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TOWARD A GREENER GATT: ENVIRONMENTAL TRADE MEASURES AND THE SHRIMP-TURTLE CASE

HOWARD F. CHANG*

The World Trade Organization (WTO) Appellate Body issued the most important ruling to date on the status of environmental trade measures under the General Agreement on Tariffs and Trade (GATT)¹ in its 1998 report in the “shrimp-turtle” case.² At issue in this case was section 609 of Public Law 101-162,³ 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.”⁴ 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 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,⁵ which prohibits

* Professor of Law, University of Pennsylvania Law School; member of the University of Southern California Law School faculty, 1992–1999. © 2000 Howard F. Chang, all rights reserved. I wish to thank Richard Parker and Curtis Reitz for helpful comments on an earlier draft and participants at the Round-Table Conference on Conservation and Management of Marine Living Resources and International Trade Policy, sponsored by the Institute of Cetacean Research in Tokyo, Japan, for comments on a paper that provided the basis for this essay.

1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

2. Report of the Appellate Body on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118 (1999) [hereinafter Appellate Body].

3. Sea Turtle Conservation Amendments to the Endangered Species Act, Pub. L. 101-162, sec. 609, 103 Stat. 988, 1037 (Nov. 21, 1989) (amending 16 U.S.C. § 1537 (1994)).

4. *Id.* sec. 609(b)(2)(A). See *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 1221 (1996), *vacated sub nom. Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998).

5. GATT art. XI.

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 ruling in the shrimp-turtle case represents 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 ruling suggests that countries can defend unilateral import bans as permissible environmental measures under the GATT as long as they avoid unfair discrimination. The result was a decision much more sensitive to environmental interests than expected. In this essay, I will draw upon my past writings, which have criticized GATT panels for their hostile treatment of environmental trade measures,⁶ to argue that the WTO Appellate Body's decision brings GATT case law much closer to a reasonable balance between environmental and trade interests.

The shrimp-turtle decision endorses the general type of case-by-case review proposed in my prior work.⁷ The Appellate Body's ruling in this case, however, has generated some confusion regarding the standard that WTO panels should apply to environmental trade measures in the future. This confusion, in turn, has generated some controversy regarding what the United States must do in order to bring its turtle conservation policies into compliance with the GATT.⁸ In this essay, I will argue in favor of an interpretation of the shrimp-turtle decision that preserves broad leeway for the use of environmental trade measures. I will argue that a more restrictive interpretation of the ruling would be inconsistent with the Appellate Body's close attention to the text of the GATT.

I. TOWARD MORE LIBERAL TREATMENT OF ENVIRONMENTAL TRADE MEASURES

The United States defended its ban on shrimp imports as a measure falling within GATT Article XX, which sets forth general exceptions from

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

7. See sources cited *supra* note 6.

8. See *Asians Contest U.S. Shrimp/Turtle Rule, Call for Complete Lifting of Import Ban*, 16 Int'l Trade Rep. (BNA) 1250 (July 28, 1999); Daniel Pruzin, *Malaysia, U.S. Reach Modus Vivendi on WTO Shrimp-Turtle Row; India Next*, 17 Int'l Trade Rep. (BNA) 82 (Jan. 20, 2000).

the obligations set forth elsewhere in the GATT. In particular, Article XX states, in pertinent 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;

...

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

....⁹

In May 1998, the WTO panel nevertheless ruled against the United States.¹⁰

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),¹¹ 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.¹² 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.

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

9. GATT art. XX.

10. See WTO Panel Report on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832 (1998) [hereinafter 1998 Panel].

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

12. See GATT Panel Report on U.S. Restrictions on Imports of Tuna, May 20, 1994, 33 I.L.M. 839 (1994) [hereinafter 1994 Panel]; GATT Panel Report on U.S. Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter 1991 Panel].

United States, but on much narrower grounds than the panel below. In its ruling, the Appellate Body used much better legal reasoning than that seen in past panel decisions, with much closer attention to the plain meaning of the language in GATT Article XX. For example, in the shrimp-turtle case the panel below required that the type of measure allowed under Article XX “not undermine the WTO multilateral trading system,”¹³ a requirement that echoed a concern expressed by both the 1991 and 1994 tuna-dolphin panels.¹⁴ The Appellate Body explicitly rejected this requirement as “a test that finds no basis . . . in the text” of Article XX.¹⁵ This attention to 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.¹⁶ 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.¹⁷

A. PROCESSES AND RESOURCES OUTSIDE THE JURISDICTION OF THE IMPORTING COUNTRY

The Appellate Body agreed that section 609 was a measure “relating to’ the conservation of an exhaustible natural resource.”¹⁸ 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

13. 1998 Panel, *supra* note 10, para. 7.44.

14. *See* 1994 Panel, *supra* note 12, para. 5.26; 1991 Panel, *supra* note 12, para. 5.27.

15. Appellate Body, *supra* note 2, para. 121.

16. *See* Chang, *Trade Measures*, *supra* note 6, 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.”).

17. *See, e.g.*, Chang, *Trade Measures*, *supra* note 6, at 2172–75; Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, J. WORLD TRADE, Oct. 1998, at 73.

18. Appellate Body, *supra* note 2, para. 142.

number of environmental . . . measures applied to PPMs and justified pursuant to Article XX.”¹⁹

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 fleets outside the jurisdiction of the United States.²⁰ 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).²¹

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).²²

The Appellate Body, however, expressly declined 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 text of Article XX.

19. 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).

20. See 1991 Panel, *supra* note 12, paras. 5.25, .32.

21. Appellate Body, *supra* note 2, para. 133.

22. See, e.g., 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 (1999) (“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 to Appellate Body*, *supra* note 2, at 119 (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”); Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 440 (1999) (“[I]t remains unclear whether future panels will allow countries to implement measures protecting natural resources outside their jurisdiction.”); Wofford, *supra* note 16, 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”).

In fact, the 1994 tuna-dolphin panel explicitly rejected any limitation on the scope of the Article XX exceptions based on the location of the natural resources protected by the trade measure in question, because the panel found no such limitation in the plain language of Article XX.²³ WTO dispute settlement panels should similarly reject any such jurisdictional requirement in the future.

As I have argued elsewhere, restrictions on imports produced by environmentally harmful processes can protect important resources wholly outside the jurisdiction of the importing country.²⁴ 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 imported seafood harvested using harmful practices. Otherwise, these imports would displace sales of domestic seafood harvested subject to environmental regulation. Furthermore, fishing operations may move to unregulated countries in order to avoid these environmental regulations. In the extreme, if foreign seafood displaces domestic seafood 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, countries can ensure that their efforts to change the practices of their 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. ENVIRONMENTAL POLICIES OF THE EXPORTING COUNTRY

In the shrimp-turtle case, however, the United States banned shrimp imports based on the environmental policies of the exporting country rather than the processes used to harvest the particular shipment of shrimp in question. Therefore, the panel below ruled against the United States because it was “conditioning access to its market . . . upon the

23. See 1994 Panel, *supra* note 12, paras. 5.15, .20.

24. See Chang, *Trade Measures*, *supra* note 6, at 2177–78.

adoption . . . of certain policies” by the exporting country’s government.²⁵ 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.²⁶ The Appellate Body went so far as to declare that banning imports based on whether the governments of exporting countries have adopted policies “unilaterally prescribed” by the importing country is “a common aspect” of Article XX measures.²⁷ The Appellate Body concluded that to hold that such unilateral import bans cannot fall within Article XX would be “abhorrent,” because it would render “most, if not all, of the specific exceptions of Article XX inutile.”²⁸

Thus, the Appellate Body has indicated 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*. That is, the opinion apparently allows countries to impose a unilateral import ban broader than a mere process standard. The 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. While the Appellate Body expressed some concern about this ban, because it applied even to imports that themselves were harvested by environmentally friendly processes, it did *not* state that such a ban was necessarily a violation of GATT.²⁹

The 1994 tuna-dolphin panel cited the same feature of 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.³⁰ The Appellate Body made a similar inference regarding the purpose of the U.S. ban on shrimp imports, but did not hold

25. 1998 Panel, *supra* note 10, para. 7.45.

26. Appellate Body, *supra* note 2, paras. 121–22.

27. *Id.* para. 121.

28. *Id.*

29. See *infra* notes 80–82 and accompanying text.

30. 1994 Panel, *supra* note 12, para. 5.27. Some observers had therefore suggested that the fact that section 609 also “pressures harvesting nations to enact specific conservation laws” might “be its downfall” before a WTO panel. David E. Kaczka, *A Primer on the Shrimp-Sea Turtle Controversy*, 6 REV. EUR. COMMUNITY & INT’L ENVTL. L. 171, 177 (1997). See also Gregory Shaffer, *Trade and the Environment: Options for Resolving the WTO Shrimp-Turtle Case*, 15 Int’l Trade Rep. (BNA) 294, 299 (Feb. 18, 1998) (suggesting that the WTO panel might deem the U.S. import ban to be a violation of the GATT because the “country-wide scope” of this import ban “constitutes a form of coercion”).

that the U.S. measures therefore fell outside Article XX.³¹ 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.”³² Thus, consistent with the plain language of Article XX, the Appellate Body’s opinion allows for import bans designed to change the policies of other governments. In fact, the opinion 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.³³

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.³⁴ 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.³⁵ 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.³⁶ The types of trade measures condemned by past panels can create the incentives

31. See *supra* notes 26–28 and accompanying text; *infra* note 39 and accompanying text. See also 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).

32. Appellate Body, *supra* note 2, 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”).

33. For a defense of such trade sanctions, see Chang, *Trade Measures*, *supra* note 6, at 2199–207.

34. 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).

35. Broader import bans may also discourage environmentally harmful production processes more effectively than process standards even without changing the environmental policies of foreign governments. See Chang, *Trade Measures*, *supra* note 6, at 2178–84.

36. We can offer “carrots” to countries that regulate, or we can threaten the use of “sticks” against those that do not. The prospect of “carrots,” however, would create perverse incentives to harm the environment. See Chang, *International Externalities*, *supra* note 6, at 312–21; Chang, *Trade Measures*, *supra* note 6, at 2150–60.

necessary for countries to join a multilateral agreement that imposes environmental regulations on them.³⁷

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 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.³⁸

C. DISCRIMINATION IN THE APPLICATION OF SECTION 609

Sensitive to these environmental objectives, 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, even if it was designed to change the policies of other governments through a unilateral import ban.³⁹ The Appellate Body carefully identified problems *only* in the particular way in which the executive branch *applied* this law to shrimp exporting countries.⁴⁰ In particular, the Appellate Body held that the implementation of section 609 by the executive branch featured “arbitrary or unjustifiable discrimination between countries,” which violated the requirements set forth in the preamble to Article XX.⁴¹ 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 preamble in Article XX to guard against the abuse of the Article XX exceptions,⁴² much as critics of past panel decisions, including this author, have proposed.⁴³ Given its case-specific approach, the opinion is quite explicit regarding precisely

37. See Chang, *Trade Measures*, *supra* note 6, at 2146–60.

38. See *id.* at 2149; Chang, *International Externalities*, *supra* note 6, at 323–24.

39. Appellate Body, *supra* note 2, para. 141.

40. See *id.* at 159 n.128. Some commentary fails to make this distinction between the statute and the application of the law by the executive branch. See, e.g., 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, 321 (2000) (stating that the Appellate Body held that “section 609 amounted to ‘unjustifiable discrimination’”).

41. GATT art. XX.

42. See Appellate Body, *supra* note 2, 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”).

43. See, e.g., Chang, *Trade Measures*, *supra* note 6, at 2172–75; Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 513–15 (1993).

which particular features of the trade measure in question amount to “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.⁴⁴

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 only looked at whether the country’s policies were “essentially the same” as U.S. policies.⁴⁵ 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.⁴⁶ 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.⁴⁷

Second, the United States failed to engage in “serious” negotiations with *all* affected countries before imposing its import ban.⁴⁸ 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.⁴⁹ The result was “unjustifiable” discrimination.⁵⁰

Third, the United States gave fourteen countries a three-year phase-in period (1991–1994).⁵¹ The United States did not impose an import ban on others until 1996, when it did so with only four months’ notice.⁵² The shorter phase-in period was not only more burdensome but also

44. Although this attention to the text of Article XX represents an improvement over past panel decisions, some observers believe that the Appellate Body distorted the meaning of the term “discrimination.” See, e.g., Simmons, *supra* note 22, at 445 (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’”).

45. Appellate Body, *supra* note 2, para. 163.

46. See *id.* para. 164.

47. *Id.* para. 177. For a critique of this reading of the term “discrimination,” see Simmons, *supra* note 22, at 443 (arguing that while there is a text-based duty “not to discriminate between countries where the conditions are the same, there is no affirmative duty to *discriminate* where conditions between countries are different”).

48. Appellate Body, *supra* note 2, para. 166.

49. See *id.* para. 171.

50. *Id.* para. 172.

51. *Id.* para. 173.

52. See *id.*

accompanied by less effort by the United States to transfer TED technology to the exporting countries.⁵³

The Appellate Body held that these problems in the application of the statute “considered in their cumulative effect” were “unjustifiable discrimination” in violation of Article XX.⁵⁴ 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, if the United States were to remedy these problems only on a prospective basis, these reforms may be sufficient to eliminate the “unjustifiable discrimination” in the application of the U.S. import ban.⁵⁵

Finally, the Appellate Body complained that the U.S. certification process was not “transparent”: there is “no formal opportunity for an applicant country to be heard, or to respond to any arguments . . . made against it,” “no formal written, reasoned decision” with reasons for a denial of certification, and “[n]o procedure for review of, or appeal from, a denial.”⁵⁶ Thus, the United States denied certification without a process to ensure that the statute was “applied in a fair and just manner.”⁵⁷ The Appellate Body concluded that denials under this procedure amounted to “arbitrary discrimination.”⁵⁸

D. UNILATERAL ENVIRONMENTAL TRADE MEASURES

The Appellate Body’s critique of the U.S. implementation of section 609 has 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.”⁵⁹ Eric Richards and

53. *See id.* para. 175.

54. *Id.* para. 176.

55. The WTO is unlikely to require anything more than prospective remedies for the second and third problems. *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, 56 (noting that “the fact of discriminatory treatment in the past may be difficult to redress in the present”). Thus, although the complainants in the shrimp-turtle case have called upon the United States to lift its ban on shrimp imports completely, *see supra* note 8, a lifting of the import ban is not necessary for the United States to comply with the Appellate Body’s ruling.

56. Appellate Body, *supra* note 2, para. 180. For an insightful analysis of the requirement of transparency, *see* Hansen, *supra* note 22, at 1057–67.

57. Appellate Body, *supra* note 2, para. 181.

58. *Id.* para. 184.

59. Perkins, *supra* note 22, at 119. Unilateral environmental trade measures have been especially controversial. *See* Daniel Pruzin, *WTO Chief Hits Out Against Unilateral Trade Measures*, 15 Int’l

Martin McCrory, for example, assert that it is “permissible for a country to adopt unilateral measures” only “in rare circumstances.”⁶⁰ They cite the Appellate Body’s discussion of the general preference for multilateral solutions to international environmental problems over unilateral actions.⁶¹ The Appellate Body pointed 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.”⁶²

The Appellate Body’s opinion, however, carefully avoids the suggestion that unilateral measures generally fall outside Article XX. Such a claim would be inconsistent with earlier passages in 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.”⁶³ 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.⁶⁴ 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.⁶⁵

Therefore, when the Appellate Body referred to the alternative of “cooperative efforts,”⁶⁶ it did so *only* to underscore the feasibility of serious negotiations with *all* affected parties prior to the imposition of trade

Trade Rep. (BNA) 1058 (June 17, 1998) (reporting WTO chief Renato Ruggiero’s criticism of unilateral environmental trade measures).

60. Richards & McCrory, *supra* note 40, at 340–41.

61. *See id.* at 322 (quoting Appellate Body, *supra* note 2, paras. 168, 171).

62. Appellate Body, *supra* note 2, 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”). 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).

63. Appellate Body, *supra* note 2, para. 121. *See supra* notes 26–28 and accompanying text. *See also* Sakmar, *supra* note 32, 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 16, at 581 (“[T]he Appellate Body asserted that unilateral environmental policies are not only legitimate, but also to be expected under Article XX exceptions.”).

64. GATT art. XX.

65. *See supra* notes 18–23 and accompanying text.

66. Appellate Body, *supra* note 2, para. 171.

measures. That is, the Appellate Body pointed 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.”⁶⁷ Thus, a failure to negotiate with all countries on an equal basis may render a subsequent trade measure “a means of arbitrary or unjustifiable discrimination” against the targeted imports, but a unilateral measure would *not* violate the GATT if even-handed negotiations do precede the imposition of the measure.

II. U.S. EFFORTS TO COMPLY WITH THE SHRIMP-TURTLE RULING

The Appellate Body’s critique of the U.S. implementation of section 609 has also generated controversy regarding what reforms the United States must undertake to bring itself into compliance with the GATT. To comply with the shrimp-turtle decision, the U.S. State Department vowed to pursue negotiations with the four complainants in the shrimp-turtle case, promised to provide technical assistance to them for the development of TED programs, and proposed revisions to its guidelines for the implementation of section 609.⁶⁸ The proposed guidelines would 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, provide greater transparency and due process for nations seeking certification under section 609, and allow the importation of shrimp harvested by vessels using TEDs even if the exporting nation is not certified.⁶⁹ The United States has allowed such shrimp imports since 1998, when the State Department adopted this policy after the U.S. Court of Appeals for the Federal Circuit vacated on procedural grounds the decision by the U.S. Court of International Trade prohibiting such imports.⁷⁰ The State Department

67. *Id.* The Appellate Body does not address the question, “[H]ow much of a diplomatic effort must the importing nation make?”. Neuling, *supra* note 31, at 47. If a WTO panel finds that the importing nation makes such efforts with all exporting nations on an equal basis, then the panel should not engage in further scrutiny of the importing nation’s efforts, given the meager basis in the text of Article XX for such scrutiny. *See* Simmons, *supra* note 22, at 444 (“[T]here is currently no mandate within the GATT to engage in bilateral and multilateral negotiations prior to taking unilateral actions.”).

68. *See* Notice of Proposed Revisions to 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. 14,481, 14,482 (proposed Mar. 25, 1999).

69. *See id.* at 14,481–82, 14,484.

70. *See* Earth Island Inst. v. Albright, 147 F.3d 1352, 1356 (Fed. Cir. 1998), *vacating* Earth Island Inst. v. Christopher, 20 Ct. Int’l Trade 1221 (1996); Revised Notice of Guidelines for

issued final guidelines in 1999 that affirmed this “shipment-by-shipment exception,” allowing shrimp imports if the individual shipment was caught with the use of TEDs.⁷¹

Environmentalists, however, advocate a “country-by-country” import ban, arguing that a “shipment-by-shipment” approach will be ineffective in protecting sea turtles.⁷² The U.S. Court of International Trade ruled in favor of environmentalist plaintiffs again in 1999, holding that section 609 permits the importation of wild shrimp only from certified nations.⁷³ Richards and McCrory have called this holding “a decision that threatens to sabotage United States compliance efforts.”⁷⁴ 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.”⁷⁵ To support this claim, they quote passages in the Appellate Body’s decision stating that 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.”⁷⁶ Sydney Cone also infers that

Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094, 46,094–95 (Aug. 28, 1998).

71. Rossella Brevetti, *State Department Issues Guidelines to Comply with WTO Shrimp Ban Ruling*, 16 Int’l Trade Rep. (BNA) 1183, 1183 (July 14, 1999). 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 (July 8, 1999).

72. 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. Bernazani, 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).

73. See *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1081 (Ct. Int’l Trade 1999). The Court of International Trade, however, delayed “entry of judgment on plaintiff’s motion” until the “defendants’ annual report to Congress” pursuant to section 609, their report to the court on any responses to the proposed guideline revisions, and “the presentment of evidence on or before July 2, 1999” regarding the enforcement of earlier guidelines. *Id.* See Rossella Brevetti, *CIT Faults U.S. Implementation of Wild Shrimp Import Ban*, 16 Int’l Trade Rep. (BNA) 638 (Apr. 14, 1999). Citing this litigation, Steve Charnovitz has suggested that compliance with the Appellate Body decision would require “new legislation.” Brevetti, *supra* note 72, at 1768. See Sakmar, *supra* note 32, at 387 (“Earth Island’s continued challenge to the Guidelines issued by the United States will make it difficult for the United States to comply easily with the WTO’s ruling.”).

74. Richards & McCrory, *supra* note 40, at 325.

75. *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.”).

76. Appellate Body, *supra* note 2, para. 161. See Richards & McCrory, *supra* note 40, at 321. As a result of these passages, some observers consider the legality of a country-by-country import ban “not so clear.” Rossella Brevetti, *U.S. Examining Ways to Make Restrictions on Shrimp Imports More*

the Appellate Body deemed a country-by-country import ban to be a violation of the GATT.⁷⁷ Therefore, Cone criticizes the Appellate Body, which “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.”⁷⁸

If we read the Appellate Body’s 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.⁷⁹ If we read the Appellate Body’s critical statements in context, however, we find that the ruling does not object to a country-by-country import ban per se. Instead, the Appellate Body objects to the import ban on narrower grounds. The Appellate Body’s specific complaint 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.”⁸⁰ It is this *particular* aspect of the “coercive effect” of the *application* of section 609 that disturbs the Appellate Body.⁸¹

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

Transparent, 16 Int’l Trade Rep. (BNA) 309, 310 (Feb. 24, 1999) (quoting one anonymous source as stating that the Appellate Body’s decision “is kind of grey” on this issue).

77. See Cone, *supra* note 55, at 53, 55, 58. According to Cone, “the Appellate Body’s rationale . . . seems to be . . . that the measures taken by the United States were not in conformity with the chapeau because they were unilateral measures undermining the multilateral trading system.” *Id.* at 57.

78. *Id.* (quoting Appellate Body, *supra* note 2, 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 Neuling, *supra* note 31, 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”).

79. See *supra* notes 26–39 and accompanying text.

80. Appellate Body, *supra* note 2, 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 United States”). See *supra* notes 45–47 and accompanying text.

81. See Appellate Body, *supra* note 2, para. 161 (criticizing the embargo for requiring other countries “to adopt *essentially the same* policy . . . as that applied to . . . United States domestic shrimp trawlers”).

certified as “comparable” to that of the United States.⁸² Thus, the United States would be in compliance with the Appellate Body’s ruling even if it were to return to a country-by-country import ban, because it has already revised its guidelines to allow for this more flexible approach to certification. This reform, together with reforms that ensure greater transparency in the certification process, equal access to technical assistance, and even-handed negotiations with exporting countries, is sufficient to bring the United States into compliance with the GATT.

CONCLUSION

The Appellate Body’s ruling 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. An exporting country can challenge such measures, however, if they are applied in a manner that amounts to “arbitrary or unjustifiable discrimination between countries” or “a disguised restriction on international trade.”⁸³ In particular, the Appellate Body’s ruling holds 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, open serious negotiations with all exporting countries on an equal basis, make the same efforts to 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

82. 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 76, at 310.

83. GATT art. XX. I have argued elsewhere that these provisos, properly interpreted and vigorously enforced, are sufficient to guard against the abuse of environmental trade measures for protectionist purposes. See Chang, *Trade Measures*, *supra* note 6, at 2190–99.

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 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.