EXTRATERRITORIAL APPLICATION OF GATT ARTICLE XX(G): EVALUATING THE GATT/WTO DECISIONS

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The conclusion of the Uruguay Round of trade negotiations and coming into existence of the World Trade Organization (WTO) intensified the debate on trade versus environment. WTO in its fold comprises GATT 1947 (now GATT 1994) with certain modifications. The myth that GATT has no provisions relating to the environment has been slow to die.[1] While it is true that the GATT does not mention the word "environment," the history of the life and health exceptions in trade agreements demonstrates that trade-related environment measures (TREMs) have been in use for more than a century. For example, the Commercial Convention between Egypt and Great Britain of 1889 provided an exception for "prohibition occasioned by the necessity of protecting the safety of persons or of cattle, or of plants useful to agriculture".[2]

Some governments argue that the GATT provisions, in Article XX are flexible enough to allow for the use of trade provisions within Multilateral Environmental Agreement (MEA).[3] The history of Article XX exceptions demonstrates that it was designed to encompass environmental measures.[4] The language of GATT Articles XX(a), (b) and (g) appears broad enough to cover most, if not all, trade-related environmental measures.[5] The Appellate Body in *Shrimp/Turtle* case considered that Article XX(g), "exhaustible natural resources" was crafted more than 50 years ago.[6] It

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1. Kyle E. McSlarrow, *International Trade and Environment : Building a Framework for Conflict Resolution,* 21 ENVIRONMENTAL LAW REPORTS, 1991, 10,589 at 10,595.
2. COMMERCIAL CONVENTION, 1889, Egypt - U.K., Art. II, 172 Consol. T.S. 290-92.
3. TRADE AND ENVIRONMENT : NEWS FROM THE GATT, GATT Doc. TE 004, Nov. 26, 1993 at 3.
4. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX* (hereinafter Charnovitz 1991), 25 JOURNAL OF WORLD TRADE, Oct. 1991 at 55.
5. Ernst-Ulrich Petersmann, *International Trade law and International Environmental law : Prevention and Settlement of International Disputes in GATT*, 27 JOURNAL OF WORLD TRADE, February 1993 at 72.
6. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (12 Oct. 1998) [hereinafter *Shrimp/Turtle Appellate Decision*]; 38 INTERNATIONAL LEGAL MATERIALS, 1999 at para 129.

said that a treaty interpreter should read these provisions in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.[7]

In this regard the controversy is prevailing over the issue of extraterritorial application of measures covered under Article XX. The issue became of concern among environmentalists, after *Tuna/Dolphin* I, where the GATT Panel invalidated extraterritorial application of Article XX(g).[8] Specifically, in the present paper discussion is targeted over the extraterritorial application of a measure by a state on conservation of "exhaustible natural resources" lying outside the jurisdiction of the state imposing measures, when measures are taken in pursuance of some internationally agreed environmental agreements.

The study begins with discussion on issues of extraterritoriality, and notes that *Tuna/Dolphin* I Panel held extraterritoriality of measures inapplicable. Then the feasibility of extraterritorial application of measures in face of concept of sovereignty was examined. The next part discusses the rejection of extraterritorial application of Article XX(g) by the *Tuna/Dolphin* I panel and notes the fallacy of the decision. Subsequently the article notes that *Tuna/Dolphin* II admitted Article XX(g) to have extraterritorial application but rendered it infructuous by applying 'undermining test." Here it is noted that undermining test was held interpretively wrong by the *Shrimp/Turtle Appellate Decision.*

Then the paper takes note of the *Reformulated Gasoline* and *Shrimp/Turtle* Appellate decisions, though these decisions do not determine the question of extraterritorial application of Article XX(g), but hold that United States taking of measures against imported gasoline to conserve clean air at home and measures targeted at conserving turtles lying outside the jurisdiction of the US justified. These decisions testify, by necessary implication, the extraterritorial application of TREMs in certain cases. Lastly, the discussion observes in conclusion, the advantages of extraterritorial application of environmental measures as restraints on trade.

I. EXTRATERRITORIALITY[9]

The basis for almost every externally-directed environmental trade

7. *Ibid.*
8. *United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/R, B.I.S.D. (39th Supp.) 155 (Sept. 3, 1991) (unadopted) [hereinafter Tuna/Dolphin]; 30 INTERNATIONAL LEGAL MATERIALS, 1991 at 1594.
9. Extraterritoriality means outside one's territory; Extrajurisdictionality means outside one's jurisdiction. The meanings of the two are different technically. However the usage of each term in the discussion here, refers the both meanings - the meaning carried by the Article XX(e) - "relating to the products of prison labour".

measure is the assertion that practices of another country or its citizens are causing some kind of harm to the environmental interests of the complaining countries. Terms such as "transborder" or "transboundary" are often employed to describe the idea that an activity of one country has adverse effects on other countries, but the range of impacts covered by these terms is quite broad. The range varies from events with a physical impact on other countries to events that take place entirely within the borders of the target country.

The cases that most clearly entitle an affected state to act are those in which some harmful physicals substance is transmitted across borders into the complaining country and causes traceable damage. The example usually cited is the so-called *Trail Smelter* case involving transboundary emission of toxic sulfur dioxide fumes from a lead and zinc smelter.[10] These are the easy cases. Once the scientific facts are established, the "wrong" in such cases is almost universally acknowledged. Legal liability can be established, and remedies of retorsion and retaliation, including proportional trade retaliation, are taken for granted — so much so that cases involving this sort of direct impact do not occupy very much space in the current trade-and-environment debate.[11]

Now the question of territoriality arises in determining whether the trade measures for environmental purposes, extends to the conservation of exhaustible natural resources when these are lying within the jurisdiction of the state itself or these may be directed for conservation or protection of the thing existing outside or within the jurisdiction of the other states.

The issue of extraterritoriality first arose in *Tuna/Dolphin I* case.[12] In this case Mexico brought an action against the United States for violation of its GATT obligations as a result of the application of the United States' Marine Mammal Protection Act of 1972 ("MMPA"). The MMPA prohibited the importation of tuna or tuna products into the United States that had been harvested by purse-seine nets in the Eastern Tropical Pacific Ocean ("ETP").[13] The MMPA defines the ETP as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west latitude, and the coasts of North, Central and South America.[14]

10. *United States* v. *Canada* (*Trail Smelter* Arbitration), 3 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS, 1941 at 1938.
11. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, 2 FAIR TRADE AND HARMONIZATION, 1996 at 112.
12. *Tuna/Dolphin I*, *supra* n. 8.
13. *Id.*, para 2.1.
14. *Id.*, para 2.3.

The basis for this prohibition was that the schools of tuna in the ETP often swim below herds of dolphins. This means that the use of purse-seine nets[15] to catch tuna necessarily resulted in the incidental killing and injury to dolphins.

In 1990, following protracted litigation, the United States determined that the Mexican tuna fleet had exceeded the statutory limits on dolphin taking and imposed an embargo on imports of Mexican tuna.[16] The Mexican government challenged the embargo.

In *Tuna/Dolphin I* the Panel was doubtful of Article XX to have extraterritorial effects. The Panel recognized that the working of Article XX(b)'s health and safety exception and Article XX(g)'s resource conservation exception were not expressly limited to the protection of jurisdiction of the contracting parties.[17] In light of this ambiguity, and the practice of past panels to interpret the exceptions in Article XX narrowly, the panel ruled that neither Article XX(b) nor (g) permitted the use of measures that extended beyond the jurisdiction of the party taking the action.[18]

The Panel considered the drafting history of Article XX(b) and noted that Article 32 of the New York Draft of the Charter of the International Trade Organization contained an exception based on the same wordings as the present Article XX(b) but with the provision that "corresponding domestic safeguards under similar conditions [must] exist in the importing country."[19] From the deletion of this proviso in the final draft of the exception, the panel concluded that "the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."[20]

It is submitted that the Panel has failed to address the thesis of environmentalists that "Mexican" dolphins are part of ecosystem that transcends all jurisdictions.[21] In defending its decision, the Panel warned that extraterritoriality would undermine the multilateral trading system.[22]

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15. *Id.*, para 2.1.
16. *Id.*, para 2.7.
17. *Id.*, para 5.25.
18. *Id.*, para 5.26.
19.. *Ibid.*
20. *Ibid.*
21. "In reality all dolphins are stateless". Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVIRONMENTAL LAW REPORTS, 1993 at 497.
22. *Tuna Dolphin I, supra* n. 8, para 5.27.

II. Sovereignty Considerations

The obsession against extraterritoriality arises from the concept of sovereignty. The principle of the sovereign equality of states is the cornerstone of international law. From this doctrine flows a sovereign state's exclusive jurisdiction over its territory, resources and the people who live there.[23] Also flowing from this doctrine is the duty of non-intervention in matters that fall under the 'exclusive jurisdiction of other states'.[24]

From the perspective of encouraging unfettered economic development, it is tempting to view the principle of sovereignty as established a state's absolute right to determine the domestic level of environmental protection or degradation it deems appropriate within its territory. Such an interpretation would certainly be in accord with the antecedents of the sovereignty doctrine. But conflicts related to production externalities, with spillover effect beyond national borders, may arise when distinct sovereignties have different interests in an environmental problem.[25]

Therefore, some authors have noted that such an 'absolutist' view of the sovereignty doctrine is inconsistent with an international legal system 'based on the principle of reciprocal rights and obligations'.[26] Although this point goes beyond the *Tuna/Dolphin I* Panel's terms of reference, it should be noted that the sovereign rights of states over resources within their jurisdiction is not absolute.[27] According to the Stockholm Declaration on the Human Environment, nations have a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."[28] The tension between sovereign rights and international responsibilities underlies

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23. Ian Brownlie, Principles of Public International Law (1990) at 287.
24. *Id.*, at 287-289.
25. OECD, Annex : OECD Conceptual Framework for PPM Measures in OECD, Trade and Environment : Process and Production Methods, OECD Paris, 1994, 149-62 at 156.
26. "For if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law" — Brierly, The Law of Nations (1963) at 7-16.
27. Under Law of the Sea Convention of 1982, "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." 21 International Legal Materials, 1982, 1261 at 1308.
28. *Stockholm Declaration*, Principle 21. Moreover, Recommendation 103(a) of the Stockholm Declaration states that "no country should solve or disregard its environmental problems at the expense of other countries." 11 International Legal Materials, 1972 at 1462.

many of the difficult environmental problems the world faces. Dolphins may roam in and out of national territory and thus be a jurisdictional concern as well as an extraterritorial one.

Perhaps nowhere are the pitfalls of an absolutist view more apparent than with respect to environmental issues. First, the accepted notion of 'global environmental interdependence' is incompatible with traditional notions of sovereignty.[29] Tension exists foremost because environmental degradation does not respect the territorial rights implicit in the doctrine of sovereignty. Pollution migrates and other forms of environmental degradation also frequently have transborder or even global implications. Environmentally-related violations of sovereignty occur daily, and the practice is usually to tolerate these violations, if they are kept within reasonable limits and the cumulative risks are not too great. Thus, in environmental matters territorial sovereignty is not inviolate.[30]

Second, gone is the belief that a sovereign (source) state is free to do as it pleases within its own territory, jurisdiction or control. Just as 'no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state" and hence insulated from international law',[31] permanent sovereignty over natural resources is also qualified,[32] constrained by 'treaties and rules of customary international law concerning conservation and environment protection' that serve to limit a sovereign's use of its own natural resources. These limitations are evident in Principle 2 of the Rio Declaration,[33] and many of the more prominent

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29. There is difficulty of reconciling global environmental interdependence and traditional or historical views of the sovereignty doctrine. It is worth noting that from the perspective of global environmental interdependence all states are, to some degree, both source and suffering states. This only goes to show that all states bear some responsibility for the planet's environmental problems, and are also victims of these problems. — Bragdon, *National Sovereignty and Global Environmental Responsibility : Can the Tension Be Reconciled for the Conservation of Biological Diversity?*, 33 HARVARD INTERNATIONAL LAW JOURNAL, 1992 at 381-382.
30. Tomushat, "*International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law : The work of the International Law Commission,*" INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (1991) at 40.
31. Reisman, *Sovereign and Human Rights in Contemporary International Law*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1991, 866 at 869.
32. General Assembly Resolution, recognizes the right of people and nations 'to their natural wealth and resources,' but conditions this right on its exercise 'in the interest of their national development and of the well-being of the people of the State concerned'. 2 INTERNATIONAL LEGAL MATERIALS, 1963 at 223.
33. The balance between a state's right to use its resources and the environmental implications associated with this right are reflected in Principle of the RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT OF JUNE 14, 1992:

environmental conventions.[34] This is not to say that states do not enjoy a right to development, but only to say that, as one would expect, there are also constraints on how this right is exercised.[35]

Therefore, territoriality provides an insufficient basis for the protection of certain regions, zones, or areas of global concern. Viewed in isolation, the sovereignty doctrine provides an inadequate foundation from which to address the environmental interns of suffering states. A number of scholars have strongly objected to the notion of interest balancing, arguing that this approach would delegate "extraordinary discretion' to international trade tribunals, and would open the door "to unacceptable abuses."[36] Instead, Robert Hudec and Thomas Schoenbaum have advocated that trade measures that are specifically authorized by Multilateral Environmental Agreements (MEAs) should be permitted if agreement addresses a "serious" environmental problem of "potentially global scope," and the trade measure is reasonably related to the purpose of the MEA.[37]

Professor Lowenfield had observed:

> [i]n a situation involving more than one country, if country A wishes to regulate and country B does not, it seems ... equally fair to criticize B for attempting to impose its will beyond its borders as it is to criticize A for attempting to exercise its jurisdiction extraterritorially.[38]

Similarly, it seems equally fair to restrain states that cause global environmental harm as it is to restrain states that seek to use extraterritorial

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State have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

34. MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER, Sept. 16, 1987, 26 INTERNATIONAL LEGAL MATERIALS, 1987 at 1550, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, (CITES), Mar. 3, 1973, 12 INTERNATIONAL LEGAL MATERIALS, 1973 at 1086.
35. "The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations". Principle 3 of Rio Declaration, *supra* n. 33.
36. Thomas J. Schoenbaum, *International Trade and Protection of the Environment : The Continuing Search for Reconciliation,* 91 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1997 at 291.
37. *Id.* at 283-284; Hudec, *supra* n. 11 at 125-145.
38. Andreas F. Lwenfield, *Book Review*, 78 HARVARD LAW REVIEW, 1965, 1699 at 1703-4.

trade measures, to ensure that their own markets do not contribute to global environmental harm.

III. Article XX(g)

Article XX(g) provides that measures may be taken when they are relating to the conservation of exhaustible natural resources and they are made effective with restrictions on *domestic* production or consumption. It means that when similar restrictions are imposed domestically then the measures targeted at conservation of exhaustible natural resources may be taken.

Exceptions in Article XX of the GATT provides—

> 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 as 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
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> (b) necessary to protect human, animal or plant life or health,
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with the restrictions on domestic production or consumption.

IV. Tuna Dolphin I and Extraterritorial Application of Article XX(g)

The *Tuna/Dolphin I* Panel concluded that the natural resources and living things protected under these provisions were only those within the territorial jurisdiction of the country concerned.[39] The Panel observed that any measures taken under Article XX (g) to control the production or consumption of the exhaustible natural resource in question can only be effective if the production and consumption thereof takes place under the country's own jurisdiction.[40] The same reasons for which the *Tuna/Dolphin I* panel rejected the extrajurisdictional application of Article XX (b) also apply to Article XX (g).[41]

The Panel noted that a country could effectively control the production or consumption of exhaustible natural resources only to the extent that the

39. *Tuna Dolphin I, supra* n. 8, paras, 5.26, 5.31.
40. *Id.*, para 5.31.
41. *Id.*, paras 5.32, 5.27.

production or consumption is under its jurisdiction. Therefore, Article XX(g) was limited to take trade measures on production or consumption within one state's jurisdiction.[42]

The Panel further observed that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, it would jeopardize the rights of other states under the General Agreement.[43]

A. Rejection of Article XX(g)'s Extrajurisdictionality Seems Incorrect

Article XX(g) provides that measures may be taken when they are relating to the conservation of exhaustible natural resources if they are made effective with restrictions on *domestic* production or consumption. It means that when similar restrictions are imposed domestically then the measures targeted at conservation of exhaustible natural resources may be taken.

The question arises that besides domestic production or consumption, what is the area where the measures can be imposed?

The reply should be, the place beyond the domestic limit of the state concerned i.e. extraterritorial. The provision does not by any imagination confined to one states national or vessel. In other words the natural inference, arising from the use of phrase ". . . if such measures are made effective in *conjunction with the restrictions on domestic production or consumption* is to have extrajurisdictional effect".

There is nothing in the language of Article XX which suggests that measures to conserve exhaustible natural resources be limited to domestic jurisdiction. To the contrary, Article XX(e) permits to impose GATT-inconsistent trade restrictions on a country that produces products with prison labor an unambiguous exercise of extrajurisdictional regulation.[44]

Steve Charnovitz notes that nothing in GATT or its legislative history suggests that the drafters intended a more limited jurisdictional reach for Article XX(b).[45]

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42. *Id.*, para 5.31.
43. *Id.*, para 5.32.
44. Article XX(e) of the GENERAL AGREEMENT OF TARIFF AND TRADE, Oct 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].
45. Steve Charnovitz, *Green Roots, Bad Pruning : GATT Rules and Their Application to Environmental Trade Measures,* 7 TUL. ENVTL. L.J., 1994, 299 at 339-41. (arguing that the authors of the GATT intended Article XX to have international application).

Secondly, the *Tuan/Dolphin I* Panel reasoned for nonapplication of measures (extraterritorially) under Article XX(g) that the measures could effectively control the production or consumption of exhaustible natural resources only to the extent that the production or consumption is under its jurisdiction.[46] In other words it laid down "effective" test in determining the extraterritorial application of measures. This test has specifically been rejected by the *Reformulated Gasoline Appellate Decision*. The Appellate Body found that Article XX(g) did not impose an "effects test" in part because of the plain meaning of the words in Article XX(g), as well as due to the practical difficulties of determining causation.[47]

The definitive ineterpretation of this phrase was given by the Appellate Body in the *Reformulated Gasoline* case:

> [T]he basic international law rule of treaty interpretation ... that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here .... [T]he ordinary or natural meaning of "made effective" when used in connection with a measure a governmental act or regulation—may be seen or refer to such measure being "operative", as "in force", or as having "come into force".

B. Contradictory Approach of the Tuna/Dolphin I Panel

The *Tuna/Dolphin I* Panel examining, if any extrajurisdictionality meant Article XX(b), negatived by observing that:

> In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: "For the purpose of protecting human, animal or plant life or health if corresponding *domestic* safeguards under similar conditions exist in the importing country". This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.[48] Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary

46. *Tuna Dolphin I, supra* n. 8, para 5.31.
47. *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/9 (May 20, 1996), 35 INTERNATIONAL LEGAL MATERIALS, 1996 at 625. [hereinafter *Reformulated Gasoline Appellate Decision*].
48. *Tuna Dolphin I, supra* n. 8, para 5.26.

measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.[49]

The reason for rejecting extrajurisdictionality as noted by the Panel was drop of the phrase: *"For the purpose of protecting human animal or plant life or health if corresponding domestic safeguards under similar conditions exist in the importing country"*. But the existence of the phrase in Article XX(g), — *"... if such measures are made effective in conjunction with the restrictions on domestic production or consumption" is to have extrajurisdictional effect"* — which is almost identical in meaning and intent to the former phrase, was *ignored* by the panel in determining Article XX(g) to have extrajurisdictional application.

It is submitted that the panel erred in its ruling rejecting the extrajurisidictionality in perhaps Article XX(g). It signifies that panel lacked the objectivity in its decision, either due to its apathy towards environmental consideration or consideration that environmental issues being subservient to free trade principle. It was a major drawback because the objectivity is the mainstay to the task of rule of interpretation.

The lack of objectivity flowing from over consideration of free trade can be elicited from the panel's justification for denying extrajurisdictionality to Article XX(g) was the consideration — *"that if the extrajurisdictional interpretation of Article XX(g) ... were accepted each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement"*[50] — an unwarranted interpretation by the panel.[51]

A treaty interpreter must begin with and focus upon, the text of the particular provision to be interpreted.[52] Article XX(g), is clear and unambiguous in its meaning and natural inference. Putting of an extraneous condition regarding Article XX(g) to the effect that extrajurisidictional interpretation would jeopardize the rights under the General Agreement is liable to be rejected, and violative of treaty rule of interpretation when the concerned provisions is not ambiguous.

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49. *Ibid.*
50. *Id.*, para 5.32.
51. *Shrimp/Turtle Appellate Decision, infra* 53, paras 116, 121.
52. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose — D.J. Harris, CASES AND MATERIAL ON INTERNATIONAL LAW (London : Sweet and Maxwell, 1998) at 813.

In recent *Shrimp/Turtle Appellate decision*,[53] the Appellate Body rectified similar interpretive mistake done by the *Shrimp/Turtle* Panel decision.[54] The *Shrimp/Turtle* Panel found:

> ... [W]e are of the opinion that the *chapeau* [of] *Article XX*, interpreted within its context and in the light of the object and purpose of GATT and of the *WTO Agreement, only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system*, thus also abusing the exceptions contained in Article XX.[55]

The Appellate Body in the appeal *rejected* such condition added by the Shrimp/Turtle Panel to the chapeau of the Article XX—that the chapeau be interpreted, so as not to undermine the WTO multilateral trading system.[56] This condition is almost identical to *Tuna/Dolphin I* panel's justification in denying extrajurisdictionality into Article XX(g).[57]

The Appellate Body held "fundamental rule not to undermining, the multilateral trading system at the part of the Contracting parties is neither an obligation, *nor is it an interpretative rule* which can be employed in the appraisal of a given measure under the chapeau of Article XX."[58]

The Appellate body noted that an interpretation holding a measure requiring from exporting countries, compliance with certain policies, prescribed by the importing country renders a measure *apriori* incapable of justification under Article XX shall eventuate the specific exceptions of Article XX inutile, a result *abhorrent* to the principle of interpretation we are bound to apply."[59]

V. TUNA/DOLPHIN II AND EXTRATERRITORIAL APPLICATION OF ARTICLE XX(G)

A little shift form previous stand of no-extraterritoriality for TREMs was perceived in *Tuna/Dolphin II* case. In 1992, the European Union

53. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, Oct. 12, 1998 [hereinafter *Shrimp/Turtle Appellate Decision*], 38 INTERNATIONAL LEGAL MATERIALS, 1998.
54. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R, May 15, 1998, *modified* by Appellate Body Report, WT/DS58/AB/R, Oct. 12, 1998. [hereinafter *Shrimp/Turtle Appellate Decision*].
55. *Id.*, para 7.44.
56. *Shrimp/Turtle Appellate Decision, supra* n. 53, para 116,
57. *Tuna Dolphin I, supra* n. 8, para 5.33.
58. *Shrimp/Turtle Appellate Decision, supra* n. 53, para 116.
59. *Id.*, para 121.

brought a second challenge to the MMPA, this time based on a provision of the statute providing for a secondary embargo on imports of tuna from states that had themselves imported tuna from a state subject to the primary import ban.[60] The provision was intended to prevent states from circumventing the MMPA's primary embargo provision by engaging in "tuna laundering" — i.e. selling their tuna to an intermediary state, which would then re-export the tuna to the United States.

Tuna/Dolphin II Panel observed, first, that the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved.[61] The Panel rejected the notion that GATT established a *per se* rule against extraterritorial measures.[62] The panel eschewed the *Tuna/Dolphin I* panel's tortured reading of the text and drafting history of Articles XX(b) and XX(g), and noted that several of the other Article XX exceptions — such as the exception permitting restriction of trade "relating to the products of prison labor" - expressly permit trade measures directed at persons and actions located outside the importing state's territorial jurisdiction.[63]

Giving instance of Article XX(e) the Panel observed that measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things locate, or actions occurring, outside the territorial jurisdiction of the party taking the measure.[64] The Panel further observed that, under general international law, states are not ... barred ...from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory.[65] The Panel recalling its reasoning under Article XX(g), noted, that the text of Article XX(b) does not spell out any limitation on the location of the living things to be protected.[66] The Panel further recalled its observation that elsewhere in the General Agreement measures according different treatment to products of different origins could in principle be taken with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure.[67]

60. *United States —Restriction on Imports of Tuna*, GATT Doc. DS29/R at para 5.5, (June 1994) (unadopted) [hereinafter *Tuna/Dolphin II*], 33 INTERNATIONAL LEGAL MATERIALS, 1994.
61. *Id.*, para 5.15.
62. *Id.*, para 5.16.
63. *Ibid.*
64. *Ibid.*
65. *Id.*, para 5.17.
66. *Id.*, para 5.31.
67. *Id.*, para 5.32.

One scholar[68] observed citing *Tuna/Dolphin II* case[69], that the Panel ruled that government can enforce an Article XX(g) restriction extraterritorially only against their own nationals and vessels.[70] But such observation is not correct. *Tuna/Dolphin II* panel nowhere put the condition for extraterritoriality to be against one's own nationals and vessels. It was an additional observation of the Panel that states could pursue jurisdiction over its nationals and vessels beyond its territory.[71] Relevant provision of para 5.20 reads:

> ... the Panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels fell with the range of policies covered by Article XX(g).[72]

Panel's observation in para. 5.20 as cited[73] by the scholar, neither explicitly nor implicitly restricts for Article XX to have extraterritorial application as noted by the Panel in para. 5.15 and 5.16,[74] if it were the intention of the Panel that extraterritoriality be limited to in respect of one's nationals and vessels, the panel would not have instanced extraterritoriality applicable in Article XX exceptions — such as the exception permitting restriction of trade "relating to the products of prison labor", because it could not be directed against one states' own nationals.

However, the *Tuna/Dolphin II* Panel, put some other *condition* for the use of extraterritorial measures that extraterritorial trade measures are allowed, provided they do not force other States to change their policies within their jurisdiction.[75] The Panel examined whether under Article XX(g) (b) the measures could include measures taken as to force other countries to change their policies with respect to persons or things within their own jurisdictions, and requiring such changes in order to be effective.[76] For imposing the condition the Panel reasoned that the text of Article XX does

68. Schoenbaum, *supra* n. 36 at 279.
69. *Tuna/Dolphin II, supra* n. 60, para 5.20.
70. *Supra* n. 68.
71. *Supra* n. 65.
72. *Supra* n. 69.
73. *Ibid.*
74. *Supra* n. 61, 63 and 64.
75. *Tuna/Dolphin II, supra* n. 60, paras 5.26 and 5.38.
76. *Id.*, paras 5.25, 5.38.

not provide a clear answer to this question.[77]

It further proceeded to examine the text of Article XX(g) in the light of the object and purpose of the General Agreement and found that if however Article XX were interpreted to permit contacting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties[78] — the similar effort done by the previous *Tuna/Dolphin I* Panel and recent *Shrimp/Turtle* Panel and reached the same interpretively wrong conclusion.[79] In its approach to interpret Article XX(b) and (g) in the light of the objectives and purposes of the General Agreement, the Panel committed mistake relating to the rules of interpretation—similar to that by *Tuna/Dolphin I, Shrimp/Turtle* panels.[80] Such interpretation has been expressly rejected by the *Shrimp/Turtle* Appellate Body.[81]

If the condition imposed by the *Tuna/Dolphin II* Panel were assumed right it would have rendered the extraterritoriality of a measure infructuous. The condition for extraterritorial measures not to force other states to change their policies within their jurisdiction has been struck down[82] by the *Shrimp/Turtle Appellate Decision.*

Previous to the *Shrimp/Turtle Appellate Decision,* in *Reformulated Gasoline* Appellate Decision, the Appellate Body taking different note from the aforesaid view of the *Tuna/Dolphin II*, observed, "the phrase relating to the conservation of exhaustible natural resources' may *not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interest it embodies.*"[83]

If the interpretation[84] of *Tuna/Dolphin II* were accepted, Article XX should be no more called "exceptions". Exception means that if some

77. *Ibid.*
78. *Tuna/Dolphin II, supra* n. 60, paras 5.26 and 5.38.
79. *Supra* n. 50, 55 and 58.
80. *Ibid.*
81. *Supra* n. 58, 59.
82. *Supra* n. 58.
83. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 622.
84. *Supra* n. 78.

measure is covered under Article XX, the inconsistency of the measure with the *General Agreement* has not to be heeded to. The phrase in the chapeau of Article XX — "nothing in this *Agreement shall . . .* ", itself indicates that when a measure is evaluated under Article XX, no reference to the General Agreement be made, as unwarrantedly done by the *Tuna/Dolphin II* Panel.

In fact the chapeau to Article XX is competent enough to check any misuse or abuse of a measure in question.[85] Therefore, if the interpretive mistake by *Tuna/Dolphin II* Panel is assumed rectified, the extraterritoriality of measures should not have any hurdle when damage to global commons is at stake.

VI. Reformulated Gasoline and Extraterritorial Application of Article XX(g)

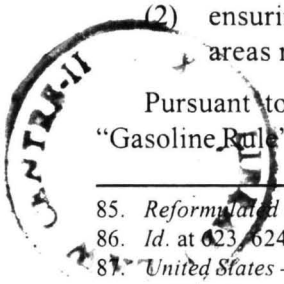
The WTO Appellate Body in *Reformulated Gasoline* case adopted more balancing approach in allowing extraterritoriality to the TREMs. The Appellate Body adopted interpretation of Article XX that would permit measures aimed at conserving global resources, so long as the importing state has a sufficient "nexus" with the protected resource, and the measure is both "even-handed" in its treatment of domestic and imported goods, and "reasonable" in light of the competing trade and environmental interests.[86]

In *Reformulated Gasoline* case, the Venezuela and Brazilian governments challenged a United States regulation concerning the maximum levels of gasoline emissions permissible in domestic and imported gasoline.[87] The regulation was promulgated pursuant to a 1990 Clean Air Act amendment requiring the United States Environmental Protection Agency (EPA) to promulgate regulations aimed at:

(1) achieving a fifteen percent reduction in the emissions of certain air-polluting substances in specific high-pollution areas, and

(2) ensuring that emissions from conventional gasoline sold in other areas remained at or below 1990 baseline levels.[88]

Pursuant to this mandate, EPA issued a regulation (known as the "Gasoline Rule") setting forth detailed criteria for establishment of the 1990



85. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 626.
86. *Id.* at 623, 624, 625.
87. *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (Jan. 29, 1996), 35 International Legal Materials at 274, paras 1.1-1.2 modified by Appellate Body Report, WT/DS2/9, May 20, 1996 [hereinafter *Reformulated Gasoline Panel*].
88. *Id.*, paras 2.2-2.4.

baseline emission levels.[89] Under these Rules, most domestic refiners were required to establish *individualized* baselines based on emissions data reflecting the actual quality of the gasoline that they themselves had produced in 1990.[90] However, the Rules did not permit foreign refiners to establish individualized baselines for their gasoline.[91] Instead, imported gasoline was required to comply with a baseline reflecting *average* emissions levels for *all* gasoline sold in the United States in 1990.[92]

The Panel established to hear the dispute concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g).[93] However, the Panel Report also concluded that "less favorable baseline establishments methods" were *not* primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).[94]

The Appellate Body, in its finding concluded, "that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g)"[95] and that the "Panel erred in law in its conclusion that the baseline establishment rules contained in part 80 of Title of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the *General Agreement*".[96]

Here, the Appellate Body articulated a new three-pronged test for Article XX(g). Under the first prong of the test, the importing state must show that the challenged measure, "taken as a whole," has a "substantial relationship" to natural resource conservation.[97] Under the second prong, the importing state must show that its measure was "made effective in conjunction with" restrictions on domestic gasoline — i.e., that the measure is "even handed" in its treatment of domestic and imported products.[98]

Finally, the importing state must satisfy the additional "burden" imposed by the Article XX *chapeau*, which states that exceptions may not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," or a "disguised

89. *Id.*, para 2.6.
90. *Id.*, para 6.2.
91. *Id.*, para 6.3.
92. *Ibid.*
93. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 18.
94. *Ibid.*
95. *Id.* at 626.
96. *Id.* at 633.
97. *Id.* at 617-23.
98. *Id.* at 623-26.

restriction" on international trade.[99]

The Appellate Body found that the Gasoline Rule satisfied the first two prongs of this test. The rule had a "substantial" relation to the conservation of clean air, since it provided means for monitoring compliance with statutory emissions requirements.[100] Accordingly, the rule could not be regarded "as merely incidentally or inadvertently aimed" at improving the quality of US air.[101] Moreover, the rule satisfied the requirement of "evenhandedness," since it imposed "corresponding" - though not necessarily identical — restrictions on domestic production.[102]

However, the Appellate Body also found that the Gasoline Rule could not be deemed reasonable under the Article XX *chapeau*. The record indicated that the United States' violation of Article III "must have foreseen, and was not merely inadvertent or unavoidable."[103] The Appellate Body based this conclusion on two factors. First, the United States had failed "to explore adequately" less discriminatory alternatives for addressing its concerns about the reliability of foreign emission date.[104] Although governments had, "in many contexts," resolved similar concerns by means of "cooperative arrangements" with foreign producers and foreign governments, the United States had failed to show that it had "pursued the possibility" of entering into such arrangements, at least "not to the point where it encountered governments that were unwilling to cooperate."[105]

The United States' decision to permit domestic refiners to establish individualized baselines was based on its concern about the physical and financial costs and burdens that an average baseline would impose on domestic refiners of "dirty" gasoline, and a desire to give these refiners time to restructure their operations and adjust to the new emissions requirements.[106] However, there was "nothing in the record" to indicate that the United States took such factors into consideration with respect to foreign refiners.[107]

Therefore, one can hold that if the measure applied by the US were reasonable in terms of *chapeau*, they would have been allowed i.e., *extraterritorially* applicable.

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99. *Id.* at 626-32.
100. *Id.* at 623.
101. *Ibid.*
102. *Id.* at 625.
103. *Id.* at 632.
104. *Ibid.*
105. *Id.* at 631.
106. *Id.* at 632.
107. *Ibid.*

VII. Shrimp/Turtle and Extraterritorial Application of Article XX(g)

The Appellate Body in *Shrimp/Turtle* case observed that TREMs provided by the Convention on International Trade in Endangered Species, 1973 (CITES) having extraterritorial applications are justified.[108] Beginning in 1987, the United States issued a series of regulations requiring US shrimp trawl vessels to use approved "turtle excluder devices" (TEDs) in all areas where there was a risk of interaction with the protected sea turtle species.[109] In 1989, the United States enacted section 609 of the Endangered Species Act, which called on the Secretary of State to initiate international negotiations for the purpose of entering into treaties to protect the endangered sea turtles.[110] In addition, section 609 imposed a ban on shrimp imports from states that failed to establish sea turtle protection program "comparable" to that of the United States.[111]

The US import ban took effect in May 1991.[112] However, the State Department issued guidelines providing that the ban applied only to fourteen countries in the Caribbean/Western Atlantic region, and granting these countries a three-year period in which to phase-in measures to avoid the ban.[113] In December 1995, the Court of International Trade issued a decision ruling that the guidelines were based on an improper reading of section 609, and directed the State Department to impose the ban worldwide within the next four months.[114] The State Department complied with this ruling in April 1996.[115] Four countries that were subjected to the new ban, but had previously been exempted from the ban under the old guidelines, filed a WTO complaint asserting that the ban was an unlawful "quantitative restriction" on international trade.[116] The *Shrimp/Turtle* Panel did not adopt the *Tuna/Dolphin I* Panel's rule against extraterritorial measures. Instead, the Panel invoked a rule similar to the *Tuna/Dolphin II* rule against coercing states to change their policies. Specifically, the Panel found that the embargo constituted "unjustifiable discrimination," because it conditioned access to the US market on the adoption of specific policies by foreign governments.[117]

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108. *Shrimp/Turtle Appellate Decision, supra* n. 53, paras 132, 133.
109. *Supra* n. 54.
110. *Id.*, para 2.7.
111. *Ibid.*
112. *Id.*, para. 2.8.
113. *Ibid.*
114. *Id.*, para 2.10.
115. *Id.*, para 2.11.
116. *Id.*, para 7.11.
117. *Id.*, paras 7.25, 7.26, 7.49. 7.62.

In its October 1998 ruling,[118] the Appellate Body confirmed that Article XX(g) could be invoked to justify measures aimed at protecting resources outside the importing state's territorial jurisdiction — provided that the importing state has a sufficient "nexus" with the protected resource. The United States had such a nexus with the protected sea turtle species, because the turtles were acknowledged to be "threatened with extinction", were highly migratory, and occurred in waters over which the United States exercised jurisdiction.[119]

The Appellate Body noted that all of the participants in the appeal were parties to CITES.[120] It observed that all the seven recognized species of sea turtles were listed in Appendix I to CITES.[121] Thus the exhaustibility of sea turtle is incontrovertible, as the list in Appendix I includes "all species *threatened with extinction* which are or may be affected by trade."[122]

The Appellate Body further considered, citing the Panel report based on documented statements from the experts confirming the migratory nature of sea turtles, that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas.[123] Without passing upon the question of jurisdictional limitation of Article XX(g) the Appellate Body noted in the case before it that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).[124]

This finding indicates that a WTO Member may rely on Article XX(g) to justify a trade-restrictive measure aimed at protecting environmental resources in the "global commons" so long as there is at least *some* jurisdictional relationship between those resources and that WTO Member.[125]

Since at least two GATT Panels that addressed the issue expressed serious doubt about the possibility of such justification, the Appellate Body's opinion on this point may give notable comfort to advocates of trade restrictions aimed at global environmental protection.[126]

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118. *Shrimp/Turtle Appellate Decision, supra* n. 47.
119. *Id.*, paras 132-133.
120. *Id.*, para 135.
121. *Id.*, para 132.
122. *Ibid.*
123. *Id.*, para 133.
124. *Ibid.*
125. Nancy L. Parkins, *Introductory Note*, 38 INTERNATIONAL LEGAL MATERIALS, 1999.
126. *Ibid.*

VIII. Conclusion

Article XX exceptions are intended to preserve each state's right to use trade measures to pursue legitimate regulatory objectives, including the protection of exhaustible natural resources and human, plant and animal life.

The principle of "sustainable development" — now expressly incorporated in the new WTO Preamble - recognizes that all states have a shared interest in the global environment, and a mutual obligation to avoid causing environmental harm outside their national boundaries. Ironically, this principle is designed to address a prisoner's dilemma similar to the "false" dilemma addressed by trade rules themselves. As Edith Weiss has argued, states share the global environment not only with each other, but also with future generations.[127] However, no individual state has an incentive to conserve the world's limited environmental resources, because no individual state can prevent other states from stepping in to take its place. Similarly, although all states share a common interest in cleaner air, states are better off if they "free ride" on another state's pollution control efforts. As a result, the dominant strategy for each state is to over-exploit the world's limited environmental resources, to the common detriment of all.[128]

Trade measures can *directly* protect scarce global resources, by ensuring that the importing state's own market does not directly contribute to over-exploitation of scarce global resources. For example, a ban on tuna harvested by methods that are harmful to dolphins can reduce the demand for such tuna, driving the price downward and reducing the incentive for continued use of these methods.

However, direct measures may not always be sufficient to deter over-exploitation of scarce global resources. In those cases, trade measures can protect scarce resources *indirectly*, by overcoming the collective action problems that lead to over-exploitation of such resources in the first place. This principle is illustrated by the WTO agreements themselves. In order to reduce the incentive for foreign countries to "free ride" on the trade liberalization efforts of other countries, GATT and WTO rules conditioned access to the agreements on the negotiations of "reciprocal" trade commitments by each member state. Similarly, environmental groups seek to overcome incentives to "free ride" on the environmental efforts of other states by conditioning the benefits of GATT rules on compliance with certain minimum environmental standards.

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127. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 American Journal of International Law, 1990 at 198.

128. Garret Hardin, *The Tragedy of the Commons*, 162 Science 1968 at 1243.

Opponents of environmental trade measures have argued that states can overcome the "tragedy of the commons" and the problem of free riding by using economic incentives such as increased foreign assistance or technology transfer — rather than restrictions on international trade.[129] However, as Prof. Chang has shown, economic "carrots" are often far less effective than trade "sticks".[130] A rule requiring the use of "carrots" gives each count the incentive to wait for others to delay negotiations and increase their environmentally harmful behavior, in order to hold out for more and bigger "carrots". The use of trade measures avoids these perverse incentives. As Prof. Chang points out: "With sticks, a country that signals and inclination to harm the environment can bring greater penalties upon itself; with carrots, the same signal can yield greater rewards."[131]

129. GATT, *Trade and Environment*, 1 INTERNATIONAL TRADE, 1992 at 90-91.

130. Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J., 1995 at 2131.

131. *Id.* at 2159.