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Julie H. Paltro

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A "GREENING"¹ OF THE WORLD TRADE ORGANIZATION? A CASE COMMENT ON THE ASBESTOS REPORT²

I. INTRODUCTION

In a landmark ruling, a World Trade Organization (WTO) dispute panel upheld France's ban on imports of chrysotile (or "white") asbestos from Canada.³ This ruling, the Asbestos Report, is the first time a panel has allowed a WTO Member to impose a ban on imported goods pursuant to Article XX(b) of the General Agreement on Tariffs and Trade (GATT).⁴ Article

1. DAVID C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* (1994). This book popularized the phrase "greening the GATT." His book proposes re-balancing GATT/WTO rules in favor of more deference to national decision makers about environmental goals and the means chosen to pursue them. See Douglas J. Caldwell & David A. Wirth, *Trade and the Environment: Equilibrium or Imbalance*, 17 MICH. J. INT'L L. 563, 567-570 (1996) (book review) (discussing Esty's approach to the trade-environmental dispute). But see Sara Dillon, *Trade and the Environment: A Challenge to the GATT/WTO Principle of "Ever-Freer Trade,"* 11 ST. JOHN'S J. LEGAL COMMENT 351, 381-82, n. 55 (1996) (disagreeing with Esty's view that the goals of free trade and the environment are inseparable and can be accommodated within the GATT and instead arguing that GATT panels' failure to consider the complexity of trade's effects on the environment and other non-trade concerns results in a bias in favor of free trade).

2. WTO Dispute Settlement Panel Report on European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000), http://www.wto.org/english/tratop_e/dispu_e/135r_a_e.pdf [hereinafter Asbestos Report].

3. Daniel Pruzin, *Asbestos: WTO Panel Issues Ruling Upholding French ban of Chrysotile Asbestos*, BNA INT'L TRADE DAILY, July 26, 2000, <http://www.lexis.com>.

4. Other attempts to use Article XX(b) of the GATT, though unsuccessful, include: the Shrimp-Turtle disputes, see WTO Dispute Settlement Panel Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998), 37 I.L.M. 832 (1998), http://www.wto.org/english/tratop_e/dispu_e/58r00.pdf [hereinafter Shrimp-Turtle Report]; WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999), http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf [hereinafter Shrimp-Turtle AB]; the Tuna-Dolphin disputes, see GATT Dispute Panel Report on United States-Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993), 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I]; GATT Dispute Panel Report on United States-Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter Tuna-Dolphin II]; and see also GATT Dispute Panel Report on Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D.

XX(b) allows WTO Members to discriminate against or ban trade if such measures are "necessary" to protect, *inter alia*, human health.⁵ It is also the first time a WTO judgment has placed non-trade values above "free trade."⁶

The Asbestos Report has three important implications for international trade. First, the report demonstrates that the goal of protecting the environment expressed in the WTO's Preamble is not mere pretense. Such a demonstration is crucial to preserve the legitimacy of the WTO. The WTO purports to be concerned with regulating trade while ameliorating standards of living and preserving the environment.⁷ However, critics believe that the WTO's Preamble is merely pretense, and that the WTO is only concerned with free trade. Critics further believe that the WTO's "pro-trade"⁸ orientation excludes environmental and health objectives.⁹ Recently, the

DS10/R37S/200 [hereinafter Thai-Cigarettes].

5. See General Agreement on Tariffs and Trade 1994 [hereinafter GATT], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round, vol. 21, 33 I.L.M. 1125, 1154, at art. XX(b) (1994) [hereinafter Final Act].

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: [hereafter the chapeau] . . . (b) necessary to protect human, animal or plant life or health.

6. Geoff Winestock, *WTO OK of France's Asbestos Ban May Calm Critics*, at www.ban.org/ban_news/wto.html (last visited July 28, 2000). The author defines "free trade" and "pro-trade" as the notion underlying the negotiating history of the GATT 1947, or generally as the idea of removing impediments such as tariffs or non-tariff-barriers which would be a guise for protectionism, such as certain environmental legislation.

7. See Preamble to the WTO Agreement, *supra* note 5:

The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment. . . .

8. See author's definition, *supra* note 6.

9. Margaret Graham Tebo, *Power Back to the People*, ABA JOURNAL, July 2000, at 54-56; see also Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 J. TRANSNAT'L L. & POL'Y 331, 355

WTO has come under increasing scrutiny.¹⁰ During the protests of the 1999 meetings of the WTO, the IMF, and the World Bank in Seattle, environmentalists were among the most embittered and boisterous.¹¹ Protesters accused the WTO of ignoring health and ecological concerns in trade conflicts.¹² Some protestors even dressed as sea turtles which were threatened by the results of the WTO¹³ in the Shrimp-Turtle dispute.¹⁴ The Asbestos Report could help diffuse opposition to the WTO in environmental circles, and it may help to affirm the WTO's questioned legitimacy among environmentalists.¹⁵

Second, Member countries and non-governmental organizations (NGOs) will try to promote legislation based on the direction in which they believe the WTO Dispute Settlement Mechanism (DSM) to be headed, perhaps in banning more trade for human health purposes.¹⁶ Last, and most important, future disputants will use this report as a basis for trying to usher in a new era of environmentally and health-friendly

(2000):

The WTO has no ability to reach compromise among competing values, or even to give non-trade values a 'seat at the table.' Trade agreements shift decision-making from local democratic bodies to unaccountable global trade bureaucracies that enforce rules largely written by large multinational corporations. Citizens' ability to govern themselves suffers, along with their environment and standard of living, when large multinational corporations can write the rules for global commerce with no effective accountability.

10. See Tebo, *supra* note 9, at 54-56.

11. Winestock, *supra* note 6.

12. *Id.*

13. *Id.*

14. Shrimp-Turtle AB, *supra* note 4.

15. Tebo, *supra* note 9 (discussing that political, environmental and human rights groups question the legitimacy of the WTO). See also Dan Pruzin & Peter Menyasz, *WTO: WTO Interim Panel Report Said to Find Against Canada in French Asbestos Case*, BNA INT'L TRADE DAILY, June 14, 2000, <http://www.lexis.com> ("A ruling in favor of the EU would help repair the WTO's battered image among green groups and other non-governmental organization, which have accused the trade body of riding roughshod over national environmental and public health concerns in the name of free trade.")

16. This is a logical assumption, especially in light of recent research. Global Trade Watch, a division of the D.C.-based consumer group Public Citizen, has gathered data showing that many WTO Members are pre-emptively dismantling, environmental, and health legislation to avoid the political and monetary costs of defending a law from a WTO challenge. Tebo, *supra* note 9, at 54 (discussing WTO's power to usurp countries' own legislative intent to protect the environment in the context of the "turtle case").

interpretation of Article XX(b). Accordingly, this panel's ruling will be essential to understand how the WTO may resolve the tension between trade and non-trade goals in future disputes.¹⁷

Criticism of the GATT/WTO system turns on whether the current trading system is overly committed to economic efficiency to the detriment of other values, such as the environment.¹⁸ Previous interpretations of Article XX(b) have highlighted how difficult it is to balance environmental and health concerns and efficient international trade. Over time, the interpretation of Article XX(b) has evolved from a formalistic and narrow analysis into more of a realistic, balancing approach.¹⁹ However, the reasoning has been fairly formalistic overall prior to the Asbestos Report. Neither environmental nor health measures have previously passed muster under Article XX(b) because they were found to be too trade discriminatory.²⁰

This Comment suggests that environmentalists and domestic health legislators and organizations should cautiously welcome the Asbestos Report as a "greening" of the WTO. Remarkably, the Report found that in order for a proposed "less-trade-restrictive alternative" measure to render a defending Member's environmental or health legislation not "necessary" and therefore untenable under Article XX(b), the proposed measure must be "sufficiently effective" in achieving the defending Member's environmental or health goals.²¹ This finding is remarkable as previously, panels and the Appellate Body (AB) had decided that a Member's measure is not "necessary" for purposes of Article XX(b) if there is a "less-trade-restrictive alternative" available, even if such measure would not be reasonably as effective in achieving the Member's environmental or health goals.²² In future Article XX(b) disputes,

17. See Pruzin, *supra* note 3. (reporting that Remi Parmentier, head of political unit for Greenpeace International, positing that the panel's upholding the ban would set an important precedent in favor of environmental and public health concerns, but that it should not be interpreted as a "greening" of the WTO because asbestos is such an obvious case due to the known scientifically proven harms, unlike the beef-hormone cases.)

18. Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 860 (1999).

19. *Id.*

20. See all disputes, *supra* note 4.

21. See Asbestos Report, *supra* note 2, at VIII, paras. 8.208-8.210.

22. See Thai-Cigarettes, *supra* note 4, at VI, paras. 74-75; Tuna-Dolphin II,

the Asbestos Report's more forgiving interpretation of "necessary" should logically result in more measures meeting the "necessary" standard and thus being allowed to stand.

Yet, it is possible that this report may prove to be an anomaly in GATT/WTO jurisprudence as the Asbestos dispute has very unique facts that future panels and the AB could easily distinguish.²³ Unlike asbestos harms, most environmental and health problems are not as heavily documented.²⁴ Also, few commercial products may prove as undisputedly deadly to humans as asbestos.²⁵ Furthermore, it may be difficult to

supra note 4, at V, para. 5.35; Tuna-Dolphin I, *supra* note 4, at V, para. 5.27.

23. Although the GATT/WTO dispute resolution system does not possess the same rationale regarding *stare decisis*, as the United States' judicial does, there is still a loose notion of precedent and one can observe in panel and appellate reports both the parties' and arbiters' reliance on previous disputes. See Tuna-Dolphin II Report, *supra* note 4, at III, para. 3.74 (The European Economic Community (EEC) and the Netherlands recognized that although there is no *stare decisis* in the GATT because there is no hierarchy between courts or arbitral bodies in the GATT, international courts and tribunals were always careful to maintain their own precedents and a 'certain coherence' in their decisions. They furthered argued that the GATT required such coherence in order to provided stability with the international trading system.). See also Asbestos Panel Report, *supra* note 2, at paras. 8.74-8.77:

Article XVI:1 of the Agreement Establishing the WTO, and para. 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement, allow the 'legal history and experience under the GATT 1947 to be brought into the new WTO. Adopted panel reports 'are an important part of the GATT *acquis*.' They create legitimate expectations and among WTO Members and should thus be taken into account when they are relevant to any dispute.

Id. The report goes on to allow even unadopted reports to be used for guidance in reasoning, though the reports bear no legal status.

24. See Asbestos Report, *supra* note 2, at VIII, para. 8.188 (concluding that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies, that it was confirmed by experts gathered by the panel with respect to both lung cancers and mesotheliomas, and that experts confirmed that the types of cancer concerned have a mortality rate of close to 100%). See Remi Parmentier, Greenpeace's Political Director, in *World Trade Organisation Still in Need of Environmental Reform*, at <http://www.greenpeace.org/pressreleases/toxics/2000sep18.html> (last visited 9/28/00) (discussing the Asbestos ruling as a lukewarm indicator of the "greening" of the WTO since asbestos has undisputed scientific evidence behind it unlike other causes where there is scientific disagreement). See also Winestock, *supra* note 6.

25. See Asbestos Report, *supra* note 2, at VIII, paras. 8.188, 8.194, 8.196, 8.200-8.201; see *id.* para. 8.203 ("there is an undeniable public health risk in relation to the chrysotile contained in high-density chrysotile-cement products"). See also *WTO Tribunal Upholds French Asbestos Ban, But Uses Damaging Reasoning*, 2 Harmonization Alert (Sept./Oct. 2000), at <http://www.tradewatch.org/harmonizationalert/SeptOct00/SepOct00>.

use this report to support environmental or health measures that are less controversial than banning asbestos, a highly toxic product of low trade value.²⁶ Last, normative "morality" concerns such as the maximization of the human welfare,²⁷ and WTO public relations concerns may arguably have influenced the panel, since the previous narrow reading of the "necessary" standard would likely have dictated a different outcome.²⁸ Thus, future Article XX(b) disputes may ultimately be decided differently as there may not be such an overwhelming consensus regarding environmental causes, or even human health issues where the evidence is less overwhelming than with asbestos.

As background, Part II of this Comment will discuss the GATT, the WTO, and its DSM. Part II will also analyze prior interpretations of Article XX(b). These rulings demonstrate the tensions between trade and non-trade values and show the reluctance on the part of panels and the AB to uphold environmental and health regulations at the expense of pro-trade values. Part III will summarize the factual background of the Asbestos Report, the parties' arguments, and the panel's findings. Part IV will analyze the Asbestos Report's interpretation of Article XX(b). The analysis will suggest that the Asbestos Report is a big step towards the "greening" of the WTO in that

pdf (last visited 2/15/01) ("In light of the overwhelming evidence of the toxicity and carcinogenicity of asbestos and the broad public view in numerous countries that health risks from asbestos are unacceptable, it would have been surprising if the Panel had dared to overturn the French ban.")

26. See Winestock, *supra* note 6 (characterizing asbestos trade as a "dying and discredited industry" and also one of "fairly low international trade value."). However, though it's of low trade value generally, Canada brought the dispute to the WTO because although the level of trade of asbestos in France is arguably not very large, Canada brought action due to "jobs, votes and the fragility of Quebec's position within the Canadian federation." Also, while the loss of French trade is not crucial, the possibility that developing nations might adopt the French ban is since Asia, Morocco, Tunisia and Algeria buy the bulk of Canadian chrysotile. See *id.*

27. See discussion *infra* Part II. A. p. 10 (defining "morality reasons" under the "Liberalism Model" where the consideration of a "normative universal morality of right and wrong" enter the equation in legal disputes. In this scheme, free trade is preferable only to the extent that the collective human welfare is maximized and that domestic social goals are met. This is not the dominate philosophy of which the WTO was based, however.) See Dailey, *supra* note 10 (quoting Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 348, 356 (1998)).

28. See discussion *infra*, at V, 42.

the panel's interpretation of "necessary" under Article XX(b) should make it easier for a trade measure to survive scrutiny. However, this analysis will further suggest that the applause should be cautious as this case is so factually different from any other prior Article XX(b) dispute that its reasoning may be confined to its facts in future disputes. Part V will briefly conclude. Following Part V is a Postscript which will report and analyze the recent AB decision in the Asbestos dispute.

II. BACKGROUND

A. *A Brief History of the GATT and the WTO*

The GATT, opened for signature October 30, 1947, liberalized trade by reducing tariffs at regularly held negotiation "rounds" held between the contracting parties.²⁹ The GATT 1947 was based on free trade principles and sought to prevent the introduction of protectionist measures.³⁰ During the Geneva-Uruguay Round from 1986 to 1993, 125 countries revised the GATT 1947 rules and established the WTO.³¹ The WTO was designed to provide a common institutional framework for the conduct of trade relations among its Members.³²

The DSM is the cornerstone of the WTO.³³ The DSM is one of the major achievements of the Uruguay Round, because the previous procedure of GATT third party dispute resolution was largely ineffective.³⁴ It was ineffective because all disputants had to consent to the dispute resolution in order to begin the process, and further because once there was a result, a disputant could legally refuse to accept it.³⁵ Moreover, under

29. HAMMOND SUDDARDS SOLICITORS, AN ANATOMY OF THE WTO 2 (Kon Stantinos Adamantopoulos ed., 1997) [hereinafter Adamantopoulos].

30. *Id.* at 7, 30.

31. *Id.*

32. *Id.*

33. JEFFREY S. THOMAS & MICHAEL A. MEYER, THE NEW RULES OF GLOBAL TRADE: A GUIDE TO WTO 308 (1997). See also Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 5, Annex 2, art. III:2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 21; 33 I.L.M. 1125 (1994), [hereinafter Understanding] ("the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral system").

34. THOMAS & MEYER, *supra* note 33, at 308.

35. *Id.* See also J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settle-*

the old system, individual Member states that were not part of the dispute could block adverse panel decisions.³⁶ Now, the system has a more recognizable "legal" framework.³⁷ There is compulsory adjudication when a Member brings a complaint to the Dispute Settlement Body (DSB) and the outcomes are binding.³⁸ Unlike under the GATT 1947,³⁹ the panel's report is automatically adopted unless a unanimous decision by all WTO Members, including the winning party, opts not to adopt.⁴⁰ Furthermore, in contrast to the old system, there is now a reviewing court, the AB, which further legalizes the system.⁴¹ Losing Members must comply with the ruling and if winning Members are dissatisfied with the compliance, or lack thereof, they can seek compensation or retaliation.⁴² In short, the DSM represents the "teeth" of the WTO, because its Members have consented to use the DSM and not to take unilateral

ment, HARV. JEAN MONNET WORKING PAPERS (2000), at I, p. 1, <http://www.jeanmonnetprogram.org/papers00/000901.html>.

36. Dillon, *supra* note 1, at 375.

37. *Id.*

38. Weiler, *supra* note 35, at 1.

39. The GATT 1947 and 1994 are functionally equivalent as the 1947 was subsumed as an annex-Annex 1A-to the WTO Agreement. It is this annexed GATT that is termed the GATT 1994. The only difference is that with the GATT 1994, the WTO and the DSB have power to compel compliance with panel decisions. See Dillon, *supra* note 1, at n. 1.

40. Understanding, *supra* note 33, at art. 16.4, 17.14, at 417-18, 33 I.L.M. 1224.

41. But see Weiler, *supra* note 35, at IV, p. 7 (criticizing the AB for not grasping that one of its tasks is to be the "custodian of the entire judicial element of dispute settlement and that it has an institutional responsibility towards . . . the Panels. It should be the task of the AB to socialize, institutionalize and valorize the work of panels" instead of often issuing scathing reviews.) For an interesting discussion of the philosophical evolution of the DSM, see PIERRE PESCATORE ET AL, HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT, Release #10, Vol. 1 (June 2000). Over the evolution of the DSM there was tension between the U.S. and Canada (and most developing and non-European countries) who wanted the system to be more legalistic-protecting the rights of small countries and pressuring the offending party to conform to the code-versus European countries and Japan who wanted a more pragmatic structure focusing on negotiation and consensus. A legalistic GATT would promote decisions on the merits and effective implementation of decisions whereas a less intrusive GATT calls for using the dispute mechanism only to facilitate a negotiated settlement. See also THOMAS & MEYER, *supra* note 35, at 311 (discussing how the U.S. and Canada wanted a system akin to a domestic court which does not have a consensus requirement versus Europe and Japan which wanted to continue the diplomatic nature of Articles XXII and XXIII of the GATT 1947).

42. Terence P. Stewart & Amy Ann Karpel, *Part I: Review of the Dispute Settlement Understanding*, 31 LAW & POL'Y INT'L BUS. 593, 596 (2000).

action.⁴³

The DSB administers the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (Understanding) and is authorized to establish dispute settlement panels, adopt reports, oversee implementation of rulings and recommendations, and authorize the suspension of concessions and of other obligations.⁴⁴ The most important provision of the Understanding for grasping the mind-set of the panelists and of the AB is Article 3. It states that the DSB's purpose is to "provid[e] security and predictability to the multilateral trading system" and "to preserve the rights and obligations of Members under the covered agreements."⁴⁵ Article 3 also states: "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."⁴⁶ The need for predictability and security in inter-state relations could account for panels' and the AB's reluctance to allow non-trade measures to affect and diminish trade efficiency. If Members can introduce conservation or health measures often enough under the exception to Members' obligations under Article XX of the GATT, then the "pro-trade goal"⁴⁷ of the GATT may be compromised.⁴⁸ The DSM's pro-trade orientation is a factor in every Article XX(b) dispute. This pro-trade orientation stems from Article 3.⁴⁹ Thus, at the outset of any dispute resolution, the scale is tipped towards trade and away from non-trade values pursuant to Article 3.⁵⁰

43. THOMAS & MEYER, *supra* note 33, at 22, 24.

44. *Id.* at 313.

45. Understanding, *supra* note 33, at arts. 3:1, 2.

46. *Id.*

47. The author defines "pro-trade goals" as "free trade" e.g. minimizing barriers (tariff and non-tariff) to international trade. "Pro-trade" here can also be seen under the "Economic Efficiency Model." See Discussion *infra* II.A, at 11-12.

48. Of course, this contention depends on how one characterizes the "pro-trade goal" of the GATT. If one considers that goal to include the WTO's Preamble on "sustainable development" (see Preamble, *supra* note 7), then this contention would not be as convincing. However, the author is referring to just the GATT and not the Preamble. But even if the author was referring to both the GATT and the Preamble, practically speaking, regardless of the "sustainable development" concept in the Preamble, it is evident throughout the panel and AB reports that Article XX should be used very sparingly or else free trade could be often and easily compromised.

49. McLaughlin, *supra* note 18, at 865.

50. Assuming non-trade values—e.g. environmental justice—are de-stabilizing and unpredictable (since a Member state can create domestic legislation at any

Moreover, the WTO's binding dispute mechanism can now ensure those pro-trade values by narrowly construing the Article XX exceptions, at the expense of environmental justice and the collective human welfare.⁵¹ Before the binding dispute mechanism, a Member who had a domestic environmental or health law could continue to enforce that law, even if other Members objected, or if there was a dispute resolution against the domestic legislation. However, now with the binding dispute mechanism, the GATT/WTO arbiters can and have forced Members to change their domestic environmental and health policies to comport with the GATT's pro-trade goals.⁵²

The environmentally conscious Preamble to the WTO, which was not present in the GATT 1947, is also important.⁵³ It may not be equally important since the Preamble is not binding, as are the positive obligations in the GATT. Nevertheless, because panels and the AB often cite to and sometimes even feature the Preamble in its analysis of a dispute, most notably in Shrimp-Turtle AB, the Preamble is pertinent to

time), and if the Understanding's purpose is to provide "security and predictability to the multilateral trading system," it logically follows that arbiters of the Understanding will be loathe to allow Members to use the non-trade values in Article XX(b). *See also* Dillon, *supra* note 1, at 378, 382 (1996) (arguing that the GATT system is ill equipped to deal with national environmental or health laws because, *inter alia*, "the main thrust of thinking can never be other than in favor of ever-increasing free trade because in panels trying to avoid national laws having protectionist implications, which most will, they will end of avoiding "protectionism," even at the cost of environmental and labor standards.)

51. Of course, this contention is relative to how one views the WTO's trade values. Under the "Economic Efficiency Model," the only way to ensure non-trade values is to have unhindered trade which will promote wealth which will in turn allow for those wealthier countries to implement expensive environmental legislation, for example. However, this author challenges that model. *See id.* at 352-353, 355 (1996) (arguing that although a 1992 GATT Secretariat report provides official support for the notion that increased trade liberalization will generate the wealth necessary to allow environmentally sound production methods, this is not the only way to protect the environment, and in fact, might thwart environmental protection as "by its nature ever-expanding international trade is accelerating the degradation of our global environmental as a whole.")

52. *See, e.g.,* Shrimp-Turtle AB, *supra* note 4.

53. *See* Preamble to WTO, *supra* note 7. Shrimp-Turtle AB, *supra* note 4, at VI, para. 152 (discussing that the GATT 1947 Preamble promoting the "full use of the resources of the world," had to be changed to the current Preamble which "allow[s] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment . . ." as the 1947 version was no longer appropriate to the world trading system of the 1990s). In drafting the WTO Preamble, the drafters used the GATT 1947 Preamble as a model but changed it to reflect environmental concerns.

Article XX(b) interpretation.⁵⁴ The Preamble states that WTO Members should: “[expand] the production of and trade in goods. . . while allowing for the optimal use of the world’s resources in accordance with *the objective of sustainable development, seeking both to protect and preserve the environment . . .*”⁵⁵ The addition of environmentally conscious language in 1995 represents a shift in environmental awareness, at least on paper. Moreover, with the current binding dispute mechanism, there is now the means for panels and the AB to enforce the environmental-trade balance, albeit there is no positive requirement for these bodies to do so or for the Members to follow the Preamble on their own.⁵⁶ Yet, although the Preamble seemingly harmonizes trade and environmental/human welfare concerns, in practice, there has been tension between the two theories that has spurred the contentious debate between environmentalists and pro-trade organizations.

The predominant philosophy on which the WTO is based has been termed the “Economic Efficiency Model.”⁵⁷ This model claims that the efficiency and economic growth that comes with free trade will increase the “collective welfare”⁵⁸ by increasing production, enhancing the availability of goods, and reducing consumer prices.⁵⁹ It also claims that only trade liberalism, and not environmental legislation, will truly generate the requisite wealth that will permit environmentally friendly production methods to be implemented, especially in poorer third-world countries.⁶⁰ This theory appraises trade barriers as “inefficient intrusions into otherwise autonomously functioning markets [that] tend to divert resources from their most highly valued uses” and result in market losses.⁶¹

54. See *Tuna-Dolphin I*, *supra* note 4, at para 6.2; *Shrimp-Turtle AB*, *supra* note 4, at VI, para. 152.

55. Preamble to the WTO Agreement, *supra* note 7. (emphasis added)

56. The WTO Preamble does not give Members positive obligations like the “national treatment principle” and has been criticized as being largely ineffective in promoting non-trade values because the language “sustainable development” is so vague. See Dillon, *supra* note 1, at 371.

57. Dailey, *supra* note 9, at 350.

58. The author defines “collective welfare” as including production process methods (PPMs), such as negative externalities of trade like child labor or a soot blowing factory, and not as limited to the economic collective welfare.

59. Dailey, *supra* note 9, at 350-351.

60. Dillon, *supra* note 1, at 352-53.

61. Dailey, *supra* note 9, at 348 (quoting Dunoff, *supra* note 27, at 348).

In stark contrast, the coveted "Liberalism Model" of international environmentalists espouses that the "primary goal of the WTO should be to lower trade barriers to the extent that trade policies do not violate certain domestic social policies."⁶² Unlike the "Economic Efficiency Model," the "Liberalism Model" subscribes to a "normative universal morality of right and wrong" and in doing so accommodates non-trade values such as the environment.⁶³

One scholar, Virginia Dailey, has recently argued that "sustainable development," and not economic efficiency, should be the overarching principle of the WTO and constitute an "express obligation" for every WTO Member.⁶⁴ She reasons that the principle of "sustainable development" has been recognized as part of customary international law, and as such, should be infused into the interpretation of Article XX(b) and its chapeau, or introductory preamble.⁶⁵ According to scholars, "sustainable development" includes obligations to (1) consider the needs of present and future generations; (2) accept limits on the use of natural resources for environmental protection reasons; (3) apply equity in the allocation of rights and obligations; and (4) integrate all aspects of the environment with development.⁶⁶ However, instead of a being a potent non-trade force in the GATT/WTO regime, "sustainable development" remains an elusive concept since the term is so vague. Because it is highly debatable what level of "development" is actually "sustainable" this term cannot be applied as a legal test.⁶⁷

62. *Id.* at 351 (quoting Dunoff, *supra* note 28, at 356).

63. *Id.* (quoting Dunoff, *supra* note 27, at 356).

64. *Id.* at 344.

65. *Id.* at 334-343. She explains that "sustainable development has become customary by looking to: (1) state action and *opinio juris*; (2) Multilateral Environmental Agreements (MEA's) like, *inter alia*, the 1987 Montreal Protocol and the 1989 Basel Convention; (3) other International legal documents like the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment; and (4) two recent judicial decisions by the International Court of Justice (ICJ) have recognized sustainable development as party of customary international law. *See* Concerning the Gabčíkovo-Nagymaros Project (Hung. V. Slov.), Sept. 25, 1997, 37 I.L.M. 162, 200-1, §140 (1998). *See also* Request for an Examination of the Situation in Accordance with Para. 63 of Court's Judgment of 20 Dec. 1974 in the Nuclear Tests, (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22, 1995).

66. Dailey, *supra* note 9, at 345.

67. Dillon, *supra* note 1, at 371. *See also* Caldwell and Wirth, *supra* note 1, at 585, 586 ("sustainable development" is defined as development that meets the needs of the present without compromising future generations' ability to meet their

B. The Interpretive Evolution of Article XX(b) of the GATT

The GATT/WTO system establishes three fundamental principles in order to effect free international trade.⁶⁸ First, Article I requires “most favored nation treatment” among its Members, meaning that Members must not discriminate against “like products” from any other Member and must treat all such products identically.⁶⁹ Second, Article III, known as the “national treatment” principle, dictates that Members must apply taxes and regulations no less favorably to imported products than domestic products.⁷⁰ Third, Article XI limits quantitative import restrictions to duties, taxes, or other charges, and generally prohibits quotas, import prohibitions and export prohibitions.⁷¹

Article XX lists general exceptions to these fundamental GATT articles. For purposes of this Comment, the essential language of Article XX is the chapeau,⁷² and subsection (b). They read respectively:

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: [hereafter the chapeau] . . . (b) necessary to protect human, animal or plant life or health.”

⁷³

The established method of interpretation of Article XX(b) and

needs, yet as a concept is “somewhat indeterminate.”)

68. McLaughlin, *supra* note 18, at 865.

69. See GATT, *supra* note 5.

70. See *id.*

71. See *id.*

72. See *id.*

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.

Id.

73. *Id.* at art. XX.

the chapeau is a three-step analysis.⁷⁴ First, panels must determine whether the controverted measure is to "protect human, animal, or plant life or health." Second, panels must assess whether the measure is "necessary" for the protection. Third, if the measure is necessary, then the panel analyzes the measure under the chapeau to determine if the "necessary" measure is nevertheless "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," or "a disguised restriction on trade." If the necessary measure is neither arbitrary, unjustifiable nor a disguised restriction, then the measure is allowed to stand.

The drafting history and subsequent interpretation of the Article XX's chapeau and the Article itself reveal a fear of the exception's potential to undermine the principle of free trade since Members may create protectionist barriers under the guise of environmental and health protection policies.⁷⁵ To prevent such abuse of the Article XX exceptions, panels have construed Article XX as a limited and conditional exception from obligations under other GATT provisions, and not as a positive rule establishing obligations in and of itself.⁷⁶ Indeed, the chapeau was specifically adopted to ensure that such abuse would not occur.⁷⁷ This concern for the vulnerability of trade values influences the panel and AB decisions under GATT/WTO dispute resolution.

1. Traditional Doctrinalism: Pre-WTO Disputes

The interpretation of Article XX(b) of the GATT, from its drafting in 1947 to the WTO's DSM, manifests a grave concern with protecting exporting countries against protectionist retaliation under the guise of "health concerns," specifically by nar-

74. See *Tuna-Dolphin II*, *supra* note 4; *Shrimp-Turtle AB*, *supra* note 4.

75. WTO, *GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX* 5622 (1995).

76. *Id.* This sentence refers to the panel report on *United States—Section 337 of the Tariff Act of 1930* [hereinafter *Tariff Act*], 7 November 1989, BISD 36S/345, 385, para. 5.9.

77. See *Thai-Cigarettes*, *supra* note 4, at 56, n. 7 (discussing the Netherlands and the Belgo-Luxembourg Economic Union's concerns during the draft ITO Charter during the London session of the Preparatory Committee that "Indirect protection is an undesirable and dangerous phenomenon . . . Many times the stipulations 'to protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection")

rowly interpreting "necessary." Before the WTO was established, the exceptions in Article XX were construed quite narrowly.⁷⁸ This partly accounts for the absence of any reports allowing a country to discriminate against trade based on Article XX(b). This traditional, narrow construction of Article XX exceptions promotes free trade over the other societal values.⁷⁹ Early panels viewed⁸⁰ free trade as the primary means to stimulate economic growth and efficiency, which they believed was an essential prerequisite to environmental protection.⁸¹ Thus, panels failed to balance the environmental or health risks of abandoning the environmental/health measure against the level of detrimental economic impact, if any, of such measure on the targeted nation(s).⁸²

Several reports illustrate this narrow interpretation of Article XX(b) and failure to balance the risks against the benefits. The Thailand-Cigarettes Panel (Thai-Cigarettes)⁸³ held that a Thai measure banning the importation of tobacco products, including cigarettes, except those by government licence, was not "necessary" to protect their citizens' health.⁸⁴ Thailand sought to protect its nationals' health by ensuring the quality and reduce the quantity of cigarettes sold.⁸⁵ The government argued that the only way it could control smoking was to ban imports, including U.S. cigarettes, which were believed more harmful than Thai cigarettes.⁸⁶ The Thai-Ciga-

78. WTO, GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 562 (1995). See also Asbestos Panel Report, *supra* note 2, at VIII, para. 8.75 (discussing the relevance of reports adopted by panels under the GATT 1947 as significant, allowing the "legal history and experience" of it to be brought into the WTO. They are an "important part of GATT *acquis*" and "create legitimate expectations among WTO Members and should be taken account when they are relevant to any dispute.")

79. The Article XX exceptions to the pro-trade GATT rules reflect concern with other non-trade values like environmental justice and human and animal health. By panels and the AB limiting the use of these exceptions, naturally free trade will face less impediments, such as environmental domestic legislation.

80. See author's definition of "free trade," *supra* note 6.

81. McLaughlin, *supra* note 18, at 870

82. *Id.* at 870-871.

83. *Thai-Cigarettes*, *supra* note 4.

84. *Id.* at II, paras. 6, 8. The regulation in question was section 27 of the Tobacco Act, 1966. Licenses had only been granted to the Thai Tobacco Monopoly, which had imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976, and 1980.

85. *Id.* at IV, para. 76.

86. *Id.* at III, para. 14 (discussing that Thailand believed that due to chemi-

rettes Panel held that the Thai health measure was not "necessary" under the "least-trade-restrictive-alternative" analysis.⁸⁷ Under this analysis, a defending Member "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."⁸⁸ Under this analysis, the panel reasoned that a Thai policy requiring complete disclosure of cigarettes' ingredients, coupled with a ban on unhealthy substances and on cigarette advertising, is the "least-GATT-inconsistent" alternative, thus rendering the Thai measure untenable under the GATT.

Of particular relevance, is that this panel used precedent interpreting "necessary" in paragraph (d) of Article XX to interpret paragraph (b) of the same article.⁸⁹ It saw no reason why under Article XX, the meaning of "necessary" would not have the same meaning in paragraph (d) as (b).⁹⁰ This is now the established analysis.⁹¹ Nevertheless, it is illogical. Paragraph (d) concerns the protection of patents and trademarks⁹² and paragraph (b) concerns health issues. The different context justifies a different interpretation of the term "necessary." An alternative interpretation for Article XX(b) would require a "reasonableness" standard, such as "reasonably" necessary. One scholar, Thomas Shoenbaum, contends that the traditional interpretation of "necessary" is erroneous.⁹³ He argues that because the grammar and syntax of Article XX(b) makes it clear that the purpose of the clause is to protect living things, the "least-trade-restrictive-alternative" requirement subverts this purpose by changing the meaning instead to protect

cals and other additives indicative of U.S. cigarettes, those cigarettes were more harmful to one's health than Thai cigarettes.).

87. McLaughlin, *supra* note 18, at 868; Dailey, *supra* note 9, at 376.

88. Thai-Cigarettes, *supra* note 4, at VI paras. 74-75 (the note to this paragraph refers to the Tariff Act, *supra* note 76 at para 5.26.).

89. Tariff Act, *supra* note 76.

90. Thai-Cigarettes, *supra* note 4.

91. See Shrimp-Turtle AB, *supra* note 4; Tuna-Dolphin I, *supra* note 4; Tuna-Dolphin II, *supra* note 4.

92. GATT, *supra* note 5, at art. XX(d):

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

Id.

93. See McLaughlin, *supra* note 18, at 870-71.

against measures impeding free trade.⁹⁴ This author agrees with Shoenbaum's analysis and would further add that the "least-trade-restrictive analysis" would only comport with the purpose of Article XX(b) if the purposed alternative was just as effective or almost as effective as the measure at issue in protecting the environment or health.

Tuna-Dolphin I and Tuna-Dolphin II⁹⁵ provide additional examples of interpretive formalism. The Tuna-Dolphin I dispute occurred when the U.S. imposed an embargo on Mexican tuna until the U.S. Secretary made findings as to Mexico's incidental dolphin kill rates.⁹⁶ The measure was the U.S. Marine Mammal Protection Act of 1972 (MMPA).⁹⁷ Its purpose was to greatly reduce the incidental killing or serious injury of dolphins in the course of commercial fishing by prohibiting the taking and importation of marine mammals, unless an exception was explicitly authorized.⁹⁸ Two species of the many species of dolphin at issue were the eastern spinner and coastal spotted, which are listed in the Convention of International

94. *Id.*; see this Comment's author's definition of "free trade," *supra* note 6.

95. Tuna-Dolphin I, *supra* note 4; Tuna-Dolphin II, *supra* note 4.

96. Tuna-Dolphin I, *supra* note 4, at para. 2.7. See *id.* at para 2.6. Section 101(a)(2)(B) of the MMPA provides that as a prerequisite for finding that another country has comparable incidental taking rates and a similar harvesting regulatory regime, the average incidental taking rate must not exceed 1.25 times the average taking rate of the U.S. vessels in the same period. Also, the share of Eastern spinner dolphin and coastal spotted dolphin relative to total incidental takings of dolphin during each year must not exceed 15% respectively. Therefore, the Secretary was trying to find whether the percentage of Eastern spinner dolphins killed by the Mexican fleet over the course of an entire fishing season did not exceed 15% of all dolphins killed by it in that period.

97. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. 1361-1421h (1994 & Supp. IV 1998)).

98. Tuna-Dolphin I, *supra* note 4, at para. 2.4 (explaining that MMPA authorized limited incidental taking of marine mammals by U.S. fishermen in the course of commercial fishing pursuant to a permit issued by the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce). The MMPA does not prohibit or regulate the sale of tuna caught by the U.S. although it provides for forfeiture of cargo as a penalty for violation of its regulations on harvesting tuna. See *also id.* at para. 2.5. The Act provides that the importation of tuna harvested with purse seine nets in the Eastern Tropical Pacific ("ETP") and products therefrom is prohibited unless the Secretary of Commerce finds that (i) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the U.S., and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable the average rate of such taking by U.S. vessels.

Trade in Endangered Species of Wild Fauna and Flora (CITES).⁹⁹

The panel held that the U.S. measure was not "necessary" because the U.S. had not demonstrated that it had exhausted alternative measures, such as negotiation of international cooperative agreements.¹⁰⁰ The Tuna-Dolphin I Panel began its analysis by recalling that Article XX was a "limited and conditional exception from obligations under . . . GATT," and so had a history of being narrowly construed.¹⁰¹ The panel then applied the "least-trade-restrictive-alternative" analysis.¹⁰² Under this analysis, the panel determined that even if Article XX(b) permitted Members to protect animal life outside of their domestic jurisdiction, which it did not,¹⁰³ the measure would not be "necessary" because the U.S. had not demonstrated that it had "exhausted all options reasonably available to it," including negotiation of international cooperative arrangements.¹⁰⁴

However, the panel did not take into account the practical reality that negotiations are time-consuming. The environment, animal life and human life can all be irreparably harmed as time passes.¹⁰⁵ For instance, one scholar has re-

99. *Id.* at paras. 2.10, 3.14.

100. *Id.*

101. *Id.* at para. 5.22.

102. Tuna-Dolphin I, *supra* note 4, at V para. 5.27.

103. See *id.* at para. 5.22-5.29. The panel decided that although the text did not recognize jurisdictional boundaries, its drafting history did, although such boundaries were stricken from the final version. The panel further reasoned that a broad, borderless interpretation of Article XX(b) would jeopardize the multilateral framework of the GATT, because a Member could then utilize Article XX(b) to unilaterally determine the environmental or health policies of other Members. *Id.*

104. Tuna I Report, *supra* note 4, at paras. 5.24-5.29. The panel noted that even if an embargo was "necessary," the particular measure in question was not "necessary." This is because Mexico had to meet the U.S. taking rate, yet could not predict what it would be beforehand, so that at any given time, Mexico could not know if their policies conformed to the U.S. dolphin protection standards.

105. 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, 21 (1999) (discussing implication of AB's strong suggestion that international negotiations precede the imposition of environmental trade measures being an impediment to environmental protection because such negotiations will prevent WTO Members from acting quickly and unilaterally to protect the environment). See also National Wildlife Federation (NWF), *Breaking News: WTO Appellate Body Strikes Down U.S. Turtle Protection for the Last Time*, at <http://www.nwf.org/nwf/international/trade/turtles/wtofinal.html> (visited Aug. 24, 1999) (commenting on the Shrimp-Turtle Panel Report, *quoted in*, Neuling, at 43):

ported that "the world is losing between 27,000 and 150,000 species per year, approximately seventy-four species every day, and three every hour [and] up to seventy percent of the world's fisheries are depleted or under stress after years of over-exploitation."¹⁰⁶ This concern is especially pertinent in the case of the eastern spinner dolphin and coastal spotted dolphin, which are on the endangered species list.¹⁰⁷ Yet, even for the dolphin species that are not endangered, a similar concern applies because if dolphins continue to be maimed or killed in tuna purse seines then their numbers could become seriously depleted to the point where they may be put on the endangered species list. In short, Tuna-Dolphin I shows the preeminence of trade values at the expense of environmental values. Therefore, the panel's acknowledgment of the WTO's Preamble rang hollow when it stated: "... that the provisions of the GATT impose few constraints on a contracting party's implementation of domestic environmental policies."¹⁰⁸

Tuna-Dolphin II, a related dispute, involved the "intermediary nation embargo," an aspect of the MMPA prohibiting tuna imports from countries that imported tuna from third nations that harvested tuna through the incidental taking of dolphins.¹⁰⁹ The panel found the U.S. measure not "neces-

Sometimes it is impossible to negotiate with all countries when trying to protect a species on the verge of extinction. Sometimes timing or political situation necessitate that one country take the lead in promoting comprehensive environmental protections. Although they did it imperfectly, the U.S. Government made a good faith effort to protect endangered sea turtles around the world from death in shrimp nets. While efforts by one country are not enough, and are not the ideal solution to international environmental problems, sometimes, in cases such as this one where an entire life form is threatened, they are necessary.

Id.

106. Daily, *supra* note 9, at 332, (citing Case Concerning the Gabcikovo-Nagymaros Project (Hung. V. Slov.), Sept. 25, 1997, 37 I.L.M. 162, 206 (1998)).

107. Tuna-Dolphin II, *supra* note 4, at para. 3.23; See also William J. Snape, III, *Biodiversity and the Law: An Introduction*, 8 TUL. ENV'TL. L.J. 5, 12 (1994) (reporting that the problematic relationship between environmental law and international trade is particularly severe in the areas of marine biodiversity due to, *inter alia*, over-fishing).

108. Tuna-Dolphin I, *supra* note 4, at para. 6.2.

109. *Id.* at II, para. 2.12. Any intermediary nation that exports yellowfin tuna or such products to the U.S. and that imports the same from countries that are subject to a direct prohibition on import into the U.S. must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months. See also *id.* at V, para. 5.5. Subsequent to the

sary" under the "least-restrictive-trade-alternative."¹¹⁰ Specifically, the panel reasoned that because the regulation was only effective if it succeeded in "coercing" the intermediary nations to adopt the U.S. policy within their own jurisdictions instead of having a direct conservation or protective effect on the environment, the measure could not be "necessary."¹¹¹ Such reasoning equates "necessary" with "directly affecting," which is not contemplated by the language or negotiating history of Article XX(b).¹¹² Also, the panel's reasoning tends to undermine any environmental or health legislation as the purpose of such legislation is often an attempt to force other countries to change their ways. Therefore, Tuna-Dolphin II narrowed the interpretive landscape of "necessary" to measures which "directly affect" the legislated environmental or health problem, and to measures which do not impinge on a state's sovereignty.

The panel's analysis of the necessity of the conservation measure impermissibly rendered Article XX(b) obsolete. The panel reasoned that a measure "forc[ing] other countries to change their policies within their own jurisdictions"¹¹³ cannot be "necessary" and thus allowable under GATT because such a policy would seriously impair GATT's free trade objective.¹¹⁴ The panel feared that if Article XX(b) were construed to allow Members to deviate from their basic obligations under GATT by internationalizing their domestic conservation policies at the expense of free trade, free trade would no longer be possible. However, the panel turned the analysis upside-down by inserting the broad consideration of GATT's overall purpose into the discrete and specific interpretation of "necessary"

entry into force of the new provision of the MMPA dated Oct. 26, 1992 that provided certification by reasonable proof by the intermediary nation that it has not imported products subject to the direct prohibition within the preceding six months, France, the Netherlands and the UK were withdrawn from the list. Costa Rica, Italy, Japan and Spain remained on the list.

110. *Id.* at V, para. 5.35.

111. *Id.* at V, para. 5.38.

112. See generally WTO, GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 5622 (1995). But see Neuling, *supra* note 105, at 15 (concluding that, in the final analysis, the negotiating history of Article XX may not have had much bearing on the Article's interpretation, although paragraphs (b) and (g) were probably written for non-environmental reasons, and not intended to create a broad environmental exception in GATT. Its conscription into this unnatural role leaves it an ineffective tool for achieving environmental objectives.)

113. Tuna-Dolphin II, *supra* note 4, at V, para. 5.38.

114. *Id.* at V, para. 5.39.

under Article XX(b). In essence, it performed the chapeau analysis—is the measure unjustifiably discriminatory—before first determining, in the absence of trade concerns, whether a measure to protect life or health was necessary to protect that life or that health.¹¹⁵

The question the panel should have addressed, but did not, was whether the measure was “needed” or “indispensable” to save the dolphins, regardless of whether the broader GATT trade objectives would be impaired. Since Article XX(b) is an exception to the GATT’s pro-trade agenda, necessarily any measure allowed under its “necessary” standard will appear to be in conflict with Members’ positive obligations under the GATT 1947. However, such conflict is legal in the GATT regime under the Article XX exceptions. Therefore, the panel should have first evaluated the health measure under the “necessary” standard in the Article, without concern as to whether the measure would impair GATT pro-trade objectives. Then, if the measure is “necessary,” the panel can then determine under the standards in the chapeau if the “necessary” measure is nevertheless “arbitrary or unjustifiable discrimination,” which by implication would upset the GATT’s agenda by abusing the limited exceptions in Article XX for protectionist ends. Thus, a panel that initially determines under a “necessary” analysis whether or not a measure conflicts with the GATT’s broad purpose of reducing trade barriers will in fact render the exception obsolete.

Notably, Tuna-Dolphin II implied in dictum that Article XX(b) may allow Members to pursue environmental protection measures outside their jurisdiction. This represents a complete turn-around from the finding in Tuna-Dolphin I which rejected such measures as “unilateral” and “jeopardizing the multilateral framework of GATT.” This dictum indicates the WTO’s potential willingness to be less rigid in its Article XX(b) analysis, allowing for future use of this provision for global environmental protection.

Nevertheless, in sum, these three panel reports made it very difficult for an environmental or health measure to fit within the very narrow confines of the “necessary” requirement. These early GATT decisions employed “doctrinal rigidi-

115. See Shrimp-Turtle AB, *supra* note 4.

ty" in their interpretations because the underlying concern and belief was that free trade should be the only legitimate value.¹¹⁶ There was no attempt to perform a cost-benefit analysis, balancing the benefit of the domestic policy with the detriment to international trade.¹¹⁷ Thus, after the Tuna cases, no GATT Member has relied on justifying its actions solely under Article XX(b), until the Asbestos Report.¹¹⁸

2. Towards a Less-Rigid, Balancing Approach: Post-WTO Disputes

After establishing the WTO in 1995, dispute panels adopted a more balanced approach to interpreting Article XX, weighing the costs to the international trading system against the benefits to the environment.¹¹⁹ First, the WTO dispute settlement system went from being non-binding to binding. Second, a permanent AB was established that reviewed errors of law. Third, there was a consensus among the most powerful Members of the WTO that international environmental protection must be recognized by the trade organization as a legitimate area of concern.¹²⁰

However, the first Article XX(b) dispute after establishing the WTO suffered from pre-WTO "doctrinalism." The Shrimp-Turtle Panel Report (Shrimp-Turtle) illustrates "traditional doctrinalism" at its worst.¹²¹ The panel not-so-subtly implied

116. McLaughlin, *supra* note 18, at 871 (explaining that such pro-trade sentiment was unsurprising since GATT's Secretariat had traditionally wielded power in the formulation of individual panel decisions). Since the goal of the GATT 1947 is to reduce restrictions on free trade, the Secretariat, as a champion of the GATT, would wish to keep the trade restrictions to a minimum, and thus domestic environmental legislation as it tends to impose restrictions on free trade.

117. *Id.* (citing GATT Doc. TRE/W1/Rev.1 (Oct. 14, 1993)) (Report on Trade and the Environment published by the GATT Secretariat identified 19 international environmental agreements that provide for some kind of trade restrictions).

118. Dailey, *supra* note 9, at 378. Instead, Members relied on Article XX(g) because the AB has been more flexible in interpreting it and the standard is easier to satisfy. See GATT, *supra* note 5. Article XX(g) reads "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

119. McLaughlin, *supra* note 18, at 874. The AB was established as a permanent body and it remedied the problems characteristic of earlier panels by interpreting the WTO pursuant to the relevant provisions of the Vienna Convention on the Law of Treaties, and promoted a more detailed legal analysis.

120. *Id.* at 888.

121. *Id.* at 878.

that the highest goal under GATT/WTO dispute resolution is maintaining the status quo of the multilateral trading system, even at the expense of the environment.¹²² It accomplished this by determining that it was not crucial to examine the U.S. trade measure, Section 609 of Public Law 101-162 (Section 609), because it "could put the multilateral trading system at risk."¹²³ The panel went so far as to opine that trade measures that jeopardize the multilateral trading system are inherently impermissible under Article XX of the GATT 1994.¹²⁴ Yet, in contrast to this reasoning, the WTO's Preamble says that trade must be expanded with "the objective of sustainable development, seeking both to protect and preserve the environment."¹²⁵ This language necessarily suggests a compromise between trade and the environment. However, Shrimp-Turtle treated the Preamble as mere pretense and refused to try to balance the benefits of liberalizing trade against the harms to the environment.¹²⁶

Section 609 required the U.S. Secretary of State to initiate negotiations for the development of agreements for the protection of sea turtles.¹²⁷ It also provided that shrimp harvested with technology that might harm sea turtles protected under U.S. law cannot be imported into the U.S., unless the harvesting country has a regulatory program, comparable to the U.S., governing the incidental taking of such sea turtles.¹²⁸ A regulatory program must include a requirement that shrimp harvesters use turtle excluder devices (TEDs), where there is a likelihood of intercepting sea turtles.¹²⁹

122. *Id.*

123. Shrimp-Turtle, *supra* note 4, at para. 7.60.

124. Shrimp-Turtle, *supra* note 4, at para. 7.16.

125. Preamble to the WTO Agreement, *supra* note 7.

126. See Tebo, *supra* note 9 (describing the events at the November 1999 conference between the IMF, World Bank, and WTO in Seattle).

127. Shrimp-Turtle, *supra* note 4, at VII, para. 3. Enacted in 1989, revised in 1996. This Act was meant to encourage negotiations, in particular, with countries engaged in commercial fishing operations likely to harm sea turtles.

128. *Id.* at VII, para. 3. The President must annually certify to Congress that other countries have similar regulatory program regarding sea turtles as does the U.S. The U.S. theory is that if the regulatory program vis a vis protecting sea turtles is the same, presumably the rate of incidental takings of sea turtles will be the same.

129. *Id.* at VII, para. 5. The TEDs must be comparable in effectiveness to those used by the U.S. The average incidental taking rate will be deemed comparable to that of the U.S. the harvesting country requires the use of TEDs in a

The panel interpreted the chapeau in light of the GATT 1994 and the WTO Agreement as a whole.¹³⁰ The panel found that the "central" object and purpose of the WTO Agreement, of which the GATT is a part, was to eliminate discriminatory treatment in international trade relations and to promote economic development through trade.¹³¹ Accordingly, the panel held that the chapeau of Article XX, interpreted in the light of the object and purpose of the GATT and of the WTO, only allows Members to derogate from the GATT provisions if such derogation does not undermine the multilateral trading system.¹³² The panel concluded that Section 609 was not valid because the measure's efficacy depended on the U.S. forcing other countries to change their conservation policies, which in turn posed a threat to the security and predictability of the multilateral trading system.¹³³

On appeal, the U.S. argued that Shrimp-Turtle erred in applying a novel and unfounded test for determining whether the measure was "unjustifiable discrimination" under the chapeau.¹³⁴ That test was "whether the measure on its own undermines the WTO multilateral trading system, [and] also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system."¹³⁵ The U.S. contended that to reduce chapeau analysis to excluding measures which resulted in "reduced market access" or "discriminatory treatment" would turn the analysis into a mere tautology, erasing the exception under Article XX.¹³⁶

The Shrimp-Turtle AB agreed with the U.S. It found that the panel failed to examine the plain language meaning of the chapeau, which was concerned with the "manner of applica-

manner comparable to that of the U.S. program. Turtles get caught in the devices used to catch shrimp, and subsequently they die. Thus, the TEDs help save the lives of sea turtles.

130. *Id.* at VII, para. 35.

131. *Id.* at VII, para. 42.

132. *Id.* at VII, para. 44.

133. Shrimp-Turtle, *supra* note 4, at VII para. 44.

134. Shrimp-Turtle AB, *supra* note 4, at I, para. 1.

135. *Id.* at para. 7.44.

136. *Id.* at I, para. 15. *See also id.* at I, para. 16 ("it is legal error to jump from the observation that the GATT is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules.").

tion.” Instead, it focused on the measure’s “design.”¹³⁷ The Shrimp-Turtle AB noted that the report also erred in looking to the object and purpose of the GATT 1994 and the WTO Agreement instead of just the chapeau.¹³⁸ Last, the Shrimp-Turtle AB chastised the panel for analyzing the U.S. measure under the chapeau before it analyzed the measure under the actual exception.¹³⁹ This method of interpretation was inapposite to the established method of analyzing the exceptions first, then the chapeau.¹⁴⁰ In order for a measure to fail under the chapeau, it must be arbitrarily or unjustifiably discriminatory, not merely inconsistent with one of the substantive obligation so the GATT.¹⁴¹

The Shrimp-Turtle AB’s greatest accomplishment was its inauguration of the balancing approach which accounts for the environmentally-conscious negotiating history of the WTO’s Preamble and its importance in dispute resolution.¹⁴² The AB stated: “this preambular language reflects the intentions of negotiators of the WTO Agreement, [so] we believe it must add color, texture and shading to our interpretation of the . . . the GATT.”¹⁴³ This consideration ushered in the new “balancing

137. *Id.* at VI, para. 115. The AB said, “[f]or instance, the panel stressed that it was addressing ‘a particular situation where a Member has taken unilateral measures which, by their nature, could put the multilateral trading system at risk.’”

138. *Id.* at VI, para. 116 (discussing that in mistakenly looking to the object and purpose of the GATT/WTO Agreement as a whole, which possess the very broad purpose of maintaining the multilateral trading system, the panel developed an overly broad interpretation of the chapeau—which, arguably no Article XX exception could overcome).

139. *Id.* at VI, para. 117.

140. Shrimp-Turtle AB, *supra* note 4, at VI, para. 118-119.

The analysis is two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX. The sequence of steps indication above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.

Id.

141. *Id.* at VI, para. 150. *See id.*, n. 138 (“In United States-Gasoline, we stated: ‘The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.’”).

142. *Id.* at VI, para. 152.

143. *Id.* at VI, para. 153.

approach."¹⁴⁴

[W]e consider that [the chapeau] embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . and the substantive rights of the other Members under the GATT 1994. Exercise by one Member of its right to invoke an exception . . . if abused or misused, will, to that extent, erode or render naught the substantive treaty rights . . . of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests they embodied, the right to invoke one of those exceptions is not to be rendered illusory . . . thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.¹⁴⁵ (Emphasis in original.)

Based on this new balancing approach, the inquiry under the chapeau is now to locate the equilibrium between the two interests, which must be done on a case-by-case, fact-intensive basis.¹⁴⁶

However, the measure did not survive the chapeau analysis for three reasons. First, the U.S. impermissibly imposed a "single, rigid and unbending requirement" that countries applying for certification under Section 609 adopt a comprehensive regulatory program that is essentially the same as the U.S. program, without inquiring into the appropriateness of the program for the conditions prevailing in the exporting countries. The AB stated its obligation to assess whether the "application" of a measure may be characterized as "amounting to an abuse or misuse of an exception of Article XX," either in its effect or intentionally on the measure's face.¹⁴⁷ Because

144. McLaughlin, *supra* note 18.

145. Shrimp-Turtle AB, *supra* note 4, at VI, para. 156.

146. *Id.* at VI, para. 159. The AB said, "[t]he task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating the marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions." *Id.* The AB further stated that this line of equilibrium is "not fixed and unchanging [but] . . . moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ." *Id.*

147. *Id.* at VI, para. 160 (explaining that the standards of the chapeau include

Section 609 conditioned trade upon non-U.S. Members' adoption of what would essentially be a sea-turtle conservation policy identical to U.S. policy and not merely comparable, allowing no flexibility, the AB found that the measure's application has the effect of unjustifiable discrimination.¹⁴⁸ The AB further remarked that in international trade relations, it is unacceptable for one Member to condition trade relations upon other Members adopting essentially the same comprehensive regulatory program, without taking into consideration different conditions which may occur in the territories of those other Members.¹⁴⁹

Second, the U.S.' failure to negotiate with other Members with the objective of concluding agreements for the protection and conservation of sea turtles also proved decisive.¹⁵⁰ The AB reasoned that since the U.S. has signed the Inter-American Convention, which provides that each party shall take "appropriate and necessary measures" for the protection of sea turtles and that parties shall act in accordance with the WTO, the U.S. thereby acknowledged that consensual and multilateral procedures are feasible. Therefore, the AB concluded that the Convention was a "convincing demonstration" that an alternative course of action was "reasonably open" to the U.S. for securing the legitimate policy goal of its measure.¹⁵¹ The AB believed that since the U.S. negotiated seriously with some, but not other Members (including the appellees: India, Pakistan, and Thailand) the measure was "plainly discriminatory" and "unjustifiable."¹⁵² The AB seemed to establish a *per se* rule against unilateral trade measures without first attempting to negotiate a solution,¹⁵³ requiring a Member to engage

substantive and procedural requirements).

148. *Id.* at VI, para. 161. *See also id.* at paras. 161-162 (explaining that the application is 'unjustified discrimination' because the rules under Section 609 establishes a rigid and unbending standard by which the U.S. determines certification of other countries). Furthermore, other policies and measures that an exporting country may have adopted for the protection and conservation of sea turtle are not taken into account, by the administrators making the comparability determination. *See id.*

149. *Id.* at V, para. 164.

150. *Id.* at V, para. 166.

151. Shrimp-Turtle AB, *supra* note 4, at V, para. 169-171. The signatories to the Inter-American Conferences were Brazil, Costa Rica, Mexico, Nicaragua, the U.S. and Venezuela.

152. *Id.* at V, para. 172.

153. The AB emphasized that the unilateral character of the application of

in "serious, across-the-board negotiations" before imposing trade regulations.¹⁵⁴ This is both unfair and unwise as negotiations can drag on for a long time while the animal life in question becomes irreparably damaged and the species dwindle toward extinction, harming biodiversity.¹⁵⁵ Indeed, extinction is real danger for sea-turtles, which are on the endangered species list.¹⁵⁶ Moreover, the AB failed to provide any guidance regarding what constitutes "serious, across-the-board negotiations."¹⁵⁷

Third, the AB found that Section 609 also constituted "arbitrary discrimination" for the same reasons that it constituted "unjustifiable discrimination,"¹⁵⁸ and because Section 609's certification process was neither transparent nor predictable. The U.S. system lacked due process because an applicant country could neither be heard nor respond to the findings of U.S. officials by filing an appeal. Also, there was no formal, reasoned decision why certification would be denied.¹⁵⁹ Thus, although this new balancing approach is a groundbreaking advance toward allowing Article XX exceptions, the Shrimp-Turtle AB did relatively little to lower the WTO/GATT's fairly high bar of scrutiny of domestic environmental and health legislation.

III. THE ASBESTOS PANEL REPORT

A. *Facts*

On December 24, 1996, the Prime Minister of France banned asbestos by Decree No. 96-1133 (Decree),¹⁶⁰ acting

Section 609—that the details of the policies are dictated by the U.S. Department of State without the participation of other Members and certification is decided by the U.S. alone—"heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability." *Id.*

154. Shrimp-Turtle AB, *supra* note 4, at V, para. 173.

155. See Discussion *infra* Part B.1, at 18-19.

156. See Shrimp-Turtle AB, *supra* note 4, at I, para. 25.

157. McLaughlin, *supra* note 18, at 888.

158. Shrimp-Turtle AB, *supra* note 4, at V, para. 177.

159. *Id.* at V, paras. 180-81.

160. Asbestos Report, *supra* note 2, at II, paras. 2.1-2.2 (discussing asbestos as a "fibrous mineral of hydrated silicates" which can be either amphiboles or serpentine. Chrysotile or white asbestos falls within the latter group.). Asbestos is exploited for industrial and commercial purposes because their special qualities—resistance to very high heat and to different types of chemicals—have allowed them to be used for many uses, including the manufacture of industrial and con-

pursuant to the domestic Labor Code and the Consumer Code.¹⁶¹ The relevant provisions of the Decree are Article 1:I and 1:II:

I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.¹⁶²

This Decree is designed to protect against health hazards identified in a study by France's National Institute for Health and Medical Research (INSERM).¹⁶³ The study concluded that chrysotile asbestos is a carcinogenic which poses a health threat to the general public.¹⁶⁴ Before the ban, France annually imported 20,000 to 40,000 tons of white asbestos and products containing it.¹⁶⁵ Canada is the second largest producer and the world's leading exporter of white asbestos, which is used in underground pipes, shingles and friction products, such as brake linings, disc brakes and clutch pads. In 1995, Canada exported 30,000 metric tons of asbestos to France, its biggest European customer.¹⁶⁶ The EU stated that approximately 2,000 people in France die each year from cancer caused by

sumer products and in the building industry. *Id.*

161. *Id.* at VIII, para. 8.1. *See also id.* at 395 n. 1 (describing "asbestos" as all varieties of asbestos without distinction, though the only asbestos referred to by Canada is chrysotile asbestos.) The Consumer Code can be found at OFFICIAL JOURNAL OF THE FRENCH REPUBLIC of 26 December 1996.

162. *Id.* at VIII, para. 8.1. The full text of the Decree is attached to the report as Annex I. The other Articles mentioned in the report involve limited exceptions on a temporary basis, from the ban, under certain circumstances involving certain existing materials where no substitute exists. The Decree entered into force on January 1, 1997.

163. *Id.* at III, para. 3.11.

164. *Id.*

165. *Id.* at III, para. 3.8.

166. Pruzin, *supra* note 3.

asbestos exposure.¹⁶⁷

Canada initiated the dispute concerning the Decree with the European Communities (EC),¹⁶⁸ on May 28, 1998, by requesting consultations with the EC pursuant to Article XXII of the GATT 1994.¹⁶⁹ Since the consultations failed to resolve the dispute, Canada requested the DSB to establish a panel to examine the French statute.¹⁷⁰ Canada claimed that the Decree was inconsistent with Articles III and XI of the GATT, among other provisions.¹⁷¹ On November 28, 1998, the DSB established a panel.¹⁷² The panel submitted its final report to the parties on July 25, 2000, and distributed it publicly on September 18, 2000.¹⁷³

B. Arguments of the Parties

Canada made four arguments regarding the safety of white asbestos. First, Canada argued that chrysotile asbestos should be allowed because it is less dangerous than amphibole asbestos, which is the most dangerous form of asbestos.¹⁷⁴ Second, Canada contended chrysotile fibres can be used without incurring any detectable risk, because these fibres are encapsulated in a modern, inert matrix.¹⁷⁵ Third, Canada argued that the adoption of effective methods for reducing dust creation and controlled use are sufficient health-protection

167. *Id.*

168. The EC is the body with exclusive jurisdiction in international trade matter for Member States, of which France is a Member.

169. Asbestos Report, *supra* note 2.

170. *Id.* at I, para. 1.1-1.2. The date was October 8, 1998.

171. *Id.* at I, para. 1.2. Canada also claimed the Decree was inconsistent with Article XXIII:1(b) of the GATT, because it nullified or impaired one or several advantages accruing to Canada directly or indirectly under the WTO Agreement or impeded the attainment of an objective of the Agreement. As well, Canada claimed that the Decree conflicted with Articles 2 and 5 of the Sanitary Phytosanitary Agreement (SPS), and Article 2 of the Technical Barriers to Trade Agreement (TBT).

172. *Id.* at I, para. 1.3.

173. *Id.* at VII, para. 7.1. *See also id.* at I, para. 1.7 (explaining that the panel was unable to present its report within the six-month period provided in Article 12.8 of the Understanding as more time was needed to complete its report). *See also* the Understanding, *supra* note 33 (pursuant to the Procedures for the Circulation and De-restriction of WTO Documents, the report was made public).

174. Asbestos Report, *supra* note 2, at III, para. 3.9.

175. *Id.* at III, para. 3.9.

guarantees.¹⁷⁶ Fourth, Canada contended that France could control the use of white asbestos to minimize the health risk in three cases requiring particular vigilance: (1) the presence and elimination of old asbestos products in buildings; (2) the demolition of buildings containing significant amounts of asbestos; and (3) the elimination of asbestos waste.¹⁷⁷ For example, France could require the use of special tools to cut asbestos-filled products that nearly eliminate emissions, such as low-speed saws with water injection and masks for the operators, to guarantee safety.¹⁷⁸ Also, Canada accused the French Government of using the ban to protect its domestic manufacturers of substitute products, which INSERM admits have unknown human health risks, and to assuage public opinion and anti-asbestos activists.¹⁷⁹

The EC countered with four arguments. First, the EC contended that although Canada correctly stated that amphiboles asbestos is more hazardous than chrysotile asbestos in contracting mesothelioma, experts contend that the two types are equally likely to cause lung cancer.¹⁸⁰ Second, the EC emphasized that most of the substitutes for asbestos have been used regularly without any detectable risk.¹⁸¹ Third, countering Canada's charge of protectionism, the EC pointed out that France largely imports the substitute products from other countries.¹⁸² Fourth, regarding Canada's suggestion that controlled use could be a remedy, the EC maintained that controlled use does not account for the regular servicing and maintenance work carried out by people who may be unaware of whether the material on which they are working contains asbestos.¹⁸³ "Para-occupational" and do-it-yourself (DIY) enthusiasts have an extremely high risk of exposure.¹⁸⁴ Additionally, the EC points to other countries that have banned the

176. *Id.* at III, para. 3.9.

177. *Id.* at III, para. 3.55.

178. *Id.* at III, para. 3.56.

179. *Id.* at III, paras. 3.10-3.11

180. Asbestos Report, *supra* note 2, at III, para. 3.18.

181. *Id.* at III, para. 3.18.

182. *Id.* at III, para. 3.19.

183. *Id.* at III, para. 3.19.

184. *Id.* at III, para. 3.59, 3.65. Para-occupational users would be those in building, metalworking and shipbuilding, where asbestos products are used but not the asbestos itself and domestic use would be the general population when engaged in "do-it-yourself" activities.

use of chrysotile asbestos as proof that its act is not an irrational one arising out of a response to public pressure.¹⁸⁵ These countries include, among others: Iceland, Norway, Switzerland, the Netherlands, Finland, Italy, Germany, Belgium, Sweden, Austria, and the Czech Republic.¹⁸⁶

The parties also made several legal arguments regarding the applicability of Article XX(b). The EC maintained that because asbestos is a proven hazard to human health, the Decree is the only way to halt the spread of risk and reduce deaths among the French population.¹⁸⁷ The EC argued that so-called "safe" use is unable to halt the spread of risks from exposure to asbestos in production and processing, even though the number of people involved is relatively small and easy to manage. Also, "safe" use is completely ineffective in cases of occasional exposure to asbestos.¹⁸⁸ The EC explained that there is no other way to protect the general population of DIY individuals who are unaware of the risks.¹⁸⁹

Canada asserted that the current uses of chrysotile in high-density, non-friable¹⁹⁰ products do not constitute a detectable risk to human health, and that the only detectable risk is from amphiboles and friable materials which are associated with past uses of asbestos. Canada further contended that the EC incorrectly cited the risk of building maintenance workers (such as, electricians, plumbers, sheet metal workers and boiler-makers) because their risk is from friable materials that often contain amphiboles of high pathogenic potential.¹⁹¹ Also, Canada claimed that the EC exaggerated the risk to DIY enthusiasts, because these exposures would usually be to friable materials containing amphiboles which cannot be eliminated by the Decree.¹⁹² Thus, the Decree is not "necessary" to protect human life or health. However, in the event that the

185. *Id.* at I, paras. 3.31-3.32.

186. Asbestos Report, *supra* note 2, at I, para. 3.32.

187. *Id.* at III, para. 3.477.

188. *Id.* at III, para. 3.485. The principle of "safe" use cannot be applied to the risks affecting a wide range of jobs involving an enormous variety of situations, especially in servicing and maintenance. These workers may only be exposed to asbestos occasionally, but they are subject to exposure peaks that sometimes far exceed the currently accepted dust thresholds.

189. *Id.* at III, para. 3.486.

190. Those materials are easily crumbled, and more fragile.

191. *Id.* at III, para. 3.494.

192. *Id.* at III, para. 3.495.

panel finds chrysotile to be a threat, Canada contended that controlled use is a less-restrictive-alternative, which eliminates the risks just as effectively.¹⁹³

C. Findings of the Panel

After concluding that the Decree violated Article III of the GATT 1994, the “national treatment” principle,¹⁹⁴ the panel applied Article XX(b) of the GATT 1994 to the Decree. The panel first examined whether the measure fell within the scope of Article XX(b), and then considered whether its application satisfied the conditions of the chapeau.¹⁹⁵ Article XX(b) states that the measure must be “necessary to protect human, animal or plant life or health.”¹⁹⁶ The panel explained that in order for the Decree to fall under Article XX(b), it had to be designed to “protect” human life or health and be “necessary” to fulfil the policy objective.¹⁹⁷ The threshold issue was whether chrysotile asbestos posed a risk to human life or health, because if they did not, there would be nothing to “protect.”¹⁹⁸ The panel stated that the EC must show the level of protection France wished to achieve. Last, the panel considered the exis-

193. Asbestos Report, *supra* note 2, at III, para. 3.496.

194. *Id.* at VIII, para. 8.86. 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.

Id. See also *id.* at VII paras. 8.129-8.130 (allowing the risk of a product for human or animal health to be a factor of comparison for “like products” within the meaning of Article III would render Article XX(b) superfluous). Moreover, a Member could thus avoid the “necessary” test in Article XX(b) and the further test in the chapeau, thus circumventing the built-in protections against protectionism and leaving the WTO vulnerable. But see Daniel Pruzin & Peter Menyasz, *Environmental Groups Criticize WTO Ruling on Asbestos Ban*, BNA INT’L TRADE DAILY, Sept. 20, 2000, <http://www.lexis.com>. Three environmental groups criticize the panel’s finding as “setting dangerous precedent,” because the panel’s finding that the Canadian chrysotile-fibre products and less dangerous substitutes like cellulose, glass fibers, and an asbestos-cement substitute were “like” products under Article III:4 of the GATT may prevent governments from distinguishing between toxic and non-toxic products. *Id.* For an interesting criticism of the panel’s interpretation of “like products,” see HARMONIZATION ALERT, *supra* note 25.

195. Asbestos Report, *supra* note 2, at VIII, para. 8.167.

196. GATT, *supra* note 5.

197. Asbestos Report, *supra* note 2, at VIII, para. 8.167.

198. *Id.* at VIII, para. 8.170.

tence of other measures consistent or less inconsistent with the GATT which still facilitate the Decree's objective.¹⁹⁹ On the facts of this case, since the parties disputed the existence and extent of the health problem, the panel had to rule on the extent of the health problem.²⁰⁰ The panel stated that if it concluded that the health hazard was less than the EC alleged, "less vigorous" measures may have been justified.²⁰¹

To conduct its inquiry, the panel had to make a pragmatic assessment of the scientific situation and the measures available. This assessment is similar to the decision that French lawmakers had to make when adopting the health policy.²⁰² Accordingly, while the panel did not articulate any specific standard of review for local determination on health issues, the panel was fairly deferential to the local French authorities. The panel held that, based on the long-time international acknowledgment of the carcinogenicity of chrysotile fibres and the confirmation by the experts consulted in the matter, the handling of chrysotile-cement products constituted a risk to human health.²⁰³ The carcinogenicity was confirmed by the experts consulted by the panel,²⁰⁴ and the types of cancer concerned had a mortality rate of close to 100%.²⁰⁵ Accordingly, a decision maker responsible for public health measures "might reasonably find" that chrysotile-cement products posed risks.²⁰⁶ Therefore, the panel concluded that the Decree fell within the range of policies contemplated by Article XX(b).

To determine whether the Decree was "necessary," the panel applied the "least-trade-restrictive-alternative" definition

199. *Id.* at VIII, para. 8.179.

200. *Id.* at VIII, paras. 8.173, 8.176.

201. *Id.*

202. *Id.* at VIII, para. 8.183 (*citing* the Reformulated Gasoline Report, para. 6.20). *See also id.* at paras. 8.181-8.182 (explaining panel's role as not to settle a scientific debate between experts, but rather to determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures are in fact necessary in relation to the objectives pursued). Pursuant to Article 13.1 of the Understanding, the Asbestos Panel consulted scientific experts.

203. Asbestos Report, *supra* note 2, at VIII, at paras. 8.188-8.193. Both the World Health Organization and the International Agency for Research on Cancer, among other international bodies, have long recognized the carcinogenicity of asbestos. *Id.* at VIII, at para. 8.188, n.135.

204. *Id.* at VIII, para. 8.188.

205. *Id.* at VIII, para. 8.188.

206. *Id.* at VIII, para. 8.193.

of “necessary” with a new “sufficiently effective” element.²⁰⁷ The panel determined that controlled use was not a “reasonable alternative” to the Decree as it was not “sufficiently effective” in light of France’s health policy objectives.²⁰⁸ Although some countries, like the U.S. and Canada, utilized controlled use, the experts demonstrated that its efficacy remains elusive. Moreover, although controlled use could be applied in mining and manufacturing, it is more difficult to utilize the strategy in the building sector,²⁰⁹ not to mention other extremely varied circumstances of use like the DIY enthusiasts.²¹⁰ On this basis, the panel concluded that in view of the “difficulties of application,” an official making public health policy might “reasonably” consider that “controlled use” did not provide protection that was adequate in relation to the policy objectives.²¹¹ Furthermore, the panel stated that the continued marketing of products containing chrysotile asbestos would multiply the likelihood that workers could be exposed to concentrations in asbestos linked to pathologies in humans. Therefore, even if exposure rates are low, the multiplication of sources of exposure may lead to concentrations already found to have caused the disease.²¹²

The panel additionally found Canada’s claim, that the Decree is not necessary because the substitute products are of unknown risk, to be without merit.²¹³ The panel stated that the World Health Organization (WHO) as well as the experts consulted by the panel confirmed that the substitute fibres did not present the same risk to health as chrysotile. Moreover, the panel reasoned that it did not have to wait to use the substitute fibres until a degree of certainty equivalent to that which exists with respect to chrysotile had been established as that would result in “preventing any possibility of legislating

207. *Id.* at VIII, para. 8.208.

208. *Id.* at VIII, paras. 8.217, 8.222.

209. See Asbestos Report, *supra* note 2, at VIII, para. 8.213 (reasoning that because of the mobility of building sector workers and their sometimes inadequate training, as well as the large number of sites and therefore of people liable to exposure, it is difficult to impose sophisticated occupational safety practices on this sector).

210. *Id.* at VIII, paras. 8.207, 8.211, 8.214.

211. *Id.* at VIII, para. 8.209.

212. *Id.* at VIII, para. 8.216.

213. *Id.* at VIII, paras. 8.218-8.221.

in the field of public health."²¹⁴

As a matter of first impression, the panel defined "reasonably necessary" as what is "legitimate" in terms of the "economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies." In linking the "reasonably necessary" standard to the economic and administrative capabilities of the defending Member, the panel emphatically and repeatedly stressed that the standard is a "reasonable" one and that the "least-trade-restrictive-alternative" standard should be read accordingly.²¹⁵ The panel found that as a developed country, France was able to "deploy administrative resources proportionate to its public health objective and to be prepared to incur the necessary expenditure"²¹⁶ so as to comport with its positive obligations under the GATT. The panel reached this conclusion because France possessed the advanced labor legislation and the specialized administrative services to deploy administrative resources proportionate to its public health objectives.²¹⁷ This means that France, because it is a developed and prosperous nation, could not claim that another, "less-trade-restrictive alternative" that was similar in effectiveness was not feasible since France with its advanced labor legislation and specialized administrative services could afford to employ that appropriate funds.

Next, the panel applied the measure to the chapeau of Article XX(b). The chapeau states that so long as measures in Article XX are not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a

214. *Id.* at VIII, para. 8.221.

215. See Asbestos Report, *supra* note 2, at VIII, para. 8.207:

A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Articles XX(d) if an alternative measure *which it could reasonably be expected to employ* and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provision *is not reasonably available*, a contracting party is bound to use, *among the measures reasonably available to it*, that which entails the least degree of inconsistency with other GATT provisions. [Emphasis in original.]

Id.

216. *Id.* at VIII, para. 8.207.

217. *Id.* at VIII, para. 8.207.

disguised restriction on international trade" they comport with the GATT.²¹⁸ The panel stated that the determination into "arbitrary or unjustifiable discrimination" could not logically refer to the same standard by which a violation of a substantive rule had been determined to have occurred, which here would be Article III.²¹⁹ Rather, it referred to whether all suppliers of asbestos, whether domestic or foreign, are treated similarly.²²⁰ The panel held that Canada failed to rebut the presumption that the Decree does not discriminate under the chapeau established by the *prima facie* case made by the EC.²²¹ The panel noted that despite the neutral language of the Decree that does not differentiate asbestos on the basis of origin, if France treated Canadian asbestos less favorably than imports from other countries, the chapeau would be violated under Article 3:III of the Decree.²²² Article 3:III provides in relevant part, in conjunction with Article 2:I-II, that the Ministers for Labor, Consumption, Industry and Agriculture can use their discretion to discriminate against an operator qualifying for an exception to the ban who imports chrysotile fibres from Canada.²²³ However, since Canada had not argued this, and since this had not been the case, the panel did not consider this contention.²²⁴

The panel also held that the Decree did not constitute a "disguised restriction on international trade."²²⁵ After noting that the actual scope of this phrase had not been clearly defined, the panel went on to conclude that since the Decree did not amount to "arbitrary and unjustifiable discrimination," neither did it amount to a "disguised restriction."²²⁶ The panel also focused on the word "disguised" to conclude that "a restriction which formally meets the requirement of Article XX(b) will constitute an abuse if such compliance is in fact only

218. GATT, *supra* note 5.

219. Asbestos Report, *supra* note 2, at VIII, para. 8.227.

220. *Id.* at VIII, para. 8.227.

221. *Id.* at VIII, paras. 8.228-8.229.

222. *Id.* at VIII, para. 8.228.

223. *Id.* at VIII, para 8.1.

224. *Id.* at VIII, para. 8.1.

225. Asbestos Report, *supra* note 2, at VIII, para. 8.231.

226. *Id.* at VIII, paras. 8.235-8.237. The panel based its finding on the Reformulated Gasoline Appellate Report which stated that the former inquiry can be taken into account in considering the latter.

a disguise to conceal the pursuit of trade restrictive objectives."²²⁷ Using the standard in the Japan-Alcoholic Beverages Appellate Report,²²⁸ the panel reasoned that since the aim of a measure may be difficult to divine, protectionism can most often be discerned from the measure's "design, architecture and revealing structure."²²⁹ However, the panel found nothing offensive in the Decree's design, architecture and revealing structure.²³⁰ The panel ended its analysis by acknowledging the possibility that measures such as those in the Decree might have the "effect" of favoring the domestic substitutes, but that this cannot justify the conclusion that the measure has a protectionist aim.²³¹ Thus, the panel finally held that the Decree satisfied the conditions of Article XX(b) and the chapeau.

In light of the findings of the Asbestos Panel, the state of current GATT/WTO jurisprudence on Article XX(b) of the GATT 1994 seems to be as follows: (1) State health officials will enjoy some deference under a "reasonable" standard in their decisions on the existence and extent of health problems; (2) any proposed "least-restrictive-trade-alternative" must be "sufficiently effective" as the measure at issue to be considered a "reasonable alternative" to the measure at issue; (3) what is a "reasonable alternative" will also be determined in terms of the economic and administrative situation facing the particular Member; and (4) a State can employ the use of substitute products that are less dangerous than the banned product, even if the risks of that substitute are less well-known than those of the banned product. All four aspects mentioned are novel considerations in an Article XX(b) analysis. Of course, as with many cases in the U.S. domestic judicial system, we often have to wait until subsequent cases cite to and utilize prior decided cases to find out what the cases in fact stand for.

227. *Id.* at VIII, para. 8.236.

228. WTO Appellate Body Report of Japan—Taxes on Alcoholic Beverages, WT/DS8; DS10; DS11/AP/R (1996).

229. Asbestos Report, *supra* note 2, at VIII, para. 8.236.

230. *Id.* at VIII, paras. 8.238-8.239.

231. *Id.* at VIII, para. 8.239.

IV. ANALYSIS AND IMPLICATIONS FOR THE FUTURE

Environmentalists and public health observers should be optimistic after the Asbestos Report. It is the first environmental or health dispute where a measure taken under Article XX(b) was found "necessary." It is also the first environmental or health dispute under the GATT to survive the chapeau's "arbitrary or unjustifiable discrimination" standard. The panel implicitly acknowledged the WTO Preamble's "sustainable development" principle based on the "Liberalism Model" which values human health and environmental concerns as equal to free trade.

However, environmentalists and public health observers should be cautious in their enthusiasm as it is not clear that the result here will control future Article XX(b) disputes. The Asbestos Report leaves three questions unanswered which could compromise the "greening" of the WTO. First, because the dangers of asbestos are so well documented, it is not clear whether the benchmark for proving a measure is "necessary" is now unreachably high or even whether there is a specific threshold. Second, because the asbestos industry has a low trade value,²³² it is not clear if the panel's conclusion would have been different if the industry had a high trade value. Third, it is unclear whether the panel was driven by moral or equitable concerns under the "Liberalism Model,"²³³ because the issue posed grave danger to human health. Future panels may not be so forgiving if the "health" or "life" at stake is "animal" or if the purpose is environment conservation.

Optimistically, the Asbestos Report interprets "necessary" more pragmatically and flexibly than in past disputes. Also, the report seems to grant considerable deference to domestic law makers in choosing health-inspired trade regulations. In determining whether the asbestos ban was necessary, the panel concluded that a law maker could "reasonably" conclude that "controlled use," a "least-trade-restrictive-alternative," was an inadequate substitute.²³⁴ Additionally, the panel paid def-

232. See Discussion *infra* I (especially notes 24-27).

233. See Discussion *infra* Part II.A., at 12.

234. Asbestos Report, *supra* note 2, at VIII, para. 8.209; but see John O. McGinnis and Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 HARV. L. REV. 511, 596 (Dec. 2000) (arguing that, even though the Asbestos Panel's loosening of the "least-trade-restrictive-alternative" requirement is positive,

erence to France's choice of requiring substitute products even when the level of risk associated with those products is not clear, at least when less dangerous than a product like asbestos.²³⁵ This latter development is important in suggesting that when a substitute measure's potential for harm is not completely clear, the panelists will defer to the Member country in light of its needs to carry out health legislation. Such deference is new to GATT/WTO jurisprudence.

In a related point, the panel suggests that the WTO will not use the "least-trade-restrictive" requirement to hamstring poor developing countries into implementing very expensive regulatory programs common in the developed world.²³⁶ By defining "reasonably necessary" in relation to the "economic and administrative realities" of the defending State, the panel implicitly seems to acknowledge that the "least-trade-restrictive-alternative" must be a more relative and flexible determination vis a vis poorer WTO Members. However, the "reasonably necessary" standard seems to be a double-edged sword for developing countries. In ruling that France must "deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditures,"²³⁷ the panel seems to suggest that Members, including developing countries, will be expected to devote as much resources as they can relative to their wealth to the structuring of a WTO/GATT friendly domestic policy.²³⁸ If this is the case, developing country Members will not be able to decide for themselves what proportion of their resources to spend on domestic environmental and health policies.

Most groundbreaking, is the panel's interpretation of the "least-trade-restrictive-alternative" as an alternative which must be "sufficiently effective" in light of the domestic health policy. This new analysis is quite pragmatic, accounting for contingencies and the realistic improbability of implementing alternatives, e.g. controlled use, to the necessary degree to accomplish the Member's legislative goal, e.g., zero asbestos

the WTO should go even further to give even more deference to national regulatory agencies; otherwise panelists would have the ability to substitute their own views for the views of the national authorities).

235. Asbestos Report, *supra* note 2, at VIII, para. 8.221.

236. McGinnis & Movesian, *supra* note 234, at 595.

237. Asbestos Panel, *supra* note 2, at VIII, para. 8.207.

238. McGinnis & Movesian, *supra* note 234, at 595.

exposure and risk. Additionally, this analysis cedes to Members more domestic autonomy in how to structure measures to effect environmental and health goals.

Prior to the Asbestos dispute, many scholars criticized the "least-trade-restrictive alternative" standard in the "necessity" analysis.²³⁹ These scholars claimed, and the author agrees, that the prior interpretation of "necessary" was problematic. The interpretation was problematic because it failed to require proposed alternative measures to be of substantially equivalent effectiveness in achieving the particular environmental or health goal, instead of being markedly inferior.²⁴⁰ Unlike past reports, the Asbestos Report seems to have infused "sufficiently effective" or perhaps, arguably, "almost equally effective" into the equation, thus accommodating the notion that alternatives must be almost equally effective in terms of their Article XX(b) goal. If this new "sufficiently effective" standard had been applied in past environmental disputes, the trade restrictions would likely have been allowed to stand.²⁴¹

For instance, in the Tuna-Dolphin and Shrimp-Turtle disputes, where the panels and the AB found that the U.S.'s failure to negotiate rendered the conservation measure "not necessary," this new "sufficiently effective" standard may have changed the outcome. In applying the more forgiving "sufficiently effective" standard, the panel and AB would likely have recognized that the negotiation of international agreements take precious time during which irreparable harm can be done to the dolphin population in general as it contributes to biodiversity and the equilibrium of the environment.²⁴² This reasoning would likely have proved especially persuasive to the panel and AB when applied to the endangered eastern spinner

239. See, e.g., Dailey, *supra* note 9, at 376; McLaughlin, *supra* note 18, at 870-1 (citing Thomas Shoenbaum, *International and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 284-313 (1997)). See also *id.* (citing Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994)).

240. See Dailey, *supra* note 9, at 376; McLaughlin, *supra* note 18, at 870-1 (citing Shoenbaum, *supra* 239, at 284-313).

241. Dailey, *supra* note 9, at 377-78 (arguing that if the "least-trade-restrictive-alternative" were reformed to ensure a "substantially as effective" standard in achieving environmental protection, then the bar would be lowered to allow more measures under Article XX(b), and would have specifically "drastically change[d] the outcome in every one of the environmental cases hears in the GATT thus far).

242. See Discussion *infra* Part II.B, at 18-19.

and coastal spotted dolphins and the endangered sea turtles. Thus, negotiation may have been assessed as not being a "reasonably available" alternative to unilateral action.²⁴³

Nevertheless, the Asbestos Report should not necessarily be hailed as an unequivocal "greening" of the WTO. It is not clear that the result here will control future Article XX(b) disputes for three reasons. First, because the dangers of asbestos are so well-documented,²⁴⁴ it is not clear whether the benchmark for proving a measure is "necessary" is set unreachably high or even whether there is a specific threshold. Medical evidence and statistical data on the deadly health risks of asbestos have been building up for decades, and so the dangers are well documented.²⁴⁵ As one legal expert, Sam Zia Zarifi, said: "In effect, by accepting a ban on asbestos (a product with a fairly low international trade value), the WTO could discourage bans on other products whose hazards are not as well known as asbestos."²⁴⁶

Second, the measure at issue is non-controversial. There is not much at stake in terms of economic efficiency in trade, whereas there is much at stake with regard to the aggregate human welfare. The asbestos industry is a largely a "discredited and dying industry."²⁴⁷ Particularly with this case, the facts show that not much is at stake for Canada in terms of trade value with France since the majority of Canadian asbestos is exported to Asia, Morocco, Tunisia and Algeria.²⁴⁸ The loss of French trade is not crucial to the industry. There are only 2,000 jobs or so at stake.²⁴⁹ It is unclear whether or not the result would be the same in a controversial case where the measure at issue was akin to that in either the Tuna-Dolphin or Shrimp-Turtle disputes, where the measure was trying to save animal life and to conserve the environment but the eco-

243. *Id.* at 378.

244. See Discussion *infra* Part I, at 6 (especially notes 24-27).

245. Laurie Kazan-Allen, *The WTO Speaks: Chrysotile is Bad for You!* BRITISH ASBESTOS NEWSLETTER, Issue 39 (Summer 2000), <http://www.lkaz.demon.co.uk/ban39.htm>.

246. *Id.*

247. *Id.*

248. Kazan-Allen, *supra* note 246.

249. *Id.* However, what is crucial is the possibility that developing nations might adopt similar prohibitions as Asian countries buy 65% of Canadian chrysotile and Morocco, Tunisia and Algeria are also good customers. In these countries, uncontrolled use is the norm.

conomic efficiency at risk was great because the fishing industries have a high trade value.

Last, it is possible that the “normative universal morality of right and wrong” from the “Liberalism Model”²⁵⁰ influenced the panel, whereas this notion has not seemed to affect decisions preceding the Asbestos Report. Specifically, perhaps it was the toxicity of asbestos and its proven, deadly harm to humans that fueled the decision and not legal doctrine. It seems that if the panel had followed prior interpretations of Article XX(b) of the GATT, then the case may have come out differently because the reading of “necessary” was relatively narrow in those past interpretations. Under prior interpretations of those standards, it seems probable that controlled use of asbestos would have been appraised as the “least-trade-restrictive-alternative,” because controlled use would have significantly reduced the harm of asbestos on French citizens, albeit not in total. Although what is “right” or “equitable” is less controversial in the asbestos case as asbestos is a clear killer of humans and the trade value at issue was low, there may not be such an overwhelming consensus regarding environmental causes, or even human health issues where the evidence is less overwhelming.²⁵¹

V. CONCLUSION

Canada has appealed the panel decision to the AB, which is expected to issue its ruling in early March, 2001.²⁵² This author suspects that the AB will affirm the ruling of the panel, perhaps not on the exact same grounds but for the same reasons—namely, the indisputable evidence against the use of asbestos in France. Only in future cases, however, will we

250. Dailey, *supra* note 9.

251. See Winestock, *supra* note 6 (discussing how insignificant the trade loss to Canada is as the asbestos industry in Canada only employs 2,000 or so Quebec residents).

252. Daniel Pruzin, *International Agreements: EU, Chile Announce Deal in Dispute Over Fishing Vessels Catching Swordfish*, BNA INT'L TRADE DAILY, Jan. 29, 2001, <http://www.lexis.com>. The WTO's Appellate Body decided on Dec. 20, 2000 to defer its decision well beyond the allowable 30-day extension the circulation of reports citing “exceptional workload” and further said that the reports will be circulated no later than March 12, 2001. See Ravi Kanth, *Dispute Settlement: WTO Appellate Body Delays Decisions in Asbestos, Steel Dumping Disputes*, BNA INT'L TRADE DAILY, Jan. 9, 2001, <http://www.lexis.com>.

learn if the Asbestos Report will have an impact on environmental and health regulations. One concerned scholar, Sam Zia Zarifi, commented that "the Asbestos dispute . . . potentially constitutes the most significant expansion of the WTO's reach into areas of human health and worker safety once exclusively reserved for sovereign States."²⁵³ Despite this concern for state sovereignty, however, this case seems to be a step in the right direction even though it may not translate to environmental disputes or to health cases which are less egregious or well documented.

Moreover, interestingly, since Canada placed its appeal with the AB, the AB decided on November 23, 2000 to accept "amicus curiae" briefs in the Asbestos appeal.²⁵⁴ The AB first "opened the door" to amicus briefs in the Shrimp-Turtle AB ruling when it found that panels have the discretion to seek, accept, or deny information presented by NGOs as part of the comprehensive nature of their authority, reversing the panel's finding that such submissions were not allowed in the WTO. Until the Asbestos dispute, no procedure has been established for determining when and how such submissions should be made or accepted.²⁵⁵ Nevertheless, despite these progresses in WTO/GATT dispute settlement, the WTO still has a long way

253. Kazan-Allen, *supra* note 245.

254. Daniel Pruzin, *WTO: WTO Appellate Body Under Fire for Move on Acceptance of Amicus Briefs*, BNA INT'L TRADE DAILY, Nov. 27, 2000, <http://www.lexis.com>.

255. Shrimp-Turtle AB, *supra* note 4, at V; Daniel Pruzin, *WTO: WTO Appellate Body Under Fire for Move on Acceptance of Amicus Briefs*, BNA INT'L TRADE DAILY, Nov. 27, 2000, <http://www.lexis.com>. AB chairman Florentino Feliciano said the decision was made "in the interest of fairness and orderly procedure in the conduct of this appeal . . . for the purposes of this appeal only . . . and is not a new working procedure drawn up by the Appellate Body." *Id.* Thus far, 5 NGO briefs have been rejected by the AB without reason. *Id.* For an interesting commentary on the role of NGOs in GATT/WTO dispute resolution, see Weiler, *supra* note 38, at IV:4, 3 (2000) (arguing that opening up dispute resolution to NGOs could skew the system considerably in favor of Western developed countries, especially Northern American, but grants that for lawyers and judges, who wish to guarantee the integrity of a legal process, "the notion of excluding voices affected by one's decision and not hearing arguments by then run counter not only to the ethic of open and public process but to the very principles of natural justice.") See also McGinnis & Movsesian, *supra* note 234, at 571-572 (arguing that the WTO should not allow NGOs a direct role in the dispute settlement process because such groups are sometimes unaccountable even to their own membership and would give special interest groups, including protectionist groups, too great a measure of influence in policy-making).

to go before it can claim to be “greening” itself.

Future panels can ameliorate, although probably not obliterate,²⁵⁶ the trade-versus-environment conflict by relying more heavily on the WTO’s Preamble. Specifically, panels should adhere to the “sustainable development” principle and try to balance the “Liberalism Model” (seeking to lower trade policies to the extent that they do not violate environmental and human welfare domestic social policies) with the “Economic Efficiency Model” (seeking to reduce trade barriers to create wealth which in turn can be used to conserve the environment and improve the lives of the world population.) Furthermore, as Virginia Dailey suggests, future panels should incorporate the “sustainable development” principle, as a rule of customary international law, into the balancing test of Article XX’s chapeau.²⁵⁷ This would accomplish more of a binding obligation on the part of Members not to violate customary international law which is binding even for non-signatories. Moreover, incorporating “sustainable development” into customary international law would place a mandatory obligation on panels and on the AB to decide disputes in harmony with the principle.

In addition to relying more heavily on the “sustainable development” principle in the WTO’s Preamble, future panels should apply the Asbestos Report’s “sufficiently effective” standard stringently. Specifically, panels and the AB should refine this newfound standard so that alternative measures need not be resorted to under the “necessary” interpretation unless they are *almost equally as effective* as the measure at issue. (Emphasis supplied) Only then will measures that are truly “necessary” to effect a particular health or environmental measure be permissible under the GATT 1994, even though they may not be economically efficient.

VI. POSTSCRIPT

On March 12, 2001, the AB affirmed the decision of the Dispute Panel in its report (“Asbestos AB”). In its ruling, the AB seems to answer the question lurking in the Panel’s ruling:

256. See Dillon, *supra* note 1, at 381-82, n. 55 (arguing that the GATT cannot accommodate the goals of free trade and the environment).

257. Daily, *supra* note 9. Of course, this vague term would have to be further and more clearly defined before incorporating it into customary international law.

Whether the Asbestos dispute can be used in future disputes to “green” WTO/GATT jurisprudence, or whether the rationale of the ruling will be limited to its facts due to the unique nature of the health measure at issue. The AB’s logic in this dispute suggests the answer to be the latter contention. Because the AB relies heavily on the unique toxic nature of asbestos and not generally on health and environmental concerns, Asbestos AB almost invites future arbiters to confine its reasoning to its facts.

The issues raised on appeal include: (1) whether the Panel erred in finding that the French Decree violated the “national treatment” principle in Article III:4 of the GATT 1994 due to a misinterpretation and application of “like products” with respect to the Canadian asbestos and the substitute products used in France and (2) whether the Panel erred in finding that the Decree was “necessary to protect human . . . life or health” under Article XX(b).²⁵⁸ Regarding the “like products” issue, the AB overruled the dispute panel’s finding that the French measure violated the “national treatment” principle.²⁵⁹ Instead, the AB found that the Canadian chrysotile asbestos fibres and the asbestos substitute products used in France (polyvinyl alcohol and cellulose and glass fibres), and similarly the Canadian chrysotile-cement products and the substitute product used in France, fibro-cement, were not “like products” under Article III:4.²⁶⁰ The AB reasoned that health risk factors relating to a product, although just one of many considerations, “may” be taken into account in the inquiry.²⁶¹ In this case, the AB ruled that the health risk of asbestos should be part of the inquiry as “carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of

258. WTO Dispute Settlement Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001) at IV, para. 58, http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf [hereinafter Asbestos AB].

259. *Id.* For further discussion of the dispute panel’s finding under Article III:4, see Discussion *infra* Part III.C, and *supra* note 194, at 33.

260. Asbestos AB, *supra* note 258, at VI.D, paras. 125, 131, 148.

261. *Id.* at VI.D, paras. 113-114. “We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibres need be examined under a *separate* criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers’ tastes and habits.” *Id.* (Emphasis in original)

chrysotile asbestos fibres.”²⁶² Moreover, the AB stated that a consideration of health risks under a “like products” analysis would not nullify the need for Article XX(b). The AB reasoned: “The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*.”²⁶³

The AB’s ruling on the scope of a “like products” analysis would seem to make it easier for a ban on a product to survive scrutiny.²⁶⁴ In effect, this ruling gives health legislators two bites at the apple: If a Member cannot knock out a complaint by inserting Article XX(b) considerations into a “like products” analysis, then the Member still has a second defense under Article XX(b). However, the AB’s choice of the word “may” instead of “must” with respect to including considerations of health risks into a “like products” analysis is telling. This subtle yet key distinction in word choice could be seized in future disputes to confine the Asbestos AB’s inclusion of health risk factors to the facts of that unique case where “the scientific evidence of record for th[e] finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organizations, as to be practically overwhelming.”²⁶⁵ Similarly, a concurring member noted that although he or she would in this case accord dispositive weight to the health risk factor under a “like products” analysis due to the “undisputed deadly nature of chrysotile asbestos fibres,” he or she would limit this holding to this particular case.²⁶⁶ This sentiment too implies that the result in this case will not necessarily dictate results in future Article XX(b) disputes.

With respect to the second issue, “necessity” under Article XX(b), the AB disagreed with Canada’s contention that chrysotile asbestos does not pose a significant risk to human life or health, due to the overwhelming scientific evidence.²⁶⁷ Similarly, the AB disagreed with Canada’s contention that the level of protection of health envisioned by the Decree does not

262. *Id.* at VI.D, para. 114.

263. *Id.* at VI.D, para. 115.

264. *Id.* at VI.D, para. 115.

265. Asbestos A.B., *supra* note 258 at VI.E, para. 151.

266. *Id.*, at VI.E, paras. 152-53.

267. *Id.* at VII.B, para. 166.

in fact constitute a halt to the spread of asbestos-related risks, since risks still exist with the substitute products.²⁶⁸ Instead, the AB affirmed that a Member may ban one product and utilize another with less risk, although the exact degree of risk is unknown. The Report states, "it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place."²⁶⁹

Finally, the AB disagreed with Canada's claim that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.²⁷⁰ However, the AB reached this conclusion by slightly different reasoning than the Dispute Panel, which seems to forecast that the Asbestos dispute will come to be an anomaly in WTO/GATT Article XX(b) jurisprudence. Quoting from a recently decided case that addressed the issue of "necessity" under Article XX(d) of the GATT 1994, the AB stated that "one aspect of the 'weighing and balancing process . . . comprehended in the determination of an inquiry into whether a WTO-consistent alternative measure' is reasonably available is the extent to which the alternative measure 'contributes to the realization of the end pursued.'"²⁷¹ Moreover the AB stated, "[t]he more vital or important [the] common interests or values pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends (the "necessity scale")."²⁷² Under this analysis, the AB found that the French value pursued is "both vital and important in the highest degree."²⁷³ Next the AB framed the question as "whether there is an alternative measure that would achieve the *same end* and that is less restrictive of trade than a prohibition."²⁷⁴ The AB answered the question in the negative, stating that there was no alternative that could allow France to achieve its chosen level of health protection by halt-

268. *Id.* at VII.B, para. 165.

269. *Id.* at VII.B, para. 168.

270. *Id.* at VII.B, para. 165.

271. Asbestos AB, *supra* note 258, at VII.B, para. 172 (*quoting* Appellate Body Report, Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R (Jan. 12, 2000) at paras. 162-163, 166).

272. *Id.* at VII.B, para. 172 (*quoting* Appellate Body Report, Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R (Jan. 12, 2000) at paras. 162-163, 166).

273. *Id.* at VII.B, para. 172.

274. *Id.* at VII.B, para. 172. (emphasis added).

ing the spread of asbestos-related health risks.²⁷⁵

Although the AB reached the proper result in the author's view with respect to finding that the Decree was "necessary" and that there was no "less-trade-restrictive-alternative," the AB's "necessity scale" is problematic. Under this scale, the AB states that as the "vitality or importance" of the Member's value in policy rises the difficulty in sustaining a necessity finding correspondingly decreases. But who will make these value judgments as to whether or not a Member's health or environmental policy is "important"? The faceless members of the dispute panel or of the AB? Or the Members creating the legislation? If it is the former, than less universally popular values—like maintaining biodiversity and other pro-environmental policies—may be given short shrift because panelists do not assess those values as being "vital or important common interests or values." If the Dispute Panel and AB in this case were driven by moral or equitable concerns under the "Liberalism Model" because the issue posed grave danger to human health, perhaps they may not be so forgiving if the "health" or "life" at stake is "animal" or if the purpose is environmental conservation. Also, in disputes where the product at issue has a higher trade value than the relatively low value of asbestos, perhaps panelists will perceive the "value" of the health or environmental measure as less important by contrast and therefore make it more difficult for a Member to satisfy the "necessary" standard in Article XX(b).

In addition to the problem of scales and value judgements, there also is a problem with some of the AB's contradictory or, at best, vague language. The AB framed the inquiry of a "reasonable alternative" as not just whether an alternative would be "sufficiently effective" as the Dispute Panel held in the Asbestos Report, but goes even further by framing that question in terms of whether an alternative measure can achieve the *same* end. It is unclear whether the AB is raising the standard from "sufficiently effective" to the "same" level of effectiveness, or if it is only doing so in the context of disputes where the panelists consider the "values" pursued to be "both vital and important." Similarly, the standard the AB borrowed from another case—"the extent to which the alternative mea-

275. *Id.* at VII.B, para. 174.

sure 'contributes to the realization of the end pursued'"—is equally opaque. Moreover, the language seems contradictory to the "same" standard. In any event, although environmentalists and health observers can welcome the result in this case, they should be aware that winning this dispute does not ensure victory in future Article XX(b) disputes since the logic in the Asbestos AB and to a lesser extent the Asbestos Report seems tailored for the unique facts of this dispute.

*Julie H. Paltrowitz**

* The author is a 2nd year student at Brooklyn Law School. She earned her B.A. *magna cum laude* and with Departmental Honors in English from Barnard College of Columbia University in 1996. She thanks Professor Claire Kelly for her guidance and wisdom and her husband Jason for his patience.