article XX. The Appellate Body could not derive such a claim from its analysis of the Article XX chapeau, for example, without distorting the ordinary meaning of the phrase “arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”⁹⁸ While a country-by-country import ban

United States”); *see supra* notes 31-33 and accompanying text.

⁹⁴ *See id.* para. 161 (criticizing the embargo for requiring other countries “to adopt *essentially the same* policy . . . as that applied to . . . United States domestic shrimp trawlers”). Thus, as Gaines recognizes, “[t]wo intertwined thoughts” prompted the Appellate Body’s conclusion that the U.S. import ban had a “coercive effect” that produced “unjustifiable discrimination.” Gaines, *supra* note 33, at 791. Both the rigid application of the certification criteria, requiring policies identical to those of the United States, and the use of trade measures to induce other governments to comply with those criteria combined to produce “unjustifiable discrimination.” *Id.*

⁹⁵ The 2001 panel addressed the shipment-by-shipment exception as if it were a separate requirement distinct from the requirement of greater flexibility in the certification criteria applied to exporting countries by the United States. *See* 2001 Panel, *supra* note 44, para. 5.106. Robert Howse suggests that the United States did not appeal this aspect of the 2001 panel’s interpretation of the 1998 Appellate Body ruling because the executive branch of the U.S. government found that interpretation useful in defending the shipment-by-shipment exception in federal court. *See* Howse, *supra* note 26, at 512.

⁹⁶ *See, e.g.,* Gregory Shaffer, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT’L L. 507, 511 (1999). Shaffer quotes paragraph 165 as identifying the absence of a shipment-by-shipment exception as a second flaw in the U.S. import ban, separate from the first flaw, which was the application of inflexible criteria requiring exporting countries “to adopt *essentially the same* policy” as that adopted by the United States. *Id.* His quote from paragraph 165, however, omits the language in that paragraph identifying the inflexibility of the U.S. criteria, which required “essentially the same” conservation policies as those adopted by the United States, as the fundamental problem. 1998 Appellate Body, *supra* note 3, para. 165. This omitted language makes clear that the objection raised in paragraph 165 is merely an elaboration of the flaw of inflexibility identified in the preceding paragraphs, not a separate independent flaw.

⁹⁷ *See* Howse, *supra* note 26, at 512 (noting that “shipment-by-shipment inspection was not presented as a separate requirement implicit in the chapeau” in the 1998 Appellate Body ruling, nor does it appear “as a separate sine qua non requirement” in the 2001 Appellate Body ruling).

⁹⁸ GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

without a shipment-by-shipment exception might discriminate between *producers* harvesting shrimp using similar processes, this discrimination does *not* entail any discrimination between *countries* “where the same conditions prevail.”⁹⁹

The *only* aspect of the substantive criteria used by the United States to ban imports that the Appellate Body could plausibly describe as “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” was the inflexibility of the U.S. certification criteria, which raised the possibility of discrimination between countries with comparably effective conservation policies. Once the United States eliminated this inflexibility, those criteria were no longer a means of any discrimination that the WTO could condemn under the Article XX chapeau. Therefore, the United States can apply a country-by-country import ban as long as it allows an exporting country to argue that it is “differently situated” so that its program for the protection of sea turtles may be certified as “comparable” to that of the United States.¹⁰⁰ Thus, the United States would be in compliance with the GATT even if it were to return to a country-by-country import ban under section 609, because it has already revised its guidelines to allow for this more flexible approach to certification.

C. Unilateral Measures Without Multilateral Negotiations

The Appellate Body’s critique of the U.S. implementation of section 609 has also generated some commentary suggesting that “it is generally *not* acceptable for one WTO Member to restrict trade based on the failure of other Members to conform their natural resource conservation . . . policies to the *unilateral* dictates of that WTO Member.”¹⁰¹ Richards and McCrory, for example, assert that it is “permissible for a country to adopt

⁹⁹ As the Appellate Body itself implied in its 1998 ruling, either “the same conditions” do not prevail between countries with conservation policies that are not comparably effective or discrimination between such countries is generally not “arbitrary or unjustifiable.” To hold otherwise, according to paragraph 121 of that ruling, would be “abhorrent,” because it would render “most, if not all, of the specific exceptions of Article XX inutile.” 1998 Appellate Body, *supra* note 3, para. 121.

¹⁰⁰ See Joseph Robert Berger, Note, *Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355, 376 (1999) (noting that “[t]he WTO focused on the combination of the nationwide approach with the imposition of an inflexible, comprehensive regulatory program on all targeted nations” and suggesting that “[i]f the United States can address the latter problem,” then “the nationwide embargo approach might be accepted”) (emphasis added). Peter Fugazzotto of the Earth Island Institute has expressed the view that the shipment-by-shipment approach is not necessary for compliance with the Appellate Body ruling, but he concedes that “[w]hether the Asian nations agree with that remains to be seen.” Brevetti, *supra* note 88, at 310.

¹⁰¹ Perkins, *supra* note 62, at 119.

unilateral measures” only “in rare circumstances.”¹⁰² They cite the discussion in the 1998 Appellate Body report of the general preference for multilateral solutions to international environmental problems over unilateral actions.¹⁰³ In paragraph 171 of that report, for example, the Appellate Body points to the Inter-American Convention as evidence that “an alternative course of action” featuring “cooperative efforts” rather than “the unilateral and non-consensual procedures of the import prohibition” under section 609 “was reasonably open to the United States.”¹⁰⁴

On the other hand, the Appellate Body’s 1998 opinion carefully avoids the suggestion that unilateral measures generally fall outside Article XX. Such a claim would be inconsistent with passages in paragraph 121 of the same opinion implying that such a rule would render “most, if not all, of the specific exceptions of Article XX inutile” and thus would be “abhorrent.”¹⁰⁵ Such a claim would also be inconsistent with the use of the singular noun in Article XX, which permits “any contracting party” to adopt the measures in question, and with GATT case law, which has often found unilateral measures to fall within Article XX.¹⁰⁶ Nothing in the language of Article XX suggests that unilateral measures are illegal if they are directed at resources outside the jurisdiction of the importing country.

Opposing views of the Appellate Body’s 1998 ruling have produced opposing views of the Appellate Body’s 2001 ruling, which required the United States “to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.”¹⁰⁷ Robert Howse reads this statement to require the United States only “to negotiate

¹⁰² Richards & McCrory, *supra* note 86, at 340-41.

¹⁰³ See *id.* at 322 (quoting 1998 Appellate Body, *supra* note 3, paras. 168, 171).

¹⁰⁴ Appellate Body, *supra* note 3, para. 171; see Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. INT’L ECON. L. 477, 493 (1999) (concluding that the “need for a co-operative as opposed to a unilateral approach is among the central points of the Appellate Body’s finding that the US measure constituted unjustifiable discrimination”); Bree, *supra* note 42, at 125 (concluding that “unilateral measures are not permissible”). Thus, Charles Arden-Clarke of the World Wide Fund for Nature International complained that the Appellate Body ruling “still prevents countries from taking unilateral action on the global commons when irreversible environmental damage takes place.” *WTO Appeals Body Faults Implementation of Shrimp-Turtle Law*, 15 Int’l Trade Rep. (BNA) 1698, 1699 (Oct. 14, 1998).

¹⁰⁵ Appellate Body, *supra* note 3, para. 121; see Sakmar, *supra* note 74, at 383 (noting that “the WTO Appellate Body . . . recognized that unilateral measures aimed at protecting the environment could be valid,” because “if such measures were not valid, the exceptions found in Article XX would be superfluous”); Wofford, *supra* note 21, at 581 (“[T]he Appellate Body asserted that unilateral environmental policies are not only legitimate, but also to be expected under Article XX exceptions.”).

¹⁰⁶ GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A61, 55 U.N.T.S. at 262.

¹⁰⁷ 2001 Appellate Body, *supra* note 4, para. 122.

seriously with the complainants exactly to the extent it had already negotiated with the western hemisphere countries, no more and no less.”¹⁰⁸ That is, the Appellate Body does not impose “a self-standing duty to negotiate” independent of the duty not to discriminate in these efforts.¹⁰⁹ “The ‘unjustified discrimination’ was not the failure to negotiate as such, but the failure to treat the complainants as well as . . . the western hemisphere countries.”¹¹⁰ Thus, had the United States “negotiated with *no one*, it would not have run afoul of the chapeau.”¹¹¹

John Knox, however, reads the same statement from the 2001 ruling to express two separate requirements: “(1) to make good faith efforts to negotiate international agreements; and (2) to make sure that the efforts are comparable across the board.”¹¹² That is, the Article XX chapeau required the United States to negotiate with the 1998 complainants not only to avoid discrimination against them but also to pursue the “multilateral ‘alternative course of action’” urged in paragraph 171 of the 1998 Appellate Body ruling.¹¹³ Based on a similar reading of the Appellate Body rulings, Gaines worries that “unilateral measures affecting transnational or global resources outside the context of any systematic effort to promote a multilateral solution will, *ipso facto*, not qualify under Article XX.”¹¹⁴

Furthermore, Gaines complains, the Appellate Body has left open the “problematic” question of what “efforts, resources, and

¹⁰⁸ Howse, *supra* note 26, at 508.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 508-09.

¹¹¹ *Id.* at 509 n.39.

¹¹² Knox, *supra* note 20, at 41 n.165.

¹¹³ *Id.* at 42 n.165; see Bree, *supra* note 42, at 123 (concluding that the 1998 Appellate Body decision “required serious negotiations before taking unilateral action as a last resort”). Knox claims that the 2001 panel took a similar view of the 1998 Appellate Body ruling. See Knox, *supra* note 20, at 41 n.165 (citing 2001 Panel, *supra* note 44, paras. 5.59, .74, .76.). Gaines agrees, noting that the 2001 Appellate Body report “does not specifically comment on, much less disavow, the panel’s extreme interpretation of the ‘requirement’ for prior effort at multilateral solutions before invoking Article XX rights.” Gaines, *supra* note 33, at 818-19. Knox infers from the Appellate Body’s silence that it agrees with the 2001 panel’s reading of the 1998 Appellate Body ruling. Knox, *supra* note 20, at 41 n.165 (“If Howse were right, surely the Appellate Body would have corrected the panel’s basic mischaracterization of its earlier decision.”). The 2001 panel decision, however, is not much clearer than the 1998 Appellate Body ruling on this question. Both decisions impose a duty to negotiate upon the United States, but neither makes clear whether this duty arises only because the United States had already negotiated with some countries or because such a duty exists even in the absence of any discrimination among exporting countries. In any event, the 2001 Appellate Body report, as Gaines reads it, “shifts the emphasis away from ‘prior’ recourse to a more mundane concern with the perceived discrimination in treatment between the Western Hemisphere nations and the Asian nations in United States diplomacy.” Gaines, *supra* note 33, at 819. According to Howse, that report “clarified” that there is no self-standing duty to negotiate. Howse, *supra* note 26, at 509 n.39.

¹¹⁴ Gaines, *supra* note 33, at 819.

energies” would “satisfy the implicit . . . general requirement . . . that there must always be a good faith effort at negotiations before invoking Article XX rights.”¹¹⁵ What standard would a WTO panel apply in the absence of any discrimination among exporting countries? If the Appellate Body has indeed imposed a duty to negotiate on WTO members invoking Article XX(g), then it has also saddled WTO panels with the difficult task of developing an appropriate standard with little guidance on the question: How much of a diplomatic effort must the importing country make before resorting to unilateral import restrictions? Howse infers from the Appellate Body’s silence on this question that there is no such independent duty to negotiate before invoking Article XX, arguing that had the Appellate Body “intended to read into the chapeau a self-standing duty to negotiate seriously, it would have given some guidance as to the extent of the duty.”¹¹⁶

Most important, once we recall the Appellate Body’s focus on the ordinary meaning of the text of Article XX, we cannot reasonably read the Appellate Body’s rulings to impose a duty to negotiate in the absence of any “discrimination between countries where the same conditions prevail.”¹¹⁷ There is simply no basis in the text of Article XX for any such duty. As Gaines observes, “the text of Article XX makes no explicit reference to unilateral or multilateral action.”¹¹⁸ Indeed, “[n]othing in the lettered paragraphs or the chapeau constrains a member government’s choice among multilateral, regional, bilateral, or unilateral approaches.”¹¹⁹

The only provision in Article XX that the Appellate Body *ever* identifies as imposing a duty to negotiate on the United States is the chapeau language against “discrimination,” and as Gaines

¹¹⁵ *Id.*; *see id.* at 805 (noting that the 1998 Appellate Body report “sets no definable, predictable standard for determining how much effort at negotiations will satisfy the WTO”); Neuling, *supra* note 73, at 47 (noting that the 1998 Appellate Body report does not address the question of “how much of a diplomatic effort must the importing nation make?”).

¹¹⁶ Howse, *supra* note 26, at 508.

¹¹⁷ We should distinguish negotiations from those discussions that may be necessary to avoid discrimination among countries with comparably effective conservation programs. The Appellate Body required a country imposing an import ban to consider whether the conservation policies of the exporting country are as effective as those of the importing country. This requirement may entail some discussions between the importing country and the exporting country but does not imply that the importing country must negotiate a compromise with the exporting country over the appropriate level of effectiveness for these conservation policies.

¹¹⁸ Gaines, *supra* note 33, at 807. “Nor does the language of Article XX offer any basis from which to infer that multilateral action is a chapeau precondition for national measures.” *Id.*

¹¹⁹ *Id.*

notes, “[t]here is no inherent connection between unilateralism and discrimination.”¹²⁰ He complains that the Appellate Body “articulates no historical foundation or legal basis for the conclusion that failure to make bona fide efforts to negotiate a treaty comes within the chapeau’s concept of ‘unjustifiable’ discrimination.”¹²¹ Thus, Gaines takes the Appellate Body to task for imposing the “condition that unilateral measures under Article XX can only be taken after serious efforts at multilateral negotiations.”¹²²

The ordinary meaning of the text of Article XX, however, is not a reason to criticize the Appellate Body for imposing this condition as much as it is a reason to reject the notion that the Appellate Body ever imposed this condition at all. After all, as Howse notes, the Appellate Body “never held that the requirements of the chapeau, in and of themselves, impose a *sui generis* duty to negotiate.”¹²³ Given the lack of any textual basis for such a duty, and in the absence of any explicit statement by the Appellate Body imposing such a duty, we should not readily infer such a duty from the Appellate Body’s rulings. This supposed duty to negotiate is implausible as an interpretation of the Appellate Body rulings precisely because it is implausible as an interpretation of Article XX.

Knox points to paragraph 171 of the 1998 ruling, in which the Appellate Body contrasts the multilateral “alternative course of action” with “the unilateral and non-consensual procedures of the import prohibition,” as support for a duty to negotiate before imposing a unilateral import ban.¹²⁴ If we read paragraph 171 as a whole, however, and especially if we view it in context rather than in isolation, we find that the Appellate Body points to this multilateral alternative to underscore the feasibility of serious negotiations with *all* affected parties rather than only some and to demonstrate that this discrimination in diplomatic efforts was “unjustifiable.”¹²⁵ That is, the Appellate Body points to the Inter-American Convention and this “cooperative” alternative only to criticize the failure of the United States “to negotiate similar agreements with any other country or group of countries.”¹²⁶

¹²⁰ *Id.* at 805.

¹²¹ *Id.*; see Simmons, *supra* note 30, at 444 (“[T]here is currently no mandate within the GATT to engage in bilateral and multilateral negotiations prior to taking unilateral actions.”).

¹²² Gaines, *supra* note 33, at 814.

¹²³ Howse, *supra* note 26, at 507.

¹²⁴ Knox, *supra* note 20, at 41 n.165.

¹²⁵ See Howse, *supra* note 26, at 507-08. Paragraph 172 in particular is quite explicit in relating “unilateralism” to the “unjustifiable nature of this discrimination” in negotiating efforts. 1998 Appellate Body, *supra* note 3, para. 172.

¹²⁶ 1998 Appellate Body, *supra* note 3, para. 171.

Knox concedes that the text of Article XX “provides no apparent link” to “the principle of multilateralism.”¹²⁷ Thus, he can derive an independent duty to negotiate from the Appellate Body opinions only by claiming that the Appellate Body “read the chapeau as giving it broad powers to strike a balance, or find a ‘line of equilibrium,’ between trade and environmental interests.”¹²⁸ In support of this claim, he quotes paragraph 159 of the 1998 Appellate Body ruling.¹²⁹ This paragraph describes “[t]he task of interpreting and applying the chapeau” as “essentially the delicate one of locating and marking out a line of equilibrium between the right of a [WTO] Member to invoke an exception under Article XX and the rights of the other Members.”¹³⁰

This paragraph, however, does not suggest that the Appellate Body has given itself broad powers to distort the ordinary meaning of the text of the chapeau or to replace treaty language with a balancing test. After all, the Appellate Body describes itself as locating “a line of equilibrium” only in the course of “interpreting and applying the chapeau.” Thus, the quoted passage merely acknowledges that when the Appellate Body interprets certain words in the chapeau, such as “arbitrary” and “unjustifiable,” and applies them to specific facts, their precise meaning will invariably be subject to dispute, because reasonable minds can differ on the precise meaning of such words. In choosing among different plausible interpretations of

¹²⁷ Knox, *supra* note 20, at 56-57. He does suggest, however, that “relying on rigid unilateral measures in the absence of attempts to find a multilateral solution to regional or global environmental problems could be seen as unjustifiable discrimination against other countries in favor of the country applying the trade restriction,” because “the failure to take into account the views and interests of other affected countries could lead to a presumption that the resulting unilateralism will unjustifiably discriminate against those interests.” *Id.* at 65. If Knox uses the term “rigid” to refer to the inflexibility in certification criteria that the 1998 Appellate Body ruling condemned, then an importing country can avoid “unjustifiable discrimination” by eliminating this inflexibility, just as the United States did with respect to section 609, rather than by attempting to negotiate a multilateral agreement. If Knox has a broader notion of “rigid” in mind, on the other hand, then his suggestion must deem countries with conservation policies that are not comparably effective to be “countries where the same conditions prevail” in the sense relevant under the chapeau. This interpretation of the chapeau, however, would give the phrase “where the same conditions prevail” virtually no effect in restricting the type of “discrimination” prohibited by the chapeau. Furthermore, this interpretation of “same conditions” would seem to be at odds with the reasoning of the Appellate Body in the shrimp-turtle rulings, which deems countries with conservation policies that are not comparably effective to be different enough in a relevant respect to justify discrimination between them. See, e.g., 1998 Appellate Body, *supra* note 3, para. 121.

¹²⁸ Knox, *supra* note 20, at 56.

¹²⁹ *Id.* at 37.

¹³⁰ 1998 Appellate Body, *supra* note 3, para. 159. Axel Bree also reads this language as Knox does. See Bree, *supra* note 42, at 119 (“By introducing a balancing test . . . , the Appellate Body has opened the door for arguments and requirements that do not necessarily need to have a textual basis.”).

those words, the Appellate Body will inevitably have to balance the opposing interests at stake in deciding which interpretation to adopt in resolving the dispute. The Appellate Body did not, however, give itself license to invent requirements without any basis in the text of the chapeau. Such an extraordinary reading of paragraph 159 would be inconsistent with the Appellate Body's explicit focus on the ordinary meaning of the text of Article XX. Thus, this paragraph does not support the duty to negotiate that Knox seeks to derive from the shrimp-turtle rulings, and we are left with the conclusion that neither the ordinary meaning of the text of the chapeau nor the Appellate Body's interpretation of the chapeau imposes any such duty.

III. CONCLUSION

The Appellate Body's rulings in the shrimp-turtle case indicates that importing countries can defend environmental trade measures, even unilateral import bans, under GATT Article XX as long as they avoid unfair discrimination. These unilateral trade measures may justifiably discriminate against imports produced by processes that harm natural resources located outside the jurisdiction of the importing countries or against imports from countries that have environmental policies deemed inadequate by the importing country. The 2001 Appellate Body ruling, by emphasizing paragraph 121 from the 1998 Appellate Body ruling so forcefully, confirmed that WTO members enjoy a right to restrict imports based on environmental standards unilaterally prescribed by the importing country and applied to the conservation policies of exporting countries.

The case-by-case approach endorsed by the Appellate Body should provide much broader leeway for the use of environmental trade measures than suggested by past panel decisions. Under the Article XX chapeau, an exporting country can challenge such measures if they are applied in a manner that amounts to "a means of arbitrary or unjustifiable discrimination between countries" or "a disguised restriction on international trade."¹³¹ In particular, the Appellate Body held that to avoid "arbitrary or unjustifiable discrimination," the country imposing a ban on imports from an exporting country must provide a formal hearing that allows the exporting country to argue that it has comparable environmental policies even if they are not precisely the same as the policies in the importing country, make the same efforts to negotiate with all exporting countries, make the same efforts to

¹³¹ GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

transfer technology to all exporting countries, and provide a formal notice of the reasons for adverse decisions and some procedure for review of or appeal from these denials. By basing its scrutiny of environmental trade measures only on requirements that are explicit in the text of Article XX of the GATT, the Appellate Body strikes a more reasonable balance between environmental and trade interests than panels in prior decisions have struck.

The Appellate Body can continue this progress by making good on its promise to remain faithful to the ordinary meaning of the text of GATT Article XX. By focusing on that text, we can resolve many of the disagreements that have arisen regarding the proper interpretation of the Appellate Body's rulings in the shrimp-turtle case. In particular, the ordinary meaning of that text militates against any jurisdictional limitation on the conservation exception in Article XX, against a requirement that import bans based on the conservation policies of exporting countries include shipment-by-shipment exceptions, and against an independent duty for importing countries to open negotiations with exporting countries before imposing an import ban.

Closer attention to the text of the GATT would not only make for better legal reasoning but also give greater legitimacy to WTO rulings. To impose restrictions on environmental trade measures without a basis in the text of Article XX erodes respect for the WTO in particular and undermines the political support for free trade in general. In this sense, WTO rulings that are more sensitive to environmental interests will also do a better job of serving our interest in free trade as well.