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The Demise of Green Protectionism: The WTO Decision on the US Gasoline Rule

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I. INTRODUCTION

On January 17, 1996, the World Trade Organization (WTO)[1] Dispute Settlement Body (DSB) delivered its first ruling since coming into existence on January 1, 1995.[2] The DSB ruling addressed complaints by Venezuela and Brazil against United States environmental restrictions on gasoline imports.[3] The DSB concluded that the Environmental Protection Agency's (EPA) regulation governing imported gasoline was inconsistent with WTO obligations. Commentators hailed the decision as a triumph for the developing South against the developed North[4] and as a death knell for tough U.S. environmental laws.[5] The decision reignites a long-standing debate over the compatibility of national sovereignty and free trade.[6]

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1. Agreement Establishing the World Trade Organization, Apr. 15, 1994, [hereinafter WTO Agreement or WTO], Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1144 (1994) [hereinafter Results of the Uruguay Round].

2. The Dispute Settlement Body administers the GATT/WTO dispute settlement process. The scope of its responsibility and the new Dispute Settlement rules of the GATT/WTO system are outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, WTO Agreement, *reprinted in* 33 I.L.M. 112 (1994) [hereinafter DSU]. Pursuant to Art. III(3) of the WTO Agreement, the WTO administers the DSU. When the WTO General Council meets to discharge its duties under Art. IV(3), it convenes as the Dispute Settlement Body (DSB). WTO Agreement, *supra* note 1, at 1145. The DSB inherited most of the functions formerly exercised by the Contracting Parties to the WTO Agreement. The Contracting Parties are now referred to as members of the WTO Agreement.

3. Dispute Settlement Panel Report on United States-Standards for Reformulated and Conventional Gasoline, *reprinted in* 35 I.L.M. 274 (1996) [hereinafter Gasoline Panel Report].

4. *See* Humberto Marquez, *Trade-Commodities: South Triumphs in WTO's First Flight*, INT'L PRESS SERV., Jan. 19, 1996.

5. Evelyn Iritani, *First WTO Ruling Provides Grist for Opponents Citing Threat to U.S. Law*, L.A. TIMES, Jan. 19, 1996, at D-1.

6. *Dole Calls for Passage of Bill to Set Up WTO Review Commission*, 13 INT'L TRADE REP. (BNA) No. 19, at 748 (May 8, 1996); *see also* Finlay Lewis, *Hunter Wants U.S. Out of WTO, Hits Ruling on Gasoline Imports*, SAN DIEGO UNION TRIB., Jan. 25, 1996, at C-3.

On April 29, 1996, the WTO's Appellate Body[7] (Appellate Body) affirmed the DSB's ruling regarding the gasoline regulation; however, it reversed the DSB panel finding that would have limited the scope of an exception for measures on conservation of exhaustible natural resources.[8]

The gasoline dispute dealt with a U.S. environmental regulation enacted to facilitate U.S. environmental clean air policy and aimed at reducing a variety of smog causing contaminants in gasoline.[9] The regulation results in disparate treatment of foreign gasoline producers. The regulation is facially discriminatory and its purpose appears protectionist. The regulation appears to have been a political response to the pressure applied by an influential lobby group. American gasoline refiners argued in support of the regulation. The refiners contended that U.S. air pollution regulations imposed significant costs which they were forced to absorb, giving foreign producers, faced with less stringent environmental regulations outside the United States, a competitive advantage. The regulation allowed foreign refiners to sell their 'dirty' fuel cheaply in the United States.[10]

The purpose of this article is to evaluate this first ruling of the new WTO Appellate Body from a trade/environment perspective. The gasoline decision demonstrates the recurring tension between domestic environmental policies and the international trade regime.[11] The regulation increased the costs of importing a product into the U.S. market, effecting non-tariff barriers to trade. The decision reinforces the tension between environmentalists concerned about the GATT/WTO[12]

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7. One of the most striking features of the WTO settlement system is the creation of the appellate review body which conducts legal reviews of panel decisions. DSU, *supra* note 2, art. 17. The body is to be a standing organ, comprised of 7 persons appointed by the DSB for staggered 4 year terms. *Id.* art. 17, para. 1-2. Cases are to be heard by 3 of the 7 members, selected on rotation without reference to nationality or the wishes of the party. *Id.* art. 17, para. 1-3. As a general rule, the appeal proceedings should not exceed 60 days from the date of notification of the appeal to the circulation of the appellate report. *Id.* art. 17, para. 5.

8. Report of the Appellate Body in United States-Standards for Reformulated and Conventional Gasoline, *reprinted in* 35 I.L.M. 603 (1996) [hereinafter the Appellate Body Report].

9. Signed into law as Clean Air Act, Amendments, P.L. 101-549, 104 Stat. 2399 (1990).

10. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 270 (1994).

11. The most significant case dealing with the trade/environment conflict is the well published *Tuna Dolphin* decision, which determined that U.S. import restrictions on tuna to protect dolphins from incidental kill during purse seine fishing operations violated the GATT. *See* United States-Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.), at 155 (1993) [hereinafter Tuna Dolphin Report] (discussed at the GATT Council meetings on Feb. 18, Mar. 18, and Apr. 18, but not yet adopted by the Council).

12. The GATT/WTO will refer to the World Trade Organization and associated agreements which are contained under the Results of the Uruguay Round. Results of

fate of important environmental laws and trade advocates who generally view decisions such as this and the *Tuna Dolphin* case[13] as logical applications of the GATT rules against protectionism. Those involved in trade policy focus on the potential protectionism disguised as environmental action or protectionism in "green disguise." At the heart of the trade and environment debate is a fear that flexible loopholes, created under the banner of the environment, will deprive the GATT nondiscrimination principles of all meaning.

Part II of this article examines the conflict between international trade and the environment and reviews the debate prior to the gasoline dispute. Part III outlines the GATT approach to environmental regulations and discusses some past Panel decisions which examined environmental provisions. Part IV reviews the Gasoline Panel Report and the Appellate Body decision in detail. Part V evaluates the impact of the Gasoline decision and considers options for the United States. Part VI concludes the article urging WTO Members to continually assess the relationship between trade regulation and the environment, so that only those measures that are truly operating as 'green' protectionism are found to be inconsistent with the GATT.

II. THE CONFLICT

The potential conflict between trade rules and environmental rules has captured significant international attention. Many articles and books provide a detailed analysis of the elements of this conflict.[14] The interrelationship between trade and the environment is a critical issue also addressed in the negotiation of the North American Free Trade Agreement (NAFTA)[15] and in the Uruguay Round of trade negotiations.[16]

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the Uruguay Round, *supra* note 1. The GATT refers to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11 (1947), 55 U.N.T.S. 187 (1950) [hereinafter GATT]. The GATT also refers to the institutional framework which implemented the General Agreement prior to the establishment of the WTO.

13. Tuna Dolphin Report, *supra* note 11.

14. *See, e.g.*, ESTY, *supra* note 10; The Greening of World Trade Issues (Kym Anderson et al. eds., 1992); Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L. ENVTL. AFF. 203 (1992); Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. 10, 268 (1992); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992); Peter L. Lallas et al., *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271 (1992); Eliza Patterson, *GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects*, 26 JOURNAL OF WORLD TRADE 99 (1992).

15. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., *reprinted in* 32 I.L.M. 289 (1993).

16. Because the relationship between trade and the environment was such a critical issue at the meeting for the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh between

The proliferation of national and international environmental laws and the increased complexity of international trade policies results in a greater potential conflict between these two policy areas. Trade policy now deals with the indirect effects on trade of domestic policies such as those dealing with the environment. Environmental regulations impose non-tariff barriers to trade by increasing the complexity and diversity of product standards exporters must satisfy in order to trade in certain markets. Exacting pollution control requirements increase domestic production costs, reducing international competitiveness. These constraints lead to lobbying by domestic producers for trade remedies against imports produced under less stringent standards. Conversely, escalated trade levels increase use and degradation of resources in production and in transportation, aggravating environmental concerns. Environmental production standards lowered to facilitate trade and international competitiveness add to these concerns.

The GATT and now the new GATT/WTO, as the most prominent institution dealing with free trade, is increasingly forced to deal with this interrelationship between trade and the environment. Consequently, the GATT has come under severe criticism as an anti- environmental organization because it dictates whether an environmental regulation is GATT consistent. The more frequent outcome of GATT review is decisions against environmental measures.[17]

Despite the potential for conflict, it is clear that each policy area has legitimate and worthwhile objectives. Environmental protection is essential to human survival and the maintenance of the planet's natural resources.[18] While trade is not essential in itself, free trade war-

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April 12 and 15, 1994, the Members of GATT agreed to establish a Committee on Trade and the Environment under the auspices of the WTO to examine the matter. *See* Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment-Toward Environmental Reform*, 89 AM. J. INT'L L. 423, 438 (1995), for a discussion of the issues that need to be examined by the Commission and the environmental issues involved in the Uruguay Round.

17. *See* Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 468 (1994), arguing that "the supervisory function of the GATT is controversial because its influence on environmental policy can only be negative." He perceptively points out that because the GATT has no rules to regulate the environment, the most positive recommendation that can ever be made is that the environmental measure in question does not contravene GATT.

18. John Stuart Mill, more than 100 years ago, recognized the legitimacy of government intervention in environmental matters when he said:

> Is there not the Earth itself, its forests and waters, above and below the surface? These are the inheritance of the human race . . . . What rights, and under what conditions, a person shall be allowed to exercise over any portion of this common inheritance cannot be left undecided. No function of government is less optimal than the regulation of these things, or more completely involved in a civilized society.

See JOHN STUART MILL, ON LIBERTY (1982)(1859). The challenge for governments is to mesh the best environmental management with market incentives to produce the

rants protection because of its crucial role in creating economic wealth. Trade allows countries to increase production and consumption and hence economic welfare. For developing countries in particular, economic growth through trade is essential to ease poverty and its associated problems, which can include environmental damage.

Conflicts also arise from the imposition of trade restrictions for environmental reasons. The GATT represents a negotiated balance of reciprocal trade rights and obligations that is easily upset when trade restrictions are implemented to achieve national social objectives. This imbalance leads to international friction and claims for compensation.[19] Unilateral trade action supporting the environment upsets this negotiated balance and inevitably creates animosity that leads to conflicts. The GATT/WTO is concerned with only preventing disguised discrimination or 'green' protectionism, not preventing environmental regulation. Any environmental law[20] that applies equally to imports and domestic products and does not discriminate between different trading partners, should in theory, be consistent with the principles of the GATT.

III. THE GATT APPROACH

The most familiar context in which environmental laws are challenged is based on the application of GATT Articles III,[21] XI,[22] and XX.[23] Environmental regulations which affect imports may violate

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kind of environmental regulation that John Stuart Mill philosophically embraced.

19. Under the GATT, Article XXIII(1), a contracting party can complain and seek a remedy if it considers that "[a]ny benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . is the result of . . . (b) the application of another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement . . . ." GATT, *supra* note 12, at A-64.

20. Except a quantitative restriction that violates GATT, Article XI. *See infra* note 22.

21. GATT, Article III is the "national treatment" clause which prohibits discrimination against goods once they are across the border. GATT, *supra* note 12, at A-18.

22. GATT, Article XI imposes a general prohibition on quantitative measures such as quotas and embargoes. *Id.* at A-32. Article XI embodies one the fundamental principles of GATT: if protection is accorded to domestic industry it should be through tariffs and not through commercial measures.

23. GATT, Article XX(b) and (g) are considered as the environmental exceptions. Article XX (b) and (g) 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;
>
> . . .

Article III if they treat an import less favorably than a domestic product. Quantitative limits on imports may violate Article IX. Whether a GATT panel finds a violation depends upon the application of the environmental exceptions in Article XX(b) and (g).[24] The preamble to Article XX contains two tests on the motivation of the government imposing the measure. Measures must not "constitute . . . arbitrary or unjustifiable discrimination"[25] nor a "disguised restriction on international trade."[26]

Over the past ten years, several GATT Panels have found particular health, conservation, and environmental measures applied by a GATT contracting party inconsistent with GATT Articles and not otherwise justified under GATT Article XX.[27] The most significant panel decisions, which appear to raise legitimate environmental concerns, include the *Herring and Salmon Panel,*[28] the *Thai Cigarette Panel,*[29] the *Tuna Dolphin Panel*[30] and the more recent *CAFE Panel.*[31] These decisions illustrate the approach taken by GATT panels when environmental legislation has a disparate impact on foreign producers. In most of these cases the environmental exceptions were construed narrowly and the environmental legislation was challenged as GATT illegal.

In 1988, the *Herring and Salmon Panel* ruled on the conservation exception in Article XX(g).[32] The Canadian ban on unprocessed herring and salmon prevented U.S. fishermen from bringing certain fish caught in Canadian waters directly back to the United States. The

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

Id. at A-60-61.

24. GATT, Article XX does not explicitly mention the "environment;" however, clauses (b) and (g) address environmental based trade measures. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.,* United States-Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.), at 136 (1988) [hereinafter Superfund Panel Report] (holding that the U.S. tax on petroleum was GATT illegal as a discriminatory measure on its face); Canada-Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.), at 27 (1993); United States- Restrictions on Imports of Tuna (II), 33 I.L.M. 839 (1994) [hereinafter Tuna Dolphin II] (this decision has not yet been adopted by the GATT Council).

28. Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) (1989) [hereinafter Herring and Salmon Panel].

29. Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) (1991) [hereinafter Thai Cigarette Panel].

30. Tuna Dolphin Report, *supra* note 11.

31. Dispute Settlement Panel Report on United States Taxes on Automobiles, Oct. 11, 1994, *reprinted in* 33 I.L.M. 1397 (1994) [hereinafter the CAFE Panel].

32. Herring and Salmon Panel, *supra* note 28, at 114-15.

panel found the ban was inconsistent with Article XI:1. In examining the Article XX(g) exemption, the panel held that the measure must be "primarily aimed" at conservation in order to qualify as an exemption.[33] The measure did not include comparable restrictions on domestic consumption and production; thus, it could not satisfy the Article XX(g) exemption.[34]

In 1991, the *Thai Cigarette Panel* examined Thailand's ban on the importation of cigarettes.[35] The ban was enacted to achieve Thailand's health policy objectives to reduce smoking. The Panel found that the practice of prohibiting the importation of foreign cigarettes while continuing the sale of domestic cigarettes was inconsistent with GATT and not "necessary" within the meaning of Article XX(b).[36] Moreover, the bans were not the "least GATT inconsistent" measures available. The Panel concluded that other nondiscriminatory controls on the importation of cigarettes were available to achieve the health policy goals such as labelling requirements, fiscal measures, anti-smoking education, advertising bans, and bans on smoking in public places.[37]

The *Thai Cigarette Panel* ruling raised some interesting issues regarding the application of the GATT Panel process to environmental regulations. The Panel imposed an onerous burden on any contracting party attempting to defend its environmental measure by ruling that Article XX(b) demands the least GATT inconsistent measure to achieve the environmental goals. This test effectively forces the Panel to grade the measure according to its GATT consistency. Inherent in the process is the assumption that alternative measures are politically and practically capable of achieving the same environmental goals. After changes made in the new DSU, a GATT panel without the expertise to determine these issues may now employ experts to assist the panel in making determinations of this kind.[38]

The *Tuna Dolphin* dispute[39] provides the most famous and emotive example of a GATT Panel decision regarding an environmental provision.[40] In ruling that a U.S. import ban on tuna from Mexico was inconsistent with GATT, the Panel examined the application of Articles III, XI, XX(b) and (g). The Panel found that the United States embargo

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33. *See id.*

34. *Id.*

35. Thai Cigarette Panel, *supra* note 29.

36. *Id.*

37. *Id.*

38. Under the new DSU Expert Review, groups may be established to facilitate the decision making process. *See* DSU, *supra* note 2, art. 13, para. 2.

39. Tuna Dolphin Report, *supra* note 11.

40. *See* Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992), for a detailed discussion. *See also* Housman & Zaelke, *supra* note 14.

on Mexican tuna was a quantitative restriction inconsistent with Article XI. The Panel concluded the United States ban discriminated against "like" products based on their production process in violation of GATT's Article III. Article III's national treatment requirement prevents trade measures based on differences in production processes. The Panel found that the U.S. ban did not fall within the Article XX(b) or (g) exceptions, and that these exceptions could not be applied extrajurisdictionally.[41]

The *Tuna Dolphin* dispute sparked a heated debate over the ability of the GATT to resolve environmental disputes, despite the fact that Mexico did not attempt to have the Panel Report adopted by the GATT Council.[42] The Panel's finding drew criticism for the GATT's continued narrow application of the Article XX exceptions, particularly for limiting the environmental exceptions to products and for failing to consider production processes.

The 1994 *CAFE Panel* considered a number of U.S. environmental laws, including the Corporate Average Fuel Economy (CAFE) standard[43] and the gas guzzler tax.[44] The CAFE standard required automobile manufacturers to meet certain levels of overall fuel economy for their entire fleet. The gas guzzler tax imposed a tax on individual car sales that failed to meet certain mile per gallon requirements. The European Community claimed these laws disproportionately affected European made cars; thus, they constituted discrimination disguised as environmentalism.[45]

The panel found the CAFE standard applied equally to foreign and domestic producers, but violated Article III:4 because of its discriminatory effect. The methodology to determine the fleet wide average mileage differed depending on the location of the manufacturer. The separate foreign fleet accounting provision placed foreign cars at a disadvantage due to their foreign origin. The Panel held that the entire law was incompatible with the GATT. The Panel concluded the provision failed the Article XX(g) test because the separation of automobile fleets by country of origin was not a conservation policy and because the fleet averaging and separate fleet accounting provisions were inextricably linked in the CAFE standard.[46]

The European Community argued that while the gas guzzler tax was facially neutral when applied, it was discriminatory in effect. Certain categories of vehicles, which happened to be the same class of

41. Tuna Dolphin Report, *supra* note 11, at 1620.

42. The decision, therefore, has only the weight of an unadopted Panel Report.

43. 15 U.S.C. §§ 2002-2013 (1988), *repealed* by Pub. L. 103-272 § 7(b), July 5, 1994, 108 Stat. 1379.

44. 26 U.S.C. § 4064 (1994).

45. CAFE Panel, *supra* note 31.

46. *See id.*

vehicles which were not exported by European auto makers,[47] were exempt from the tax. The Panel found that the tax applied equally to foreign and domestic automobiles such that it was consistent with Article III:2. Consequently, it did not consider the Article XX exceptions.[48]

The European Commission blocked the adoption of the report by the GATT Council claiming the report in relation to the gas guzzler tax provided a loophole for protectionists who can now use environmental regulations to discriminate against imported products.[49] However, the CAFE standard has subsequently been repealed in the United States.[50]

As the cases illustrate, environmental laws that discriminate between domestic and foreign producers are likely to be challenged. Moreover, most environmental legislation has been found to be inconsistent with GATT because the environmental exceptions apply only if there is no "arbitrary or unjustifiable discrimination."[51]

IV. THE GASOLINE RULE DISPUTE

The latest WTO Appellate Body decision, the Gasoline decision, provides another example of a domestic environmental policy contravening the GATT.[52] The Gasoline decision is significant in that it is the first decision under the new dispute settlement rules in the GATT/WTO system and the first GATT Panel decision to be appealed.

The creation of the DSU makes significant changes to the GATT dispute settlement framework. Under the new rules, unless a consensus of the parties votes against the adoption of the Appellate Body's report, the report is automatically adopted thirty days after circulation to its Members.[53] This reverses the previous GATT rule, which required a consensus to adopt a panel decision. The new rule limits the parties' ability to block the adoption of panel decisions, as illustrated in the *CAFE Panel*. This limitation may increase the potential for

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47. For example, the tax did not apply equally to light trucks or vans. *See id.*

48. *Id.*

49. European Commission, 1995 Report on U.S. Barriers to Trade and Investment (May 1995) at 40. It has been argued that the CAFE Panel Report allowed a deliberately protectionist measure to slip through the GATT system. *See generally* Charles T. Haag, Comment, *Legitimizing "Environmental" Legislation Under the GATT in Light of the CAFE Panel Report: More Fuel for Protectionists?*, 57 UNIV. PITT. L. REV. 79 (1995).

50. 15 U.S.C. §§ 2002-2013 (1988), *repealed* by Pub. L. 103-272 § 7(b), July 5, 1994, 108 Stat. 1379.

51. GATT, *supra* note 23, art. XX(b) and (g).

52. Appellate Body Report, *supra* note 8.

53. DSU, *supra* note 2, art. 17, para. 14. Panel reports are automatically adopted unless a party to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt a report. *Id.* art. 16, para 4.

direct conflicts between GATT/WTO obligations and environmental protections. Although members can no longer block the adoption of contentious panel reports, they are not obligated to implement the results of the decision in domestic arenas.[54]

The first WTO Appellate Body decision widens the divide between North and South[55] in trade negotiations and environmental regulation. One theme of the trade and environment debate is the accusation that the industrialized countries are practicing environmental imperialism or colonialism. Developing countries argue that the use of trade pressure enables them to effectively impose their environmental policies, thus denying the developing countries their sovereign right to decide their own policies.

At the same time, differences in environmental standards, especially between developed economies in the North and developing economies of the South, may create "pollution havens" for firms and industries seeking less regulatory oversight. Differing environmental provi-

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54. A taste of this has already been given by the United States legislation implementing the Uruguay Round. The introduction of the Dole Bill illustrates that the U.S. may not automatically accept all WTO panel decisions and could even threaten to leave the WTO. *See* the U.S. Implementing legislation of the Uruguay Round Agreements, H.R. DOC NO. 103-316 at 3 (1994). In an agreement between the U.S. Clinton Administration and Senator Robert Dole, provisions were made which may force the U.S. to leave the WTO if too many adverse decisions are adopted against it. The Agreement set up a WTO Dispute Settlement Review Commission which will review all final WTO dispute settlement reports adverse to the United States to determine whether the panel exceeded its authority or acted outside the scope of the Agreement. In this Agreement, the following text was adopted:

> The Administration will support legislation next year to establish a WTO Dispute Settlement Review Commission . . . . It will review all final WTO dispute settlement reports adverse to the United States to determine whether the panel exceeded its authority or acted outside the scope of the agreement. Following issuance of any affirmative determination by the Commission, any member of each House would be able to introduce a joint resolution calling on the President to negotiate new dispute settlement rules that would address and correct the problem identified by the Commission. If there are three affirmative determinations in any five year period, any member of each House may introduce a joint resolution to disapprove U.S. participation in the WTO-and if the resolution is enacted by Congress and signed by the President, the United States would commence withdrawal from the WTO Agreement. Our goals here are straightforward: (1) to assure that the dispute settlement process is accountable; (2) that it is a fair process; and (3) that it works as we expect it to work. From the Administration's standpoint, we are confident that the dispute settlement process will work fairly and that the concerns expressed by many will not materialize. However, if panels do exceed their authority, this proposal gives us a fail-safe device.

Documents Relating to the Clinton Administration's Agreement with Sen. Robert Dole (R-Kan.) Concerning the Uruguay Round Agreement, Issued by the White House, Nov. 23, 1994, 11 Int'l Trade Rep. (BNA) No. 47, at 1865 (Nov. 30, 1994).

55. The North/South tension refers to the tension between developed and developing countries.

sions may also induce domestic regulators to relax environmental protection requirements or enforcement, both to attract industries and to prevent any disadvantage to domestic firms relative to competitors in other countries.[56] The Gasoline decision illustrates the importance of prioritizing the interrelationship between trade and the environment on the WTO agenda in order to decrease the tension of the debate.

A. *The History of the Gasoline Dispute*

This dispute involves a challenge to regulations promulgated under the 1990 U.S. Clean Air Act Amendments.[57] The Clean Air Act requires gasoline producers to "reformulate" the gasoline they sell in major U.S. population centers in order to control auto emissions and improve air quality in the most polluted areas of the U.S. The law requires refiners of reformulated gasoline to reduce by 15% a variety of smog causing products from their gasoline. Reformulated gasoline was required to be 15% cleaner by 1995 than gasoline which was sold in 1990.[58]

In December 1993, the U.S. EPA promulgated regulations under the Clean Air Amendments[59] for establishing 1990 baselines (the Gasoline Rule).[60] Pursuant to the regulations, U.S. refiners established individual baselines for 1990 using actual data on their fuel composition or several alternative methodologies for reconstructing their fuel composition. In contrast, importers were required to satisfy a statutory baseline. The statutory baseline was calculated by taking the average level of contaminants in the U.S. refining industry in 1990.[61] The Gasoline Rule allowed U.S. producers to measure their improvement against the quality of reformulated gasoline that they actually produced in 1990, while foreign producers had to apply the statutory baseline.

The EPA justified the disparate treatment of imports by concluding that rules governing U.S. refiners could not be applied to imports

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56. *See e.g.*, OFFICE OF TECHNOLOGY AND ASSESSMENT, BACKGROUND PAPER, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 64 (1992).

57. Signed into law as Clean Air Act, Amendments, P.L. 101-549, 104 Stat. 2399 (1990).

58. In addition, conventional gasoline emissions are also required to stay as they were in 1990, so that there was no degradation of air quality outside the major population centers.

59. 42 U.S.C. § 7545 (k) (1994).

60. The Rule devised by the EPA December 15, 1993, was formerly entitled "Fuels and Fuel Additives-Standards for Reformulated and Conventional Gasoline." 59 Fed. Reg. 7716 (1994) (codified at 40 C.F.R. § 80) [hereinafter the Gasoline Rule].

61. If the importer was also a foreign refiner they were entitled to establish their own individual baseline provided they imported at least 75 percent of the gasoline they produced at their refinery into the U.S. This was referred to as the 75% rule. *See* Gasoline Panel Report, *supra* note 3, at 278.

without raising substantial concerns about foreign data availability, enforcement problems, and environmental consequences. U.S. gasoline refiners argued that without this safeguard, the new pollution control requirements would increase domestic production costs, giving imports a competitive advantage and a chance to sell their "dirty" fuel in the United States. Venezuela claimed that the EPA regulations were facially discriminatory because importers were denied the opportunity to establish individual baselines. In practice, this meant that imported gasoline with certain parameter levels below the statutory baseline could not be directly sold into the U.S. market; whereas, U.S. gasoline with the same qualities could be freely sold in the U.S. market provided the gasoline satisfied the refiner's individual baseline.

Venezuela originally filed a complaint in 1994 under the dispute settlement mechanism of the 1947 GATT. Venezuela claimed the EPA regulations were inconsistent with the national treatment obligations. The complaint was subsequently withdrawn as part of a negotiated settlement. On March 23, 1994, the EPA offered to change the Gasoline Rule in exchange for Venezuela's promise to drop its complaint.[62] The details of this negotiated settlement evolved during secret meetings between Venezuela and the EPA, the Energy Department and the office of the U.S. Trade Representative.[63]

When Congress became aware of this deal, it blocked the proposed rule change. Subsequently, Venezuela relodged its complaint in January 1995, this time before the WTO.[64] Brazil joined the dispute as a complainant after the WTO DSB accepted Venezuela's request for a dispute settlement panel.

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62. *See EPA Announces Fuel Plan for Venezuela; Threatened GATT Complaint is Shelved*, 11 Int'l. Trade Rep. (BNA) No. 13, at 504 (Mar. 30, 1994).

63. *See* Steve Charnovitz, *Free Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L. J. 459, 521-522 (1994) (criticizing the Clinton Administration's policy in this regard, and arguing that the administration had worked out an arrangement with Venezuela whereby Venezuela agreed to a quota on gasoline imports at the current level in exchange for dropping the GATT case, thereby demonstrating evidence of the secretive and anti-democratic way that GATT rules can influence environmental laws). *See also* Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267, 1268 (1996) (criticizing executive branch actions which are secrative and suggesting that there is a need for greater domestic participation in such actions).

64. On 23 January 1995, Venezuela requested the United States to hold consultations pursuant to GATT 1994, Article XXII(1) Agreement on Technical Barriers to Trade, Article 14(1), and DSU, Article 4, regarding the December 15, 1993 rule issued by the EPA titled "Regulation of Fuels and Fuel Additives-Standards for Reformulated and Conventional Gasoline." After failing to reach a satisfactory settlement, and upon the request of Venezuela, the DSB set up a panel 10 April 1995. *See* Gasoline Panel Report, *supra* note 3.

B. *The Gasoline Panel Report*

Venezuela and Brazil requested the Panel to find that the Gasoline Rule devised by the EPA was:

(a) contrary to the most-favored-nation provision of Article I and the national treatment provisions of Article III:1 and 4 of GATT 1994;

(b) not covered by any of the exceptions under Article XX of GATT 1994; and

(c) contrary to Article 2 of the Agreement on Technical Barriers to Trade (TBT).[65]

The United States denied these claims and set forth two arguments. 1. The Gasoline Rule was justified under the exceptions contained in Article XX, paragraphs (b), (d), and (g); and 2. The Gasoline Rule did not come within the scope of Article 2 of the TBT Agreement. The Panel rejected these arguments concluding that the baseline establishment methods contained in the Gasoline Rule were inconsistent with Article III:4 and were not justified under paragraphs (b), (d), or (g) of Article XX. The Panel recommended that the DSB request the United States to change this part of the Gasoline Rule so that it conformed with its obligations under GATT.

C. *The GATT's Article III*

The Panel decision rested on the application of one of GATT's central objectives, the principle of nondiscrimination,[66] in particular, the national treatment principle derived primarily from Article III. Venezuela and Brazil argued that the Gasoline Rule violated Article III:4 by denying foreign refiners the possibility to establish an individual baseline. The Gasoline Rule accorded less favorable treatment because it required imported gasoline to conform with the more stringent statutory baseline; whereas, U.S. gasoline had only to comply with each refiner's individual baseline.[67]

Article III:1 of the GATT provides that internal taxes and other charges, laws, regulations, and requirements that affect the sale or

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65. Agreement on Technical Barriers to Trade April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex IC, *reprinted in* H.R. Doc. No. 316-2, at 1318 (1994) [hereinafter TBT]. The Panel did not make a determination on the issue of whether the regulation violated the TBT, as they had already decided that the EPA rule did not qualify for any of the exceptions in Article XX. As a consequence, the relationship between the TBT and the GATT rules will have to be determined at a later date.

66. The first principle of non discrimination is the "most favoured nation obligation" under Article I, which requires a member to provide all other members with the most favourable treatment in trade that it provides to any country. *See* GATT, *supra* note 23, art. I, at A-12.

67. Gasoline Panel Report, *supra* note 3.

distribution of products should not be applied so as to afford protection to domestic products.[68] Those laws, regulations, and requirements are also subject to a more stringent test under Article III:4, which provides that imported products must be given treatment no less favorable than that given to like domestic products.[69]

The Article III test has two parts. First, it must be decided whether the products being differentiated between are "like products." If products are not "like" then any differentiation will be consistent with Article III. If they are "like," then differentiation can only be consistent if it does not afford either protection to domestic production or less favorable treatment to imported products.

In the gasoline dispute, the Panel determined that chemically identical imported and domestic gasoline are "like products" because they have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. Secondly, the Panel determined that the imported products were treated less favorably because their refineries did not have the possibility of establishing an individual historical baseline. The Panel noted that domestic gasoline benefited in general from the fact that the seller/refiner used an individual baseline while the seller/refiner of imported gasoline did not. This less favorable treatment is illustrated by the case of a batch of imported gasoline which was chemically identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels.

The U.S. argued that not all imported gasoline was disadvantaged by the statutory baseline. The statutory baseline by the nature of its calculation was an average of gasoline quality consumed in the U.S. in 1990; therefore, at least half of the domestically produced gasoline

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68. Article III:1 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin. Moreover, in cases in which there is not substantial domestic production of like products of national origin, no contracting party shall apply new or increased internal taxes on the products of the territoriesof other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed; and existing internal taxes of this kind shall be subject to similar negotitation for their reduction or elimination.

69. Article III:4 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . . .

would have a higher individual baseline than the statutory baseline.[70] The imports were given less favorable treatment relative to those domestic producers whose baseline was below the average. The domestic producers represented roughly half of the domestic production.

The Panel acknowledged the disparity, but concurred with the reasoning of an earlier panel decision,[71] that under Article III:4 less favorable treatment of particular imported products in some instances could not be balanced by more favorable treatment of other imported products in other instances. The Panel, quoting an earlier Panel, stated "[t]he words 'treatment no less favorable' in paragraph 4 call for effective equality of opportunities for imported products in respect of applications of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[72] In this case, under the baseline establishment methods, some imported gasoline[73] was effectively prevented from benefiting from as favorable sales conditions as those afforded to domestic gasoline by an individual baseline tied to the producer of a product; therefore, imported gasoline was treated less favorably than domestic gasoline.

The U.S. also argued that there was a significant quantity of domestic gasoline from new suppliers assigned the statutory baseline.[74] Relative to the "similarly situated" domestic producers, foreign producers were treated no less favorably.[75] According to the U.S., post 1990 domestic producers were given similar treatment to pre 1990

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70. Gasoline Panel Report, *supra* note 3, at 281.

71. United States-Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990). The Panel had found that:

> [T]he "no less favorable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligations in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.

Id. para. 5.14.

72. *Id.* para. 5.11.

73. Note that the statutory baseline was calculated by averaging the level of contaminants in the U.S. industry in 1990. Therefore, some refiners would have individual baselines which were higher than the statutory baseline. When comparing the requirements for foreign producers under the statutory baseline and U.S. refiners with a high individual baseline, it would appear that the U.S. refiners were being given a higher standard to achieve.

74. The new suppliers were U.S. suppliers that had started production after 1990 and therefore did not have 1990 data on which to base an individual baseline.

75. Gasoline Panel Report *supra* note 3, at 281.

foreign producers due to their lack of data. The Panel rejected this argument declaring that Article III:4 does not "allow less favorable treatment dependent on the characteristics of the producer and the nature of the data held by it."[76] The Panel concluded the EPA rule violated Article III:4. Consequently, the Panel did not examine the complaint under Article III:1.[77]

D. *The GATT Article XX Exceptions*

Unilateral environmental measures inconsistent with Article III are GATT consistent if they fall within one of the Article XX exceptions, which are also defenses. The burden of showing that Article XX applies belongs to the respondent state,[78] in this case the United States. The protection the exceptions offer has historically been construed as narrowly as possible within the meaning of the words.[79] This is reinforced by the preambular conditions that exceptions must not " . . . [c]onstitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,"[80] nor be "[a] disguised restriction on international trade . . . ."[81] In the Gasoline dispute the Panel considered Articles XX(b), (d), and (g).

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76. *Id.* at 294. *See also* Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Act Regulations,* 13 INT'L TRADE REP. (BNA) No. 11, at 459 at 5, where he argues that the Panel in relation to this point should simply have held that national treatment "does not mean average treatment (which the EPA rule approximates). Nor does it mean treatment as favourable as some domestic subclass receives. National treatment means that the best treatment offered to domestic products must also be offered to foreign products."

77. The Panel did not find it necessary to examine the consistency of the Gasoline Rule with Article III:1, because it is a more general provision than Article III:4 and as such the Gasoline Rule would be caught under this Article if caught under Article III:4. *See* Gasoline Panel Report, *supra* note 3. The panel followed the *Malt Beverages* case which had examined a claim made under paragraphs 1, 2, and 4 of Article III and had concluded that "because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider Article III:1 allegations to the extent that the Panel were to find measures to be inconsistent with the more specific provisions of Articles III:2 and III:4." United States-Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.), at 270 (1993). The Panel did not proceed to examine the Gasoline Rule in relation to Article 1 as it considered that its findings on treatment under the baseline establishment methods under Articles III:4 and XX(b), (d), and (g) would, in any case, have made unnecessary the examination of the 75% rule under Article I:1. Gasoline Panel Report, *supra* note 3, at 296.

78. The result being that the U.S. must prove the absence of alternative measures that could meet its environmental objective.

79. *See* Tuna Dolphin Report, *supra* note 11, para. 5.22.

80. *Id.*

81. GATT, *supra* note 23. *See also* Tuna Dolphin Panel, *supra* note 11, para. 4.8 and United States Imports on Certain Automotive Spring Assemblies, May 23, 1986, GATT, B.I.S.D. (30 Supp.) 107, paras. 54-56 (1984).

E. *Article XX(b) Exception*

Article XX(b) sanctions the use of trade-restricting measures when they are "necessary to protect human, animal or plant life or health."[82] The Panel's examination of this article considered whether the measure was intended to implement an enumerated policy. The Panel agreed with the United States[83] that the pollution control policy was a policy within the range of those enumerated in Article XX(b).

The remaining issue was whether the aspect of the Gasoline Rule found inconsistent with the General Agreement was "necessary" to achieve the stated policy objectives under Article XX(b). Necessary in this context means "necessary . . . only if there were no alternative measures consistent with the [GATT], or less inconsistent with it . . . ."[84] which could reasonably be expected to be employed to achieve the gas emissions policy objectives. After the *Tuna Dolphin Panel* decision, the interpretation of the "necessary" test as the "least GATT-inconsistent" measure available was widely criticized as being too open-ended. Conceivably, any measure might have hypothetical alternatives more consistent with the GATT. Despite these criticisms, the Panel affirmed its interpretation.

The U.S. argued that there were no alternative measures available. The EPA had considered giving foreign refiners individualized baselines, but had rejected this option because it did not have reliable data to establish such baselines or to verify the refinery of origin for imported gasoline. In the Panel's view, reasonably available alternative measures existed to achieve the environmental objective. The Panel suggested giving all producers the statutory baseline or alternatively giving foreign refiners individual baselines.[85]

F. *Article XX(d) Exception*

Article XX(d) provides that measures may be applied if necessary to secure compliance with laws or regulations which are not inconsistent with the GATT.[86] The Panel dismissed the United States' arguments regarding Article XX(d). The United States argued that the baseline establishment methods secured compliance with a law or regulation that was not inconsistent with GATT. The Panel commented that the U.S. scheme might constitute a law or regulation for the purposes of Article XX(d) "not inconsistent" with the GATT, assuming

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82. GATT, *supra* note 23.

83. Venezuela and Brazil did not disagree with this point. *See* Gasoline Panel Report, *supra* note 3, at 296.

84. Thai Cigarette Panel, *supra* note 29, para. 75.

85. *See infra,* part III. H. for a discussion regarding the feasibility of the alternative measures.

86. GATT, *supra* note 23.

that a system of baselines by itself was consistent with Article III:4. Nevertheless, the Panel found that sustained discrimination between imported domestic gasoline contrary to Article III:4 did not "secure compliance" with the baseline system.[87] The Panel emphasized that the methods were not an enforcement mechanism,[88] but were simply rules for determining the individual baselines. As such, they were not the type of measures contemplated by Article XX(d).

G. *Article XX(g) Exception*

Article XX(g) provides that measures may be taken "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[89] The Panel applied a three part analysis to determine whether the conservation exception applied. The analysis is set forth below:

> First, it had to be determined whether the *policy* in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources.
> Second, it had to be determined whether the *measure* for which the exception was being invoked—that is the particular trade measure inconsistent with the obligations under the General Agreement—was "related to" the conservation of exhaustible natural resources, and whether it was made effective "in conjunction" with restrictions on domestic production or consumption.
> Third, it had to be determined whether the measure was applied in conformity with the requirements set out in the introductory clause to Article XX, that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.[90]

The Panel acknowledged that clean air was a depletable natural resource and the policy to reduce the depletion of clean air clearly satisfied the first part of the test. It was not prepared to conclude that the measures in dispute "related to" the conservation of this resource. The Panel adopted the *Herring and Salmon Panel's*[91] interpretation of the "related to" rule in which the measure had to be "primarily aimed" at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g). Similarly, a trade measure was considered to be "made effective in conjunction

87. Gasoline Panel Report, *supra* note 3.
88. An example of an enforcement mechanism would be a fine.
89. Gasoline Panel Report, *supra* note 3.
90. *Id.*
91. Herring and Salmon Panel, *supra* note 28, at 114-15.

with" production restrictions if it was "primarily aimed" at rendering effective these restrictions.[92]

The Panel believed that the "precise aspects" of the EPA rule that violated GATT Article III were not "primarily aimed" at the conservation of natural resources. According to the Panel, the United States could reach the desired level of conservation of national resources under the Gasoline Rule without being inconsistent with the national treatment obligation. In light of this finding, the Panel did not find it necessary to consider the third prong of the test.[93]

H. *The First GATT/WTO Appeal*

The Panel's interpretation of Article XX(g) prompted the United States' appeal, which was lodged on March 4, 1996. The U.S. claimed the Panel erred in its interpretation of Article XX as a whole, and in particular, that it erred by holding that the baseline establishment rules were not justified under Article XX(g). The U.S. also claimed the Panel misinterpreted whether the baseline establishment rules constituted a "measure" "relating to" the conservation of clean air within the meaning of Article XX(g).

The issue on appeal was the narrowness of the Panel's interpretation of the wording in Article XX(g). Article XX states that it is the "measures" which are to be examined under Article XX(g), not the legal finding of "less favorable treatment."[94] The U.S. contended the panel looked at whether the "discrimination" in itself "relates to conservation" rather than at whether the "measure" relates to conservation. The Appellate Body agreed finding that the Panel referred to its legal conclusion on Article III:4 instead of the "measure" in issue.[95] The Appellate Body also concluded that the baseline establishment rules were "primarily aimed" at the conservation of natural resources for the purposes of Article XX(g) and therefore satisfied the second prong of the test.[96]

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92. *Id.*

93. Gasoline Panel Report, *supra* note 3, at 295.

94. GATT, *supra* note 23.

95. Appellate Body Report, *supra* note 8, (stating that there is *"no direct connection* between less favourable treatment of imported gasoline . . . and the U.S. objective of improving air quality in the United States," *Id.* at 619 (emphasis added), and concluding that the rules that afforded less favourable treatment were not primarily aimed at the conservation of natural resources. *Id.*).

96. The Appellate Body also applied the "necessary" test, not only in examining Article XX(b), but also in applying Article XX9g). *Id.* at 620. In applying these words they found that the Panel had overlooked a fundamental rule of treaty interpretation by failing to take into account the words actually used by Article XX(g). *Id.* The Panel should have used the "relating to" test in (g), which has been interpreted by the *Herring and Salmon Report* as catching a measure that is "primarily aimed at" conservation of exhaustible natural resources. *Id.* at 621-22.

The Appellate Body considered next whether the rules met the requirements of the *chapeau* of Article XX. It concluded that the rules constituted "unjustified discrimination" and a "disguised restriction on international trade." Although the rules were within the terms of Article XX(g), they were not entitled to the justifying protection afforded by Article XX as a whole. The numerous alternative courses of action available to the U.S. in implementing the rules influenced the Appellate Body's conclusion. The alternative nondiscriminatory measures identified, included the imposition of statutory baselines without differentiation between domestic and imported gasoline. The environmental downside, however, would be that gasoline of high quality could slip down to the average standard in order to obtain a competitive advantage, consequently affecting overall air pollution. The alternative enabled both foreign and domestic refiners to have individual baselines. The problem with that option, apart from data difficulties, is that foreign refiners with a low standard are able to sell their "dirtier" fuel at a competitive advantage. "Clean" gasoline producers are required to continue to produce gasoline which satisfied their high individual baseline.

The Appellate Body did not assess the likely environmental impact of these suggested options. Implicit in its decision is an assumption that the alternative measures are capable of achieving the same environmental goals in practical terms. This type of assumption made by trade policy experts behind the closed doors of the Appellate Body is troublesome. It leads environmentalists to question whether GATT Panels and now Appellate Bodies, have the expertise or institutional legitimacy to determine such an issue.

Speculation by the U.S. claim that administrative burdens would accompany the alternative measures was viewed as insufficient to justify the denial of individual baselines to foreign refiners. On this issue, the Appellate Body agreed with the Panel Report, suggesting that the U.S. had not pursued the possibility of cooperation with the governments of Venezuela and Brazil in order to mitigate potential administrative problems.

The Appellate Body concluded that the discrimination was foreseen; therefore, the baseline establishment rules in their application constituted "unjustifiable discrimination" and a "disguised restriction on international trade."[97] Thus, the Gasoline rule was outside the justifying protection afforded by Article XX as a whole.

97. Appellate Body Report, *supra* note 8.

V. U.S. OPTIONS

For the United States, the Appellate decision will be seen by some as a pyrrhic victory. The error of law related to Article XX(g) was corrected, however, when the correct interpretation of the law was applied, the result was the same. The GATT exceptions for health and environmental policies, which allow countries to pursue such policies even if they lead to trade barriers, have been narrowly interpreted; this case continues that practice.[98] The legal conclusions of the Panel and the Appellate Body were clearly correct in finding that the EPA rule was in violation of Article III and that none of the Article III exceptions applied. The gasoline rule is an example of an environmental regulation that was clearly discriminatory on its face. The rule provides a clear example of protectionism being disguised as an environmental measure.

The Gasoline case, like the *Tuna Dolphin*, the *Salmon Herring,* the *Thai Cigarette,* and the *CAFE Panel* decision, concerned an environmental measure that operated as a nontariff trade barrier. In contrast to these previous decisions, in particular the *Tuna Dolphin* decision, the Gasoline decision cannot be used by environmentalists to bolster claims that the GATT is institutionally hostile to environmental protection. The decision provides a very lucid example of how environmental measures can function as disguised non tariff barriers to trade. It once again raises the conflict between environmental policies which impose trade burdens and trade regulation under the GATT. It is a clear case of "green" protectionism.[99] For the environmental movement, this is a poorly drafted regulation which undermines legitimate attempts to protect the environment without unjustifiable discrimination. It also undermines calls for the GATT/WTO to become more environmentally sensitive. If environmental policies are more carefully structured so that the burdens imposed on the domestic and foreign markets are equal, then they will be less likely to be perceived by the nations affected as unjustified and therefore should be able to survive international scrutiny.

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98. The Office of Technology Assessment of the U.S. Congress has noted that of all dispute resolution panel reports from 1947 to 1990, nine involved the environmental exceptions. Of the nine, two did not contain a ruling on their applicability, six found that they did not apply, and only one found that they did. Thus, GATT panel rulings offer little support for the argument that environmental measures imposing trade burdens are subject to these exceptions. ESTY, *supra* note 10, at 49 n.9. *See also* PIERRE PESCATORE ET. AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991).

99. In terms of the result, it appears that the "right party" was succesful in this dispute because here the discriminatory measure could not be supported or justified by any environmental arguments. The regulation did not encourage domestic producers with low baselines to improve the quality of their fuel. In that sense, the regulation did not really support its environmental objectives of lowering air pollution.

The Clinton Administration and other free trade supporters contend that the economic stakes in this case are trivial and that the administration has a number of options, none of which would compromise the objectives of the clean air program. They argue that in the long term, the WTO's role in settling trade disputes will work to America's advantage far more often than the reverse.[100] Under WTO procedures, the U.S. has a degree of latitude in determining how to conform with the Appellate Body ruling. One option is to simply ignore the ruling, as the effect of Appellate Body decisions on U.S. law is the same under the WTO as it was under GATT. Nothing in the DSU authorizes the dispute settlement system to repeal U.S. laws. If the U.S. disregarded the Appellate Body decision, Venezuela and Brazil could impose sanctions such as punitive tariffs on U.S. goods, but only to the extent of the damage inflicted on them by the EPA regulations. The U.S. would be unlikely to take such a confrontational approach in this instance.

When a country enters into any international agreement, it necessarily relinquishes some measure of sovereignty. Therefore, the critical question is not whether the U.S. is relinquishing sovereignty, but whether the U.S. has inappropriately relinquished sovereignty in the case of the WTO. Arguably, the sovereignty of the U.S. will be enhanced by the dispute resolution procedures because the U.S. will be able to enforce legal rights more effectively. In addition, the U.S. retains its right to withdraw from the WTO at any time. In fact, the implementing legislation established a special panel to evaluate whether the U.S. should withdraw from the WTO.[101]

The impact of the Appellate Body ruling does not constitute a threat to the U.S. implementation of environmental provisions. The ruling merely emphasizes that trade restrictive measures disguised as protectionism will be found to be discriminatory. Criticism of the new WTO and its DSU for such a stance is unjustified. The decision is not a death warrant for tough U.S. environmental laws, nor a relinquishment of U.S. sovereignty; however, it could be viewed as a small victory for the developing South.[102]

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100. SAN DIEGO UNION-TRIB., *supra* note 6.

101. *See supra* note 54 and accompanying text.

102. As Petersmann points out, the "[G]ATT dispute settlement proceedings offer an effective means, at low transaction cost, for defending weaker countries against unilateral power politics and for clarifying and adjudicating market access rights under GATT law." Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law, Prevention and Settlement of International Environmental Disputes in GATT*, 27 J. WORLD TRADE 43, 79 (1993).

VI. CONCLUSION

Questions abound as to whether the GATT/WTO requires major institutional changes to accommodate the "green agenda" and to achieve a balanced relationship between trade and the environment. As Geza Feketekuty noted, "[t]here is wide agreement among GATT members that the GATT's trade rules need to be adapted to better support the achievement of environmental goals at both the national and global levels."[103] At the meeting for the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations in Marrakesh in April 1994, the Members of the GATT agreed to establish a Committee on Trade and the Environment under the auspices of the WTO. The institutional structure, content, timetable, and mechanisms by which this environmental committee will carry out its work will largely determine whether trade can become a more effective agent of sustainable development.[104] Matters to raise in this fora include procedural reforms to facilitate the resolution of environmental disputes.

The gasoline dispute gives rise to a number of procedural criticisms. In particular, the Panel and Appellate Body were comprised solely of trade specialists who did not appear to have environmental expertise. In environmentally inspired disputes, it would be preferable for a panel to call for the establishment of an expert review group[105] to facilitate fact finding and provide technical advise on certain aspects of the dispute. Increased public participation and environmental expertise in the dispute resolution process could go a long way towards overcoming the gap between free trade advocates and environmentalists. The inclusion of experts with environmental knowledge in the adjudicatory process would facilitate the resolution of interpretational difficulties which occur due to the competing policy objectives between trade and the environment. Environmental experts will be able to help determine the appropriate principles to differentiate between acceptable and unacceptable environmental measures. As outlined above, the GATT does not prohibit environmental protection per se. The GATT is concerned only with discriminatory measures which restrict trade.

The Gasoline decision illustrates that in relation to domestic environmental laws, the GATT requires that these laws be non-discriminatory or "necessary" for the protection of the environment or "related to" conservation. The decision illustrates that domestic environmental laws need to satisfy the GATT exceptions to be acceptable and it reinforces just how difficult it will be to satisfy these requirements, partic-

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103. Geza Feketekuty, *The Link between Trade and Environmental Policy*, 2 MINN. J. GLOBAL TRADE 171, 199-200 (1993).

104. *See* Schultz, *supra* note 16.

105. DSU, *supra* note 2, art. 13, para 2.

ularly the *chapeau* of Article XX. In applying the GATT exceptions, Panelists and Appellate Body members are often required to make technical and scientific rulings on questions of fact and interpretations of law based on the imprecise and general tests of the Article XX provisions.

In this instance, the GATT rules were applied in a manner in which achieved the "right" result. The Gasoline rule illustrates a poorly drafted, inefficient environmental regulation which could be characterized as an attempt at 'green' protectionism. The EPA rule was clearly facially discriminatory. In contrast to the situation afforded to domestic producers the rule denied foreign gasoline producers the opportunity to establish individual baselines. While the environmental objective of reducing gasoline pollution is clearly commendable, the rule made no attempt to deal with improving the quality of gasoline from "dirty" domestic producers with a low individual baseline. It was entirely appropriate for this regulation to be struck down by the new WTO system.[106] However, its fate should not be used by trade advocates as an excuse to stop work on assessing the relationship between trade and the environment. It is essential to the long term future of this planet that only those environmental regulations that are truly discriminatory are found to be GATT illegal.

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106. As Petersmann perceptively pointed out in relation to the *Tuna Dolphin Report*,

> [e]ven if there were a need to formally amend the GATT on environmental grounds-there is no convincing case for 'aggressive unilateralism' and 'justified disobedience' so as to impose one's own national environmental standards on another country by means of unilateral discriminatory import restrictions. Self-righteous doctrines of 'creative illegality', calling for breaches of GATT law as a means of improving the law, and unilateral definitions of unfair trade are inconsistent with a rule-orientated trading system and with the symmetry of reciprocal GATT rights and obligations.

Petersmann, *supra* note 102, at 78.