1-1-2008

An Analysis and Synthesis of the Decisional Law Applying Article XX(g) of the General Agreement on Tariffs and Trade

Jasper L. Ozbirn

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An Analysis and Synthesis of the Decisional Law Applying Article XX(g) of the General Agreement on Tariffs and Trade

Jasper L. Ozbirn*

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The General Agreement on Tariffs and Trade (GATT) was originally enacted in 1947 (GATT 1947), after World War II, pursuant to a United Nations (UN) agreement to establish a system of international trade regulation.\(^1\) The GATT 1947 was intended to be a treaty and a governing document to the International Trade Organization (ITO).\(^2\) However, the ITO never materialized, and the GATT 1947 was left without an organization to enforce it.\(^3\) Without any governing body after the failure of the ITO, the GATT 1947 became a sort of ad-hoc guideline for resolving trade-policy disputes between countries.\(^4\) Although the GATT 1947 contained procedures for dispute settlement, it was intended to govern an international organization, not to create one, and there were inherently flaws in using the GATT by itself to settle disputes.\(^5\)

A major problem with using the GATT to resolve disputes was that it had no binding effect, but merely authorized suggestions be made as to how the parties should resolve disputes.\(^6\) This enabled countries to make bilateral agreements that were only marginally legal under the principles of the GATT 1947 because there was little risk that these agreements would be challenged.\(^7\) This eventually led to the decline of importance of the GATT Dispute-Settlement decisions, until the WTO was established in 1994.\(^8\)

The WTO was created in 1994 by the Marrakesh Agreement,\(^9\) which was signed by 128 countries.\(^10\) In its formation, the WTO adopted the GATT 1947, along with a number of understandings on how the GATT 1947 should be interpreted, as its basic governing document.\(^11\) Through the rules of the WTO, the GATT 1947 became binding on WTO members.\(^12\) This resulted in what is known modernly as the GATT 1994, which is substantively the same as GATT 1947, but has the power of the WTO to enforce it.\(^13\)
Without detailing the substantive provisions of the GATT, the three most basic provisions are: the “most favored nation” principle; the “national treatment” principle; and the “general elimination of quantitative restrictions.”

The “most favored nation” principle is the very first Article of the GATT. Basically, it provides that an importing country must treat all the countries it imports from equally. For example, under this principle, an importing country cannot give a ten percent tariff reduction to country A while refusing that tariff reduction to country B, so long as the product imported from A is the same as the product imported from country B. The “national treatment” principle requires that countries treat local and foreign producers the same, as long as they are producing the same commodity. Countries must treat domestically-produced products similarly to like-products that are imported. Finally, Article XI of the GATT provides generally for the elimination of quotas, and states that the only permissible restrictions or prohibitions on trade are duties, taxes, or other charges. These three provisions constitute what will be referred to throughout this Comment as the “substantive provisions” of the GATT.

Procedurally, it is relevant to note that the cases discussed in this Comment have been decided by one of two distinct bodies. The earlier cases, from 1947 through 1994, were decided by GATT Panels. These Panels were limited by the fact that GATT 1947 embodied a “consensus” approach because the GATT was technically a treaty, and thus the Panel decisions were not binding. The cases decided after 1994 were decided by the WTO under the Dispute Settlement Understanding (DSU), pursuant to the 1994 version of the GATT. Under the rules of the DSU, the dispute is first heard by a WTO Panel, and if that decision is not appealed, the Panel’s decision becomes binding once adopted by the Dispute Settlement Body. If the Panel decision is appealed, it is heard by the Appellate Body, and the Appellate Body’s decision becomes binding once adopted by the DSB.

In the disputes involving Article XX of the GATT, both GATT Panel and WTO Panel decisions have typically refused to approve any justification of a violation of the substantive provisions of the GATT under the exceptions

15. Id. art. I.
17. Id.
18. Id.
19. Id.
20. GATT art. XI.
23. Id.
provided for in Article XX(g) for purposes of environmental protection or conservation. This Comment will discuss and compare the decisions of the GATT Panels and the WTO Panels and Appellate Bodies, and will then synthesize those decisions to formulate a workable standard of law with respect to the application of Article XX(g). To accomplish this, Section II will describe each dispute involving Article XX that has been decided by either a GATT Panel or WTO Panel. Section III will assimilate these decisions and reports in order to provide a framework for future analysis of XX(g).

II. PRECEDENTS

Article XX(g) of the GATT 1994 states exceptions to the applicability of the substantive provisions of the GATT. That provision reads in full:

XX: 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 Member of measures:

. . . .

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

Article XX(g) has only been addressed by WTO or GATT Panels in a few cases. As such, each case provides something new to the analytical structure, which is constantly changing. Because of the dynamic nature of the current law surrounding XX(g), it is necessary to discuss each Panel’s analysis of XX(g). Since the GATT Panel decisions were less complex than WTO decisions, this section includes both the facts and an explanation of the GATT Panel’s analysis. For the more complex WTO Panel decisions, this section will explain only the factual basis of the disputes; the analysis of the WTO Panel and Appellate Body will be set forth in full in Section III.


25. GATT art. XX(g).
A. Canadian-Tuna

This was the first case in which a GATT Panel addressed the applicability of XX(g). Even though the decision of the Panel was not published, it has often been cited as precedent. The dispute in this case arose from restrictions the United States placed on imports of Canadian-produced tuna, after Canada seized nineteen United States fishing vessels. The United States was acting pursuant to a United States law that provided for the Secretary of the Treasury to take action against any country that seized a United States vessel under a claim of jurisdiction that the United States did not recognize. Canada challenged the resulting import prohibition as a violation of the GATT, and the United States argued the ban was justified under XX(g).

The GATT Panel did not provide a framework for analysis of XX(g) in this case, but simply discussed that provision from the top down, and quickly found a requirement on which to base its decision. The Panel first found that the introductory clause, known as the chapeau, was “likely” met because the discrimination against Canada by the United States “might not necessarily have been arbitrary or unjustifiable.” Also, because the measure had been publicly announced, the GATT Panel found it was not a “disguised restriction.”

Having found that the chapeau was “likely satisfied,” the GATT Panel found it appropriate to continue to subsection (g). The Panel noted that the United States had not provided evidence of any restriction on domestic consumption of tuna. The Panel further noted that XX(g) clearly required the measure be “made in conjunction with restrictions on domestic products or consumption.” Because

28. Canadian-Tuna, supra note 26, ¶ 2.1.
29. This law was Section 205 of the Fishery Conservation and Management Act of 1976. Id. ¶ 2.2.
30. Id.
31. Id. ¶ 3.1.
32. Id. ¶ 4.8.
33. Sanford Gaines, The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. PA. J. INT’L ECON. 739, 862, n.5 (2001). “Chapeau” is a term of art in international law referring to an unnumbered section that precedes the numbered sections of a text. The term “chapeau” will be used throughout this paper to refer to the introductory paragraph of GATT Article XX.
34. Canadian-Tuna, supra note 26, ¶ 4.8. The Panel did not state whether it found the chapeau was in fact met, but stated that because it was “likely” met it was proper to continue to address subsection (g). Id.
35. Id.
36. Id. This is the exact opposite of the order of analysis today. See infra note 139, ¶ 120.
37. Canadian-Tuna, supra note 26, ¶ 4.8.
38. Id. ¶ 4.11-12.
39. Id.
the United States had failed to show the implementation of any domestic restriction, the Panel found that the measure failed this element of XX(g).40

B. Herring-Salmon41

This case involved a challenge by the United States of a Canadian law that prohibited Canadian fish-processing plants from exporting herring or salmon in an unprocessed form.42 The Canadian laws provided essentially that no herring or salmon could be exported from Canada unless processed.43 The United States challenged the law as a violation of the GATT, and Canada argued the measure was justified under XX(g).44

Contrary to the “top down” order of analysis followed by the GATT Panel in Canadian-Tuna, in this case the Panel began with the language of XX(g).45 The issue raised was whether the Canadian measures were “related to” conservation, and “in conjunction with” conservation, for purposes of XX(g).46 The Panel found that based on the context of Article XX in relation to the other provisions of the GATT, as well as the purpose behind Article XX, a measure must be “primarily aimed at” conservation in order to be “related to” conservation within XX(g).47 Similarly, in order to meet the “in conjunction with restrictions on domestic goods or services” requirement, the measure must be “primarily aimed at” rendering the measure effective.48

On the facts before it, the GATT Panel found that the Canadian law was not “primarily aimed at” conservation or rendering effective its restrictions because (1) the measure was not necessary to collect the data that helped regulate the industry, and (2) the slight impact the Canadian measure had on conservation was “merely incidental” to its purpose of preventing export.49 Therefore, the Panel found that XX(g) did not apply.50

40. Id. ¶ 4.12.
42. Id. ¶ 1.1.
43. Id. ¶ 2.2 (citing CRC 1978 Ch. 823 Canada Gazette, Part II, Nov. 8, 1978, p. 3900). Processed was defined to include fish that was “canned, salted, smoked, dried, pickled or frozen.” Id.
44. Id. ¶¶ 3.1, 3.3.
45. Id. ¶ 4.4.
46. Id.
47. Id. ¶ 4.6.
48. Id.
49. Id. ¶ 4.7.
50. Id.
C. Tuna-1

In this case, Mexico challenged a United States law that prohibited the import of tuna caught by Mexican fishing vessels, unless Mexico substantially complied with rules the United States enacted under the Marine Mammal Protection Act (MMPA). The MMPA has two parts. Part one regulates the incidental killing of dolphins in the United States, and part two applies to countries wishing to export tuna into the United States. Both parts generally prohibit the "taking" of dolphins with the express goal of reducing the incidental killing of marine mammals by commercial tuna fishermen. The MMPA did allow a limited number of incidental takings by commercial fishing operations, but required a permit be issued by the National Marine Fisheries Service. One such permit was issued to the American Tuna-boat Association, which covered all United States tuna fishing operations in the Eastern Pacific. This permit stated explicit upper limits on the permissible number of dolphins incidentally killed or injured as a result of tuna fishing. It also placed specific limits on the taking of two particular species of dolphin.

The enforcement mechanism for the domestic rules of the MMPA provided for the confiscation of the cargo of any vessel found to be in violation of the MMPA.

Regarding foreign fishing operations, the MMPA required that the United States ban the import of fish that had been harvested in a way that resulted in more incidental deaths or injuries than was permissible under the United States' standards. The MMPA required that the United States Secretary of State prohibit the import of any yellow-fin tuna harvested in the Eastern Pacific by purse-seine nets unless: (1) the harvesting country's government had a program in place comparable to the MMPA; and (2) the average incidental take rate of

52. Id. ¶¶ 1.1, 2.4.
53. Id. ¶ 2.4.
54. Taking includes "harassment, hunting, capture, killing or attempt thereof." Id. ¶ 2.3.
55. Id.
56. Id. ¶ 2.4.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. ¶ 2.5.
62. Purse-seine fishing involves the encircling of a school of fish with a net by a small motor-boat. The fishing vessel then draws the bottom of the net together so that the fish cannot swim under the net. The top of the net is then brought together, essentially making a "purse" around all of the fish within the confines of the net. In the Eastern Pacific Ocean, dolphins and tuna travel together, and fisherman are able to track schools of tuna by following the dolphins that are visible from the surface. The fisherman then encircle the dolphins in order to trap the tuna that are below the surface, which often kills some dolphin. There are procedures that will allow the tuna to be harvested without killing the dolphins also. Id. ¶ 2.1.
marine mammals was comparable\textsuperscript{63} to the average take rate of United States fishing vessels.\textsuperscript{64} The MMPA placed the burden of demonstrating compliance on the country requesting the Secretary of State to make such a finding, and required the similarity of the foreign program be proven by documentary evidence.\textsuperscript{65} If a country could prove it had a program comparable to the MMPA, the Secretary of State was then required to allow the imports.\textsuperscript{66}

On October 10, 1990, the United States imposed an embargo on Mexico pursuant to the rules of the MMPA until the Secretary of State could decide whether Mexico was in compliance with the MMPA.\textsuperscript{67} On November 5, 1990, Mexico requested a GATT Panel review of the embargo and of the MMPA.\textsuperscript{68}

The GATT Panel first noted that the functions of the MMPA were (1) to regulate fishing practices within the United States, and (2) to prohibit the import of fish products from countries that did not have comparable regulations.\textsuperscript{69} The Panel agreed with Mexico’s argument that the MMPA rules violated GATT Article XI,\textsuperscript{70} and then assessed the United States’ argument that such violation was permitted by Article XX(g).\textsuperscript{71}

The United States argued that Article XX(g) justified the violation of Article XI because the MMPA was “primarily aimed at the conservation of dolphin,” and the import restrictions were “primarily aimed at” giving effect to the restrictions.\textsuperscript{72} Mexico countered that Article XX(g) did not apply extrajurisdictionally, and therefore could not be invoked by the United States to justify the United States’ regulation of Mexico’s fishing practices taking place outside of United States jurisdiction.\textsuperscript{73}

Perhaps surprisingly, since it seems the United States measure complied with the requirements set out in \textit{Canadian-Tuna} that the United States impose domestic requirements equivalent to any requirements for importers, the GATT Panel adopted Mexico’s unprecedented argument for a jurisdictional limit on Article XX(g).\textsuperscript{74} The Panel gave no reason for this conclusion from the language of XX(g) nor any prior GATT Panel decision.\textsuperscript{75} The Panel did suggest that if

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{63} The requirement was that the countries’ take rate not be more than 125\% the take rate of the United States. \textit{Id.} \textsuperscript{2.6}.
\item \textsuperscript{64} \textit{Id.} \textsuperscript{2.5}.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.} \textsuperscript{2.7}. Specifically, the issue was whether the incidental taking of Eastern Spinner dolphins was less than 15\% of the total killed in that period. \textit{Id.}
\item \textsuperscript{68} \textit{Id.} \textsuperscript{1.1}.
\item \textsuperscript{69} \textit{Id.} \textsuperscript{5.1-5.2}.
\item \textsuperscript{70} \textit{Id.} \textsuperscript{7.1}.
\item \textsuperscript{71} \textit{Id.} \textsuperscript{5.22-5.23, 5.30-5.34}. Subdivisions (b) and (d) of Article XX were also at issue, but are beyond the scope of this comment and will not be discussed.
\item \textsuperscript{72} \textit{Id.} \textsuperscript{5.30}.
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.} \textsuperscript{5.31}.
\item \textsuperscript{75} \textit{See id.} \textsuperscript{5.31-5.32}.
\end{itemize}
\end{footnotesize}
XX(g) were allowed to apply extrajurisdictionally, GATT members would be able to unilaterally determine environmental policies without jeopardizing their own substantive rights under the GATT. Notably, this “extrajurisdictional” limit has not since been addressed, which suggests that it probably no longer applies.

The Panel further found that even if XX(g) did apply extrajurisdictionally, the MMPA did not meet the requirements of XX(g). It stated that a measure would be justified only if it was “primarily aimed at the conservation of exhaustible natural resources.” The Panel noted that the limit of Mexico’s incidental takings under the MMPA depended directly on the incidental takings by United States fisherman during that same period. As such, the Mexican authorities could not know at a particular time whether Mexico’s policies conformed to the MMPA. The panel found this rule was not justified by XX(g) because “a limitation on trade based on such unpredictable conditions could not be regarded as ‘primarily aimed at’ achieving the policy.”

D. Tuna II

Shortly after Tuna I was decided, the United States placed an embargo on tuna and tuna products from any country that imported tuna from a country that would be prohibited from exporting tuna to the United States under the MMPA as described in Tuna I. The European Economic Community, as well as the Netherlands, challenged this “intermediary embargo” under the GATT, and a Panel was established to review the MMPA as revised since the close of the Tuna I dispute.

The intermediary embargo prohibited the United States from importing tuna or tuna products from any country that imported tuna that the MMPA would prohibit the United States from importing directly. It required nations that accepted tuna from countries that did not comply with the MMPA to “certify and provide reasonable proof [to the United States] that it ha[d] not imported products subject to the direct prohibition [of the MMPA] within the preceding six months.”

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76. Id. ¶ 5.32.
77. This conclusion is based on the fact that no decision involving XX(g) has cited this language.
78. Id. ¶ 5.33.
79. Id. ¶ 5.32 (citing Herring-Salmon, supra note 41, ¶ 4.6).
80. Id. ¶ 5.33.
81. Id.
82. Id.
84. Id. ¶ 2.12.
85. Id. ¶¶ 1.1-1.3
86. Id. ¶ 5.5
The Tuna II Panel first found that the intermediary embargo violated Article XI of the GATT, and then proceeded to consider the United States’ argument that the embargo was justified by Article XX(g). The Panel agreed with the Tuna I Panel that dolphins were an “exhaustible natural resource.” It rejected, however, the conclusion of the Tuna I panel that Article XX(g) did not apply extrajurisdictionally.

In analyzing whether the intermediary embargo called for by the MMPA was “related to” conservation, the Tuna II Panel looked both to the intent and effect of the measure. It concluded that because the embargo “could not possibly, by itself, further the United States conservation objectives,” the measure could not be “related to” conservation. Further, the Panel emphasized that it found the United States was seeking to “force other countries to change their policies,” and that such a change in policy was necessary if the conservation effect was to be realized. Unfortunately, the Panel did not explicitly state which of these considerations led it to conclude that the embargo was not justified by Article XX(g). It merely concluded “that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed” conservation. Inserting both of these elements in one sentence raises the question of whether a measure would be invalidated for either reason, or if both are necessary.

The Tuna II dispute was the last case decided by a GATT Panel before the establishment of the WTO in 1994. The following WTO cases contain much more complex reasoning than the GATT Panel decisions. For that reason, this section will merely explain the facts and give an overview of the WTO decisions. The full reasoning of the WTO Panel and Appellate Body in each decision is provided in section III, under the heading of the element of XX(g) that is being addressed.

E. Facts of United States—Gasoline

The WTO Panel first examined the application of Article XX(g) in United States—Standards For Reformulated And Conventional Gasoline. This case involved a challenge by Venezuela and Brazil of a portion of the Clean Air Act (CAA), a federal statute enacted by the United States to prevent pollution from

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87. Id. ¶ 5.10.
88. Id. ¶¶ 5.11-5.27.
89. Id. ¶ 5.13.
90. Id. ¶ 5.20.
91. See Id. ¶ 5.24.
92. Id. ¶ 5.24.
93. Id.
94. Id. ¶ 5.27
95. Id.
motor-vehicle exhaust from exceeding its 1990 levels. The provision of the CAA challenged in this case was the Gasoline Rule, which required that reformulated gasoline be sold in areas of heightened pollution in the United States. The CAA named nine metropolitan areas where reformulated gas would be required, and coined such areas “non-attainment areas.” The CAA required that reformulated gasoline be sold in these “non-attainment” areas. In the rest of the United States, coined “attainment areas,” the CAA permitted the sale of conventional gasoline.

The CAA set forth specific requirements that a refiner had to meet in order to classify its gasoline as “reformulated.” These requirements were that reformulated gasoline had to be measured by comparing the emissions it produced with the emissions produced by baseline gasoline in similar vehicles. Baseline gasoline can be determined in one of four ways under the CAA, but there are limits on which refiners can use which methods of determining their baseline. The gasoline rule specified that certain refiners, blenders, or importers could use certain methods to establish their baselines. Which refiner could use which method was based on whether the refiner was domestic or foreign, and what data they had available. This scheme embodied “the baseline establishment rules.”

For domestic refineries, the CAA specified three “Methods” of determining the baseline for comparing emissions, and also stated a default baseline would apply if none of the three Methods could be utilized. Under Method 1, the refiner was required to use the data it had regarding the quality and volume of its 1990 gasoline to determine its baseline. If such data was unavailable, Method 2 could be used. Method 2 required the use of quality and volume data for the refiners’ 1990 blendstock gasoline. Method 3, to be used if the refiner did not

97. Id. ¶ 2.1-3.1.
98. Reformulated gasoline is conventional gasoline that has been modified by the refinery such that it produces less of certain compounds when burned in engines. Id. ¶ 2.3 (detailing the full technical definition).
99. Id. ¶ 2.2.
100. These areas were set apart because they had the worst summertime pollution between 1987 and 1989.
101. Id. ¶ 2.2.
102. Id.
103. Id. ¶ 2.3.
104. Id. ¶ 2.8.
105. Id. ¶ 2.6.
106. Id.
107. Id. ¶ 2.6-2.8. It is important to take careful note of what the baseline establishment rules are, as this term will be used repeatedly throughout this document.
108. Id. ¶ 2.6.
109. Id.
110. Id.
111. Id. “Blendstock” refers to gasoline that the refinery has blended with gasoline from other refineries. Id.
have the necessary data for Method 1 or 2, required the use of post-1990 gasoline quality and volume data with adjustments made to reflect refinery modifications since 1990. A fourth possibility under the Gasoline Rule was the application of a “statutory baseline,” which was intended to represent average United States gasoline quality in 1990.

In addition to the Methods a refiner could use, the Gasoline Rule stated additional limits on which refiners could use which methods. Most domestic refineries were not permitted to choose the statutory baseline. In contrast, gasoline importers were automatically assigned the statutory baseline unless they could establish an independent baseline under Method 1 above. The baseline establishment rules prohibited importers from using Methods 2 or 3.

Venezuela and Brazil, gasoline importers, challenged the Gasoline Rule of the CAA. They argued it violated GATT Articles I and III of the GATT. The United States countered that the CAA was consistent with GATT Articles I and III, and even if found to be inconsistent, it was justified by the exceptions provided by Article XX(g).

The WTO Panel found that the CAA did violate Article III:4, and that XX(g) did not provide a justification on these facts. In analyzing the United States’ argument, the Panel found that the baseline establishment rule, in particular, violated the GATT. The WTO Panel then concluded that Article XX(g) did not apply to save the CAA because subsection (g) was not satisfied.

Each element of both the Panel and Appellate Body’s reasoning is discussed in full in Section III.

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112. Id.
113. Id. ¶ 2.5.
114. Id. ¶ 2.8.
115. Id. Domestic refineries that opened after 1990 or had been in operation for less than 6 months were required to use the statutory baseline. Id.
116. Id.
117. Id.
118. Id. ¶ 3.1.
119. Id.
120. Id. ¶ 3.4. Arguments were made regarding XX(b) and (d), but those sections will not be discussed in this comment.
121. Id. ¶ 8.1.
122. Id. ¶ 6.10.
123. Id. ¶ 6.40.
F. The Shrimp-Turtle Case

At the time of the Shrimp-Turtle decision, seven species of sea turtles were recognized. All seven were included in the 1973 Convention on International Trade in Endangered Species (CITES) as part of an effort to protect them. In the United States, the Endangered Species Act of 1973 (ESA) prohibits the taking of any of these seven species of turtles. The ESA was enacted in response to research that showed shrimping was the leading cause of sea turtle deaths. In order to reduce the rate of accidental sea turtle deaths, the National Marine Fisheries Service (NMFS) invented “turtle excluder devices” (TEDs) for use by shrimping vessels.

The NMFS then implemented a program that encouraged voluntary use of TEDs by shrimp vessels in the United States. This provided an unsatisfactory result because not enough vessels volunteered to use TEDs. In response, the United States issued regulations, under Section 609 of the ESA, which regulated both United States and foreign shrimping vessels’ harvesting methods. Section 609 aimed to solve the problem of accidental sea turtle deaths by requiring that shrimping vessels either use TEDs or be subject to tow-time restrictions. Further, Section 609 provided that countries desiring to sell shrimp to the United States must enact and enforce programs that prevent accidental sea turtle death that are as effective as the programs in effect in the United States.

Section 609 went through a number of revisions before this case was brought before the WTO. The 1996 version of Section 609, which was the version at issue, required that all shrimp imported to the United States be accompanied by a “Shrimp Exporters Declaration” form certifying either that (1) the shrimp came from waters that were under the jurisdiction of a certified country, or (2) the

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126. Id. ¶ 2.1, 2.3.
127. Id.
128. Id. ¶ 2.4.
129. Id. ¶ 2.5 (citing National Research Council, National Academy of Sciences, Decline of the Sea Turtles: Causes and Prevention, Washington D.C. (1990), as evidence that shrimping resulted in accidental capture and drowning of sea turtles). Id. ¶ 2.5, n.3.
130. These devices allow shrimp into the net, but redirect turtles and other large objects out of the net. Id.
131. Id.
132. Id.
133. Id. ¶ 2.6.
134. Id.
135. Id.
136. Id. Tow time restrictions have the effect of preventing incidental turtle death by limiting the permissible trawl time to 90 minutes. Id.
137. Id. ¶ 2.7-2.11.
138. Id. ¶ 2.10-2.11.
shrimp was harvested under "conditions that do not adversely affect sea
turtles." Numerous countries challenged Section 609 as contrary to GATT
principles, and the United States defended on grounds of XX(g).

The WTO Panel found that Section 609 was not consistent with Article XI:
and could not be justified under Article XX. However, the Panel rejected the
analytical framework set forth by the WTO Appellate Body in United States—
Gasoline by beginning its analysis with the chapeau. As will be discussed in
Section III, the Appellate Body disagreed with the Panel, and stated that the two-
tiered approach was essential to the proper analysis of Article XX. The
Appellate Body did not rely in any way on the Panel's analysis, but analyzed the
applicability of XX(g) from scratch, making it unnecessary for the purposes of
this Comment to discuss the Panel's decision.

G. Asbestos

The Asbestos case centered on France’s unilateral decree that prohibited the
import of asbestos and products containing asbestos. Canada, a large exporter
of asbestos and products containing asbestos, challenged the French decree on
numerous grounds, including that the ban was contrary to the GATT.

The Panel found the GATT was violated, but agreed with France that the
decree was justified by Article XX, subsection (b), and that the requirements of
the chapeau were met. Though Asbestos centers on XX(b), instead of (g), it is
included in this Comment to illustrate a case where a successful argument for the
application of Article XX was made.

139. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp
Shrimp-Turtle Appellate Body].
140. Id. ¶ 34.
141. Id. ¶ 10.
143. Shrimp-Turtle Appellate Body, supra note 139, ¶ 118 (quoting Shrimp-Turtle Panel Report, supra
note 125, ¶ 7.28).
144. Id. ¶ 119.
145. Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-
Asbestos Appellate Body].
146. Id. ¶ 3.
147. Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing
Panel Report].
148. Id. ¶ 9.1(d).
149. GATT Article XX(b) provides that the application of a measure "necessary to protect human,
animal, or plant life or health" may be adopted despite its violation of other provisions of the GATT. The Panel
in Asbestos concluded that subsection (b) was met because: (1) the evidence supported a finding that asbestos
and asbestos containing products posed a health risk, (2) the measure protected human life by offsetting the
risk, and (3) the ban was "necessary" to protect public health within the meaning of Article XX(b) because
there was no "reasonably available alternative." Id. ¶¶ 8.193, 8.194, 8.222-8.223.
The French decree had three main Articles. Article one provided that in order to protect workers and consumers from the health risks associated with asbestos fibers, all asbestos and products containing asbestos were prohibited from manufacture, sale, or import. In Article two, the decree provided that certain exceptions to the ban would apply when no substitute product was available that (1) posed a lower health risk and (2) provided similar technical guarantees of safety. Lastly, the decree provided an exclusive list of what products would be banned the decree, and required that that list be reexamined annually.

Canada challenged the decree before the WTO, arguing the decree violated the GATT. The European Committee (EC) argued on behalf of France that there was no discrimination by France in the application of the decree by stating that there was no evidence of bad faith. Further, the decree covered all asbestos and asbestos containing products because it never specified asbestos from different countries, but referred broadly to asbestos in general. The EC further argued that because the decree was not discriminatory, it could not be applied in a discriminatory manner.

Canada, on the other hand, argued that the decree was discriminatory, as well as arbitrary and unjustifiable, because it was "not motivated by the objective of protecting human life, but rather by the desire to reassure a panicked nation." The WTO Panel agreed with Canada’s argument that the decree violated Article III, but found the decree was justified by the exceptions in Article XX(b).

III. SYNTHESIS OF THE PRECEDENTS

This section provides a framework for analyzing Article XX(g) based on the various orders of analysis that have been used in the cases described in Section II. It begins by parsing the requirements that the WTO has recognized as necessary to satisfy subsection (g), and then proceeds to discuss the analysis of the chapeau.

150. Asbestos Appellate Body, supra note 145, ¶ 2 (citing French Decree 96-1133, which entered into force Jan. 1, 1997).
151. Id.
152. Id.
153. Id. ¶ 3.
155. Id.
156. Id.
157. Id. ¶ 8.225.
158. Asbestos Appellate Body, supra note 145, ¶ 4.
A. Subsection (g)

The WTO Appellate Body made it explicitly clear in *Shrimp-Turtle* that the subdivisions of Article XX must be analyzed before the chapeau.\(^{159}\) Following that rule, this Comment begins by parsing subsection (g), before discussing the analysis of the chapeau. The relevant language of XX(g) provides:

Subject to [the chapeau] . . . nothing in this Agreement shall . . . prevent the adoption or enforcement . . . of measures:

. . . .

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

1. "Exhaustible Natural Resources"

The language of XX(g) explicitly requires that the measure "Relat[e] to the conservation of exhaustible natural resources."\(^{160}\) It makes sense to address the "exhaustible natural resources" element first because the analysis is easier and, if not met, the analysis need go no further.

The early decisional law regarding "exhaustible natural resources" was simple because the parties simply stipulated that the things to be protected were exhaustible natural resources.\(^{161}\) However, when the United States claimed clean air was an "exhaustible natural resource," Venezuela and Brazil refused to stipulate.\(^{162}\) Instead, the parties required the Appellate Body in *United States—Gasoline* to delve more deeply into this element to explain the limits of what was, or was not, an "exhaustible natural resource."\(^{163}\)

Venezuela argued that "exhaustible natural resources" should include only finite natural resources such as coal and petroleum, because that was what was originally intended when the GATT was adopted in 1947.\(^{164}\) "Exhaustible natural resources," Venezuela argued, should not be construed so broadly as to include clean air\(^{165}\) because clean air was renewable and its quality changed regularly.\(^{166}\) The WTO Panel disagreed with these arguments and found clean air was an exhaustible natural resource because it had value and could be depleted.\(^{167}\)

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159. *Shrimp-Turtle* Appellate Body, supra note 139, ¶ 120.
160. GATT art. XX(g).
161. See, e.g., *Herring-Salmon*, supra note 41.
163. See id. ¶¶ 6.36-6.37.
164. *Id.* ¶ 6.36.
165. *Id.*
166. *Id.* ¶ 3.60.
167. *Id.* ¶ 6.37.
Panel found, based on the general policy behind the inclusion of Article XX in the GATT, that it did not make sense to interpret “exhaustible natural resources” as narrowly as Venezuela suggested. The Appellate Body did not reach the issue of whether clean air was an “exhaustible natural resource” in the United States—Gasoline case because that issue was not appealed by Brazil and Venezuela.

However, the Appellate Body did have an opportunity to elaborate on the reason for construing “exhaustible natural resources” very broadly in the Shrimp-Turtle dispute. There, the Appellate Body discussed whether turtles were “exhaustible natural resources” for purposes of Article XX. India, Pakistan, and Malaysia argued that the seven species of sea turtles protected by Section 609 did not qualify as exhaustible natural resources because (1) “exhaustible” refers to “finite resources such as minerals” and (2) turtles should only be considered under XX(b) which protects living things. The Appellate Body rejected these arguments, and concluded that sea turtles were “exhaustible natural resources.”

The Appellate Body began its analysis by separating “exhaustible natural resource” into the two separate parts of “exhaustible” and “natural resource.” In discussing whether turtles were “exhaustible,” the WTO Appellate Body disagreed with the position that “exhaustible” should be interpreted so narrowly as to include only non-living, finite resources. It considered that even though living species are “renewable” because they can reproduce, they may nonetheless be at risk of extinction and are therefore “just as finite as petroleum.”

After finding turtles were “exhaustible,” the Appellate Body assessed whether they were also “natural resources.” The Appellate Body rejected the argument that the drafting history of XX(g) showed that Article was originally intended to be limited to mineral resources. The Appellate Body refused to rely on what the term “natural resources” may have meant when the WTO was originally enacted. It found that the concept of preserving natural resources was as old as the GATT itself. It noted that the term “natural resources” was generic

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168. The pursuit of conservation policies was proper, as stated by the GATT Panel in Herring-Salmon. Herring-Salmon, supra note 41, ¶ 4.6.
171. See Shrimp-Turtle Appellate Body, supra note 139, ¶¶ 127-134.
172. Id.
173. Id. ¶ 127.
174. Id. ¶132.
175. See id. ¶¶ 127-132.
176. Id. ¶128.
177. Id.
178. Id. ¶130.
179. Id. ¶131.
180. Id. ¶¶ 125-134.
181. Id.
and intended to embody a dynamic idea. Such dynamic ideas, said the Appellate Body, are "not static in ... content or reference," but "evolutionary" and subject to changes in the law.

Further, the Appellate Body agreed with the statement by the International Court of Justice that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Based on this, the Appellate Body interpreted "natural resources" in the context of international law prevailing when that case was decided.

Within that framework of international law, the Appellate Body found that "natural resources" encompassed both living and non-living resources. The Appellate Body justified this finding both because the international community generally acknowledged the importance of environmental protection, and because the preamble to the Agreement establishing the WTO explicitly stated the goal of sustainable development. Based on these two international agreements, the Appellate Body held that Article XX(g) applies equally to both living and non-living natural resources.

It seems clear, based on the Appellate Body's broad construction in United States—Gasoline and its analysis in Shrimp-Turtle, that the element of "exhaustible natural resources" will not be the biggest hurdle for a country to successfully argue that a measure is justified under XX(g). In fact, no decisional body under either the GATT or the WTO has yet declared a justification under XX(g) to fail because the thing to be protected was not an "exhaustible natural resource;" instead, the phrase "exhaustible natural resources" has been consistently interpreted very broadly.

This creates a general rule that anything that can be depleted is exhaustible, and what is a "natural resource" must be interpreted as understood internationally at the time of the dispute. Additionally, in light of the Appellate Body's holding

182. Id. ¶ 130 (citing Namibia (Legal Consequences) Advisory Opinion I.C.J. Rep., at 31 (1971)).
183. Id.
184. Id. ¶ 130, n.109 (quoting Namibia (Legal Consequences) Advisory Opinion, I.C.J. Rep., at 31 (1971)).
185. Id. ¶ 130.
186. Id. ¶ 131.
187. Id. ¶ 130. The Appellate Body cites as an example Article 56(l)(a) of the 1982 United Nations Convention on the Law of the Sea, A/Conf.62/122; 21 I.L.M. 1261, which says that a "State has sovereign rights for the purpose of exploring ... natural resources whether living or non-living ...." Id. (emphasis in original).
188. The Preamble to the WTO, as set forth at paragraph 129, states, "The Parties to this Agreement, recognizing that their relations should be conducted with a view to ... 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 and to enhance the means for doing so ...." Id. ¶ 129 (emphasis in original).
189. Id. ¶ 131.
190. See, e.g., United States—Gasoline Panel, supra note 24, ¶ 6.37 (concluding that clean air qualified as an "exhaustible natural resource").
in *United States—Gasoline* that clean air is an exhaustible natural resource, it seems that wide deference will be given to the country pursuing a measure to conserve what it considers to be an exhaustible natural resource.

2. **“Related to conservation”**

The last word of the chapeau combined with the first phrase of subsection (g) creates the explicit requirement that the “measure” be “relating to conservation of exhaustible natural resources.” As discussed in the previous section, the determination of what is an “exhaustible natural resource” is an independent analysis. This section will discuss the necessary elements and order of analysis for the “relating to conservation” element of XX(g).

The requirement that the “measure” be “relating to conservation” has three sub-parts. First, what constitutes the “measure” for purposes of XX(g) must be precisely defined, which is a distinct analysis. Second, the Panel must decide whether that “measure” addresses a “legitimate policy.” Third, the “measure” must be aimed at the “legitimate policy” such that there is a strong relationship between the “measure” and the “legitimate policy.”

**a. Measure**

Implicit in the last word of the chapeau is a limitation that Article XX applies only to justify “measures” that can be characterized within a subsection. The only decision to date that discusses in detail whether a particular law is a “measure” for the purposes of XX(g) is the WTO Appellate Body report in *United States—Gasoline*. That dispute arose from the United States appeal of the WTO Panel’s conclusion that the Gasoline Rule did not qualify as a “measure relating to conservation” under XX(g). In assessing whether the Panel was correct, the Appellate Body separated that statement into two separate analyses. The Appellate Body found it necessary to first precisely define the measure that was to be considered under Article XX before moving on to analyze whether that measure was “related to conservation.”

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191. GATT art. XX(g).
192. See supra Part III(A)(1).
193. See *United States—Gasoline* Appellate Body, supra note 124, at 617-618.
195. Id. ¶ 136.
196. GATT art. XX(g).
197. See *United States—Gasoline* Appellate Body, supra note 124, at 617-618. For a summary of the facts of this case, see supra Part II(E).
199. Id. at 617.
The Appellate Body found that the Gasoline Rule was in fact a "measure" within the meaning of XX(g). The Appellate Body then clarified that the precisely defined measure was the specific provision of a law that violated the substantive provisions of the GATT, and that precisely defined measure only is to be analyzed under Article XX.

The Panel concluded in its report that it was not the CAA in its entirety, but the more narrow provisions of the baseline establishment rule within the CAA that violated III:4. However, the Appellate Body found that the Panel was not clear when analyzing Article XX that it was addressing the narrow baseline establishment rule because its report referred to both the baseline establishment rule and the Gasoline Rule interchangeably. The Appellate Body reversed this portion of the Panel's analysis, stating it was crucial to the analysis of XX(g) to clearly define the measure that is being assessed before proceeding to assess it.

In defining "measure," the Appellate Body stated that the term "measure" must refer narrowly to the exact provisions that are found to violate a substantive provision of the GATT. In United States—Gasoline, the "measure" was narrowly construed to be the baseline establishment rule, not the broader Gasoline rule, or the CAA in general. Similarly, in the Shrimp-Turtle dispute, the measure was determined to be Section 609 of the ESA, not the entire ESA. Based on these two cases, the rule can be stated that the "measure" assessed under XX(g) is the precise provision found to violate a substantive provision of the GATT.

b. Policy

The second requirement of the "Related to conservation" element of XX(g) is that the measure embody or be aimed at the policy of conservation. The "measure," as it has been precisely defined, must be substantially related to "a legitimate policy of conserving exhaustible natural resources." This policy requirement has two parts: (1) that the policy is in fact a legitimate policy of

200. Id.
201. Id. at 618.
202. Id. at 617.
203. Id.
204. Id. at 618.
205. Id. at 622. The Appellate Body analyzed the baseline rule under Article XX, not the entire Gasoline Rule. Id. at 623.
206. Id. at 618.
207. Shrimp-Turtle Appellate Body, supra note 139, ¶ 137.
208. The other cases that have addressed Article XX(g) have not addressed specifically the issue of defining what the measure was.
209. United States—Gasoline Appellate Body, supra note 124, at 618; Shrimp-Turtle Appellate Body, supra note 139, ¶ 137.
conservation; and (2) the measure must be sufficiently related to that policy.\(^{211}\)
Leaving aside the discussion of what that relationship must be for the next subsection, this subsection focuses on what it means to be a legitimate policy.

To understand what it means that the policy must be legitimate, it is useful to look at the rationale of the drafters for including Article XX(g) in the GATT.\(^{212}\)

First, the fact that Article XX(g) was included in the original GATT in 1947 at all is strong evidence that the drafters intended that the GATT would not impede the conservation of exhaustible natural resources.\(^{213}\)

Further, the language of the chapeau of Article XX indicates that the reason Article XX was included was to ensure that the GATT would not hinder parties from the "pursuit of policies aimed at the conservation of exhaustible natural resources."\(^{214}\)

More recently, the Agreement establishing the WTO explicitly stated the goal of promoting sustainable development.\(^{215}\)

These facts demonstrate that the policy behind Article XX is to enable countries to pursue the policy of conservation.\(^{216}\)

The *Herring-Salmon* dispute provides a good illustration of how this "policy" requirement plays out.\(^{217}\)

In that case, the GATT Panel found that Canada's law restricting the export of unprocessed herring or salmon was not justified by XX(g) because it was not "primarily aimed at" conservation.\(^{218}\)

In so deciding, the GATT Panel relied in part on Canada's admission that the measures were not "conservation measures per se."\(^{219}\)

This likely led the GATT Panel to conclude that Canada's primary reason for enacting the measures was to protect the Canadian fishing industry,\(^{220}\)

and that the conservation of herring and salmon was merely "incidental" to the measure.\(^{221}\)

Though it did not give a precise reason, the *Herring-Salmon* Panel found that Canada's measure was not justified by XX(g), *even though* it had the incidental effect of conservation of exhaustible natural resources.\(^{222}\)

This result can be explained by the fact that the measure was not based on a *policy* of conservation; rather, conservation was merely incidental to the measure.\(^{223}\)

Therefore, the

\(^{211}\) *Id.*

\(^{212}\) *Herring-Salmon, supra* note 41, ¶ 4.5.

\(^{213}\) GATT art. XX(g).

\(^{214}\) *Herring-Salmon, supra* note 41, ¶ 4.6.

\(^{215}\) Marrakesh Agreement, *supra* note 9, at pmbl. The preamble is also available at http://www.wto.org/english/tratop_e/envir_e/issu4_e.htm#wtoagmtpreamble.

\(^{216}\) *Herring-Salmon, supra* note 41, ¶¶ 4.6-4.7.

\(^{217}\) See *id.*

\(^{218}\) *Id.* ¶ 4.7.

\(^{219}\) *Id.*

\(^{220}\) While the Panel did not state that it believed the laws were aimed at protecting the local economy, the United States made that argument. It was likely important to the Panel in making its decision that the laws themselves make no reference whatsoever to conservation purposes. See *id.* ¶¶ 2.2-2.4.

\(^{221}\) *Id.* ¶ 4.7.

\(^{222}\) *Id.*

\(^{223}\) See *id.*
measure did not embody a "legitimate goal of conservation" and failed to meet the requirements of XX(g).224

The rule that the policy behind the measure must coincide with the policy of XX(g) was affirmatively adopted by the WTO Panel in United States—Gasoline.225 That Panel quoted with approval the conclusion of the GATT Panel in Herring-Salmon that the purpose of XX(g) was to ensure that the GATT did not hinder the pursuit of environmental conservation policies.226 Unfortunately, both the WTO Panel and Appellate Body in United States—Gasoline failed to separate the "legitimate policy" analysis from the "related to" analysis, and muddled these elements by discussing them together.227 Even though its analysis of "policy" was not distinct, the Appellate Body presumably concluded that the policy of conserving clean air was legitimate because it found ultimately that subsection (g) was satisfied.228

In Shrimp-Turtle, the Appellate Body gave a moderately clarifying analysis of the distinction between the policy and the relationship between the policy and the measure.229 There, the Appellate Body interpreted the language requiring the measure be "related to conservation" as a requirement that the means adopted had to be related to the ends.230 Under this rule, the three distinct subparts required to find the measure "related to conservation" are more transparent. These are: (1) the analysis of what constitutes the means; (2) the analysis of what constitutes the ends; and (3) the analysis of the relationship between those means and ends.231

The Appellate Body in Shrimp-Turtle did not have to deal with precisely defining the measure at issue because the parties stipulated that Section 609 was the measure at issue. The Appellate Body then found that the policy of protecting endangered sea turtles was a legitimate goal because sea turtles were an exhaustible natural resource.232 Unfortunately, it did not elaborate on why the policy of conserving endangered sea turtles was legitimate, but took that legitimacy for granted.233 Its discussion of "policy" focused instead on whether

224. Id.
226. Id. ¶ 6.39 (citing Herring-Salmon, supra note 41, ¶ 4.6).
228. United States—Gasoline Appellate Body, supra note 124, at 633. On the other hand, it is possible that the Appellate Body simply overlooked the policy requirement of XX(g).
229. See Shrimp-Turtle Appellate Body, supra note 139, ¶ 141.
230. Id. ¶ 137.
231. These three requirements come from combining the Appellate Body Report in United States—Gasoline with the Report in Shrimp-Turtle. In United States—Gasoline, the Appellate Body assessed the "measure" element more thoroughly than it did in Shrimp-Turtle. See United States—Gasoline Appellate Body, supra note 124, at 617-626. In Shrimp-Turtle, the Appellate Body gave a more thorough analysis of elements two and three above. See Shrimp-Turtle Appellate Body, supra note 139, ¶¶ 135-142.
232. Shrimp-Turtle Appellate Body, supra note 139, ¶ 141.
233. See id. ¶¶ 137-142.
Section 609 was “aimed at” that policy. This relationship is the subject of the next subsection.

c. Connection between the Measure and Policy

Once it is determined exactly what the “measure” is, and that the “policy” is legitimate, the analysis can move on to the relationship between the measure and the policy, and whether it is substantially “related” for purposes of XX(g). As previously stated, the reason for precisely defining the measure first is to ensure the proper analysis of “related to.” This limits the scope of XX(g)’s application by requiring that the specific violation of the particular substantive provision of the GATT be related to the conservation of exhaustible natural resources. It is not enough that the overarching law, under which the specific measure is enacted, be so related.

The first decision to assess the meaning of “related to” was Herring-Salmon. The GATT Panel held in that case that to be “related to conservation” the measure had to be “primarily aimed at” the policy of conservation. The Herring-Salmon Panel first addressed the meaning of this language within the context and purpose of XX(g)’s inclusion in the GATT. The Panel noted that different terms are used in different subsections of Article XX. It found that “necessary” was used amongst the various subsections of Article XX, but was not included in subsection (g). Based on this omission, the Panel concluded that the language “related to” could not mean “necessary.” On the other hand, Article XX was an exception to the general rules of the GATT and “not intended to widen the scope” of exceptions. Therefore, the Panel found that “related to” had to stand between these conflicting interpretations.

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234. See id.
236. See id.
237. Id.
239. Herring-Salmon, supra note 41, ¶ 4.5.
240. Id. ¶ 4.5-4.6.
241. Id. ¶ 4.6.
242. Id.
243. Id. As an interesting sidenote, this was the first case to address this issue and the Panel successfully distinguished the different analyses provided for by the different subsections of Article XX; however, the United States—Gasoline Panel failed to do so and included “necessary” in this analysis. See United States—Gasoline Panel, supra note 24, ¶ 6.26.
244. Herring-Salmon, supra note 41, ¶ 4.6.
245. Id.
Panel found the balance rested at "primarily aimed at," and later decisions have upheld that conclusion. In upholding the "primarily aimed at" requirement, the WTO Appellate Body in *United States—Gasoline* interpreted "primarily aimed at" to require a "substantial relation that is not merely incidental or inadvertent" exist between the measure and the policy. The Appellate Body reversed the Panel’s analysis because the Panel had assessed whether the result of the measure, not the measure itself, was "primarily aimed at" the policy. It rejected the Panel’s analysis that the "less favorable treatment," as opposed to the "measure," was subject to examination under XX(g). The Appellate Body stated that focusing on the result, less favorable treatment, was in error because the chapeau of Article XX makes it clear that it is the measure, not the result of that measure, that must be assessed under Article XX(g).

The Panel’s error here stemmed from its failure to clearly define the measure before addressing whether that measure was related to, or primarily aimed at, conservation. This failure led the Panel to analyze whether the result of the measure was primarily aimed at conservation. Under this analysis, any time a measure results in less favorable treatment it would fail the "related to" requirement. This would void the chapeau because the sole purpose of XX(g) is to justify a measure that violates a substantive provision of the GATT. If the result of less favorable treatment could be used to first conclude that the measure violated GATT, and then be used again to conclude that Article XX did not apply, then Article XX would lose all function. Such a result directly contradicts the Vienna Convention on the Law of Treaties, which states that

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246. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
260. *Id.* @ 619-620.
261. *Id.* @ 619.
262. *Id.* @ 619-620.
263. *Id.* @ 619-620.
264. *Id.* @ 620.
265. *Id.* @ 619-620.
266. *See id.* @ 619-620.
269. *Id.* @ 621-622.
each provision of a treaty must be read to have purpose, and thus that interpretation must be rejected.

Applying the Vienna Convention’s standard of interpretation that each word means something unique the Appellate Body in United States—Gasoline found that article XX(g) must be interpreted in connection with Article III:4 in such a way that neither article would completely override the effect of the other. According to the Appellate Body, this necessarily requires that a balance be struck on a case-by-case basis and depends heavily on the particular facts of each case. The Appellate Body adopted the Herring-Salmon Panel’s balancing of these interests with the requirement of “primarily aimed at.”

In Shrimp-Turtle, the WTO Appellate Body again affirmed the rule that “related to” means “primarily aimed at.” The Appellate Body further stated that the essential question in the analysis of whether the measure “relate[d] to the conservation” was the quality of the relationship between the measure and the policy it pursued. The Appellate Body restated this rule as a means to ends test, requiring the “means” of Section 609 be sufficiently related to the “ends” of furthering the policy behind Section 609.

The Appellate Body cited its report in United States—Gasoline for the rule that there must be a “substantial relationship” between the policy and the measure to satisfy XX(g). The Shrimp-Turtle Appellate Body then defined “substantial relationship” as requiring a “close and genuine relationship of ends and means.”

Though the Appellate Body has made these inconsistent statements defining what constitutes “primarily aimed at,” it is at least clear from the repeated analysis of that language that the “primarily aimed at” requirement remains the appropriate test to determine whether a measure is “related to” conservation. While each case has cited this language, each has re-interpreted it to signify different requirements. Since the meaning of “primarily aimed at” is in flux, this section will discuss the facts of the four cases that have analyzed whether the measure was “primarily aimed at.” The first two cases conclude that the measure

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263. United States—Gasoline Appellate Body, supra note 124, at 622.
264. Id.
265. Id. at 623.
266. See Shrimp-Turtle Appellate Body, supra note 139, ¶¶ 136-138.
267. Id. ¶ 135.
268. Id. ¶ 137. The stated policy of Section 609 was the conservation of sea turtles. Id.
269. Id. ¶ 136 (citing United States—Gasoline Appellate Body, supra note 124).
270. Id.
271. The “primarily aimed at language” initially created by the GATT Panel in Herring-Salmon, has been quoted with approval in Tuna I, United States—Gasoline, and Shrimp-Turtle.
is not primarily aimed at conservation, and the second two cases conclude the measure is primarily aimed at conservation.

The first case to illustrate facts on which the measure was not primarily aimed at conservation is the case that created the “primarily aimed at” language, Herring-Salmon. There, the United States challenged Canada’s measure prohibiting all export of unprocessed salmon or herring. The Panel found this ban was not “primarily aimed at” conservation of those fish, but conservation was an incidental side-effect of the regulation. Further, the Panel found that the ends achieved by the measure could be equally achieved without prohibiting export. Thus, the GATT Panel held the measure was not primarily aimed at conservation.

Later, in Tuna I, the GATT Panel held the measure was not “primarily aimed at” conservation because it found XX(g) did not apply “extrajurisdictionally.” The Panel further held that even if XX(g) did apply, “a limitation on trade based on such unpredictable conditions could not be regarded as primarily aimed at” conservation. This conclusion is anything but clear, and the Panel made no attempt to clarify its reasoning. It merely stated this as the obvious result in one meager paragraph before moving on to conclude that XX(g) did not apply. It is hard to see how unpredictability has any connection whatsoever to whether the measure is “primarily aimed at,” since Herring-Salmon found the measure was primarily aimed at if it pursued the policy of conservation. Thus, if the unpredictable measure pursued conservation, it would meet the Herring-Salmon rule, but not the Tuna I rule. It seems, however, that this holding in Tuna I is somewhat of an “island in the law” as it has not been widely cited by WTO bodies while the Herring-Salmon rule has. Further, the jurisdictional requirement imposed by the Tuna I Panel was rebuked by the subsequent Tuna II Panel, and thus has no precedential value. The Tuna II Panel also added that a measure is not “primarily aimed at” conservation if it depends on other countries adopting a certain policy in order to “achieve its desired effect,” and that

272. Herring-Salmon, supra note 41, ¶ 3.1.
273. Id. ¶ 4.7.
274. Collecting data on herring and salmon for use in studying their preservation.
275. Id. ¶ 4.7.
276. Id.
277. Tuna II, supra note 83, ¶ 5.31.
278. The limits on Mexico’s allowable accidental take rate depended on the United States’ incidental take rate for the same period. Tuna I, supra note 51, ¶ 5.33.
279. Id.
280. See id. ¶ 5.1-5.34.
281. See id. ¶ 5.33-5.34.
282. See e.g., United States—Gasoline Appellate Body, supra note 124; Shrimp-Turtle Appellate Body, supra note 139.
283. Tuna II, supra note 83, ¶ 5.20.
284. Id. ¶ 5.24.
"measures taken so as to force other countries to change their policies" were not primarily aimed at conservation.\[^{285}\]

To demonstrate when a measure is "primarily aimed at" conservation, the two WTO disputes of United States—Gasoline and Shrimp-Turtle are useful. In United States—Gasoline, the Appellate Body held that the baseline establishment rules were "primarily aimed at" the legitimate policy of conserving clean air.\[^{286}\] The Appellate Body found there was a "substantial relationship" between the two, such that the baseline establishment rules were not "incidentally or inadvertently aimed at" conservation.\[^{287}\]

Second, in Shrimp-Turtle, the Appellate Body concluded that the measure was primarily aimed at the policy.\[^{288}\] In its analysis, the Appellate Body noted that (1) Section 609 was "designed to influence countries to adopt national regulatory programs" that would protect sea turtles, and (2) Section 609 was "narrowly focused" in its requirements of TED use.\[^{289}\] Based on these two facts, the Appellate Body in Shrimp-Turtle found that the "related to" requirement was met because Section 609 was "primarily aimed at" turtle conservation.\[^{290}\] It found that Section 609 was "primarily aimed at" because it was "substantially related" to the policy.\[^{291}\] It found Section 609 was "substantially related" because there was a "close and genuine relationship of ends and means."\[^{292}\]

Based on these cases, the rule seems to be that the necessary connection between the measure and the policy in order to satisfy the "related to conservation" language is that the measure be "primarily aimed at" conservation.\[^{293}\] This means that there must be a substantial relationship that is not merely inadvertent or incidental,\[^{294}\] such that there is a close connection between means and ends.\[^{295}\] This is potentially subject to the limitation that the measure

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\[^{285}\] Id. ¶ 5.27.
\[^{286}\] United States—Gasoline Appellate Body, supra note 124, at 619.
\[^{287}\] Id.
\[^{288}\] Shrimp-Turtle Appellate Body, supra note 139, ¶ 137.
\[^{289}\] An example of this "narrowness" was that Section 609 did not require countries to comply if it harvested shrimp under conditions that did not adversely affect sea turtles, or if the country had certified to the United States that it used methods of reducing incidental turtle death similar to Section 609. Id. ¶ 138. Specifically, Section 609 provided two ways countries could gain certification: (1) a country could be certified if its fishing environment did not pose a threat to sea turtles; and (2) a country could be certified by enacting TED requirements similar to Section 609 and showing the incidental take rate of sea turtles was comparable to the incidental take rate in the United States. Id. ¶¶ 139-140. The Appellate Body found the certification requirement to be "directly connected with the policy of conservation of sea turtles" because mechanical retrieval of shrimp was undisputedly a significant cause of sea turtle death, and TEDs effectively reduced such sea turtle deaths. Id. ¶ 140.
\[^{290}\] Id. ¶¶ 141-142.
\[^{291}\] Id.
\[^{292}\] Id.
\[^{293}\] Herring-Salmon, supra note 41, ¶ 4.7, aff'd by United States—Gasoline Appellate Body, supra note 124, at 619.
\[^{294}\] United States—Gasoline Appellate Body, supra note 124, at 623.
\[^{295}\] Shrimp-Turtle Appellate Body, supra note 139, ¶ 141.
not be unpredictable. Though these numerous statements obfuscate the rule, the “primarily aimed at” element seems relatively well settled, even if the exact definition of what that language requires has not yet been decided.

3. “Made in Conjunction with Restrictions on Domestic Products or Consumption”

The first case to discuss the requirement that the measure be “made effective in conjunction with domestic production or consumption” was Canadian-Tuna. This case presented an easy question for the GATT Panel because there was no domestic restriction in effect at the time of the Panel’s decision. The Canadian-Tuna Panel held, rather obviously, that the United States’ ban of Canadian tuna was not “made in conjunction with restrictions on domestic products or consumption” because the United States was not subject to any restriction and Canada was.

This element was not discussed again until fourteen years later in United States—Gasoline. In United States—Gasoline, the WTO Appellate Body set forth two extreme hypothetical situations. The first clearly failed the “in conjunction with” requirement, and the second easily met that requirement. First, the Appellate Body agreed with the Canadian-Tuna Panel that where no restriction is made on domestic trade, XX(g) cannot apply. This is evidenced by the plain language of XX(g), which requires the restriction be “made in conjunction.” It is self-explanatory that in order to make a restriction “in conjunction with domestic restrictions” requires some form of domestic restriction.

Second, at the opposite extreme, XX(g) does not require that restrictions on domestic products be identical to the restrictions on imported goods. If this were the requirement, Article III:4 would not have been violated in the first place and there would be no reason to argue that the measure was saved by XX(g). If identical restrictions were required, XX(g) would necessarily be rendered useless because it could never, by its very terms, provide a justification for a violation of

296. Though required in Tuna I, supra note 51, ¶ 5.33, this limit has not been discussed by subsequent panels.
297. See Canadian-Tuna, supra note 26, ¶ 4.9. Interestingly enough, this was also the first case where a party argued XX(g) should apply to justify a measure that violated the GATT. See id.
298. Id. ¶ 4.11.
299. Id. ¶ 4.12.
300. United States—Gasoline Appellate Body, supra note 124, at 625.
301. Id.
302. Id.
303. GATT art. XX.
305. Id.
The Appellate Body rejected this result as contrary to both the intent of the drafters of the GATT and the basic rules of treaty interpretation.\footnote{306} After recognizing these extreme cases were easily decided, the Appellate Body in United States—Gasoline attempted to determine where between them the line should be drawn.\footnote{308} Though the Appellate Body ultimately failed to draw such a line, it did establish three useful rules in its attempt: (1) The basic requirement of this language is to require “even-handedness” in the imposition of restrictions;\footnote{309} (2) the “in conjunction with” requirement does not create an “effects test;”\footnote{310} and (3) the fact that the imported product receives less favorable treatment than the equivalent domestic product is not a material consideration in the analysis of XX(g).\footnote{311}

In reaching the first rule, the WTO Appellate Body applied the rule of treaty interpretation\footnote{312} that each word in a treaty has a unique meaning and that different words are used to lead to different analyses.\footnote{313} Applying this rule of interpretation, the Appellate Body concluded that the “in conjunction with” phrase should be interpreted to mean that if restrictions on imports are to be justified by XX(g), there must be at least some restriction on domestic products as well.\footnote{314} The Appellate Body stated that the overall purpose of this language is to require “even-handedness” in applying restrictions under the guise of promoting conservation of exhaustible natural resources.\footnote{315} The Appellate Body further pointed out that if the requirement of even-handedness called for identical restrictions to be imposed on domestic and imported products, it would render Article XX(g) completely moot because Article III:4 would not have been offended in the first place.\footnote{316}

Second, the fact that the imported goods received “less favourable treatment” than domestic goods could not be a material consideration in the analytical framework of XX(g).\footnote{317} If less favorable treatment could be considered, then the same facts that supported the finding of a violation of a substantive provision of the GATT would prevent the application of XX(g). This would be contrary to the

\begin{itemize}
\item \footnote{306} Id.
\item \footnote{307} Id.
\item \footnote{308} See id. at 624.
\item \footnote{309} Id. at 625.
\item \footnote{310} Id. Because causation is difficult or impossible to prove and, in this arena, the results may take years to be noticeable. Id.
\item \footnote{311} Again, this is because requiring identical restrictions would lead to the extreme result discussed in the preceding paragraph. Id. at 625-626.
\item \footnote{312} Vienna Convention on the Law of Treaties, supra note 260.
\item \footnote{313} United States—Gasoline Appellate Body, supra note 124, at 624.
\item \footnote{314} Id.
\item \footnote{315} Id.
\item \footnote{316} Id. at 622.
\item \footnote{317} Id. at 625.
\end{itemize}
Vienna Convention on the Interpretation of treaties because XX(g) would be rendered useless.

Third, the Appellate Body made clear that it did not interpret the “in conjunction with” clause to specify an “effects test.” Venezuela argued the language of XX(g) required the restrictions on imports “reflect a conservation purpose” and also “be shown to have had ‘some positive conservation effect.’” Ultimately, the Appellate Body rejected Venezuela’s argument that this language requires a positive conservation effect.

The Appellate Body recognized that causation is hard to prove, and that effects may not be seen for many years. The Appellate Body refused to adopt a rule that would require a party to show there had been some conservation effect because “the legal characterization of ... a measure is not reasonably made contingent upon concurrence of subsequent events.” Thus the Appellate Body found the baseline establishment rules met the “in conjunction with” prong of XX(g).

To summarize the conclusions of the Appellate Body in United States—Gasoline, five rules are set forth. First, the “in conjunction with” language is intended to require even-handedness in restricting products. Second, there must be at least some restriction placed on domestic products. Third, the restrictions on domestic products need not be identical to the restrictions on the imported products. Fourth, whether the imported product receives less favorable treatment than the domestic product is not a material consideration in this analysis. Fifth, this language does not state an effects test that requires a positive conservation effect be shown.

In Shrimp-Turtle, the Appellate Body began its analysis of the “in conjunction with” element of XX(g) by citing the Appellate Body report in United States—Gasoline. There, the Appellate Body said the “in conjunction with” language constituted “a requirement of even-handedness in the imposition of restrictions, in the name of conservation.” In applying this language, the Shrimp-Turtle Appellate Body questioned whether Section 609’s restrictions on shrimp importing countries were also imposed on shrimp caught by United States

318. Id.
319. Id. at 624.
320. Id. at 625.
321. Id.
322. Id.
323. Id. at 626.
324. Id. at 622.
325. Id. at 625.
326. Id.
327. Id.
328. Id.
329. Shrimp-Turtle Appellate Body, supra note 139, ¶ 143.
330. Id. (citing United States—Gasoline Appellate Body, supra note 124, at 620-621).
vessels.\textsuperscript{331} Although Section 609 \textit{itself} did not impose such restrictions on the United States, \textit{other regulations} under the Endangered Species Act \textit{did}.\textsuperscript{332} Because the United States was ultimately subject to the same restrictions as importing countries, the Appellate Body found Section 609 to be an “even-handed” measure.\textsuperscript{333}

It is worthwhile at this point to include a reminder of what exactly is to be analyzed under XX(g). The Appellate Body stated in \textit{Unites States—Gasoline} that it was the \textit{measure}, as narrowly defined at the outset of the analysis of XX(g), that must be made “in conjunction with” domestic restrictions.\textsuperscript{334} In that case, the Appellate Body asked only whether the specific, narrow measure of the baseline establishment rule was “made effective in conjunction with restrictions on domestic products or consumption.”\textsuperscript{335} It did \textit{not} address whether the broader Gasoline Rule or the CAA were “made in conjunction with.”\textsuperscript{336}

The analysis of the Appellate Body in the \textit{Shrimp-Turtle} case, however, directly contradicts this approach.\textsuperscript{337} In \textit{Shrimp-Turtle}, the Appellate Body did not rely on the specific measure of Section 609, but relied explicitly on the broader, overarching ESA to conclude the “in conjunction with” requirement was met.\textsuperscript{338}

Thus, the Appellate Body analyzed this element in two very different ways in two subsequent cases. In \textit{United States—Gasoline}, it relied on domestic restrictions embodied by the specific measure itself,\textsuperscript{339} but in \textit{Shrimp-Turtle} it considered the overall structure in addition to the specific measure.\textsuperscript{340} This effectively expanded the considerations allowable in an analysis of the “in conjunction with” prong of XX(g), and made that requirement much easier to meet than under the \textit{United States—Gasoline} test.\textsuperscript{341} Interestingly, however, the Appellate Body did not \textit{acknowledge} that it was deviating from its analysis in \textit{United States—Gasoline} to the slightest degree.\textsuperscript{342} In fact, based on the numerous cites made to the \textit{United States—Gasoline} Appellate Body report in this section of the \textit{Shrimp-Turtle} decision, it appears the Appellate Body intended to follow its analysis in \textit{United States—Gasoline} exactly.\textsuperscript{343}

\textsuperscript{331}. \textit{Id.}
\textsuperscript{332}. \textit{Id.} \textsuperscript{¶} 144.
\textsuperscript{333}. \textit{Id.}
\textsuperscript{334}. \textit{United States—Gasoline} Appellate Body, \textit{supra} note 124, at 625 (“In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline . . . .”) (emphasis added).
\textsuperscript{335}. \textit{Id.}
\textsuperscript{336}. \textit{Id.}
\textsuperscript{337}. \textit{Compare id. with Shrimp-Turtle Appellate Body, supra} note 139, \textsuperscript{¶} 144.
\textsuperscript{338}. \textit{Shrimp-Turtle} Appellate Body, \textit{supra} note 139, \textsuperscript{¶} 144.
\textsuperscript{339}. \textit{United States—Gasoline} Appellate Body, \textit{supra} note 124, at 625.
\textsuperscript{340}. \textit{Shrimp-Turtle} Appellate Body, \textit{supra} note 139, \textsuperscript{¶} 144.
\textsuperscript{341}. \textit{Compare id. with United States—Gasoline} Appellate Body, \textit{supra} note 124, at 625.
\textsuperscript{342}. \textit{Shrimp-Turtle} Appellate Body, \textit{supra} note 139, \textsuperscript{¶} 144.
\textsuperscript{343}. \textit{See id.} \textsuperscript{¶¶} 143-145.
This difference in analysis immediately suggests three possible conclusions: (1) The Shrimp-Turtle Appellate Body intended to broaden the definition of “measure” established in United States—Gasoline; (2) the Shrimp-Turtle Appellate Body made a mistake; or (3) the Shrimp-Turtle Appellate Body is expanding the definition of “measure” for purposes of the “in conjunction with” element of XX(g) only. This difference in analysis also raises the additional question of whether it is possible to reconcile the Appellate Body report in Shrimp-Turtle with the Appellate Body report in United States—Gasoline.

First, it seems unlikely that the Appellate Body meant to overrule United States—Gasoline by expanding the definition of what constitutes the “measure” for purposes of XX(g). There was no mention of any such intention in the Shrimp-Turtle report, and if the Appellate Body intended to overturn United States—Gasoline, it probably would have stated it was doing so. Even more telling, the Appellate Body in Shrimp-Turtle would not have quoted the rule set forth in United States—Gasoline with approval if it were overruling that holding.

Second, assuming there was no intention to overrule United States—Gasoline, it is possible that the Appellate Body made a mistake in applying its own analysis. However, this option is not likely, or, at least, it is not likely to be admitted if there is an alternative explanation.

The third possibility, that the analysis of this specific element of XX(g) is being broadened, provides such an explanation. The Shrimp-Turtle Appellate Body began its analysis by quoting with approval its earlier statement that the policy behind the “in conjunction with” clause is “a requirement of evenhandedness in the imposition of restrictions.” 345 This hints that the Shrimp-Turtle Appellate Body is mainly concerned with fairness. 346 What appears to have been less important to the Shrimp-Turtle Appellate Body is that one specific measure provide the restrictions on both foreign and domestic goods. 347

Regardless whether the Shrimp-Turtle Appellate Body intentionally expanded the material considerations relevant to the “in conjunction with” prong of XX(g), one might ask whether that result can be harmonized with the other decisions. To start, the plain language of XX(g) provides substantial justification for the Appellate Body’s result in the Shrimp-Turtle dispute. 348 The plain meaning

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344. Which held that “in conjunction with” required “even handedness in the imposition of restrictions.” United States—Gasoline Appellate Body, supra note 124, at 625.


346. See Shrimp-Turtle Appellate Body, supra note 139, ¶ 143-145. Further, it is self-evident that permitting a Member to use XX(g) to impose restrictions on importers without biding by the same restrictions would be unfair.

347. As evidenced by the Appellate Body’s reliance on the ESA to provide domestic restrictions on the United States “in conjunction with restrictions” that Section 609 imposed on importing countries. See Shrimp-Turtle Appellate Body, supra note 139, ¶ 144.

348. XX(g) provides a justification “If such measures are made effective in conjunction with restrictions
of the phrase “in conjunction with” is “together with” or “jointly with.” The words “together” and “jointly” denote plurality. It would be absurd to argue that “in conjunction with” requires the measure be enacted “together with” itself; such an interpretation would directly contradict the Vienna Convention on the Interpretation of Treaties, which requires words be given their natural meaning. Further, based on the Appellate Body’s analysis in United States—Gasoline that the “measure” was the specific provision that violated a substantive provision of the GATT, the “measure” for purposes of XX(g) will always entail a restriction on a foreign country because if there is no restriction and there will be no complaint of a violation of the substantive provisions of the GATT. The drafters then almost certainly intended Article XX to require the prohibiting country to be subject to some regulation also.

If the drafters of XX(g) intended to require that the specific measure that restricts international trade provide restrictions on domestic products or consumption, they would not have used the phrase “in conjunction with” to explain this requirement. It is reasonable to conclude that, because “in conjunction with” assumes the existence of regulations in addition to the measure, the drafters of the GATT 1947 did not intend to say that the measure must be made effective in conjunction with itself. On this reasoning, it seems clear that XX(g) does not require the specific measure be the source of the domestic restrictions, but merely that the country enacting the measure be subject to similar regulations.

B. Chapeau of Article XX

To refresh the reader’s memory, the chapeau of Article XX states in full:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

349. United States—Gasoline Appellate Body, supra note 124, at 624 (citing THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 481 (L. Brown ed. 1993)).
352. Id. at 623.
353. This follows from the rule that Article XX is an exception clause. See id. at 622.
354. As the Appellate Body recognized in the United States—Gasoline dispute, if the country imposing restrictions enacted no domestic restriction comparable to the trade restriction, it is unlikely that the measure would be “related to conservation;” it would merely be a trade-restrictive measure. Id. at 625. If the country asserting XX(g) is in fact pursuing a policy of conservation, it would almost certainly take measures within its borders. Id. (citing Herring-Salmon, supra note 41, ¶ 4.10-4.12).
355. Again, this conclusion aligns with the Vienna Convention on the Interpretation of Treaties. See id. at 624.
356. See id. at 624-625.
357. This is the conclusion the Appellate Body reached in the United States—Gasoline case. See id.
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 Member of measures [that fit within the following subsections].

This section will give an overview of how the chapeau interacts with the subsections of Article XX, and specifically with subsection (g). Any case decided under Article XX will require an evaluation of the chapeau, as it applies to each subdivision. This Comment focuses on the disputes regarding XX(g) that have addressed the chapeau, but includes one case finding that the chapeau was met for a measure found to be provisionally justified by XX(b).

This section begins by laying out the ground rules and procedural fundamentals of the chapeau in subsection 1. Subsection 2 deals with the implicit requirements that have arisen from the decisional law regarding the chapeau. Subsection 3 discusses the “arbitrary or unjustifiable discrimination” language, and subsection 4 will discuss the “disguised restriction on international trade” limit.

1. Initial Considerations

The first rule pertinent to the analysis of the chapeau is that the chapeau must be assessed after the measure has been provisionally characterized as fitting within a subsection of Article XX. The reason for this rule was set forth in detail in Shrimp-Turtle. There, the Appellate Body adopted as mandatory the two-tiered approach created by the Appellate Body in United States—Gasoline. The Appellate Body in Shrimp-Turtle found the two-tiered approach to be in accord with “the fundamental structure and logic of Article XX” because analyzing the application of the measure depends on what type of measure is at issue. The Appellate Body gave the example that the analysis of a measure enacted to protect public morals may receive different treatment by the chapeau than a measure enacted to regulate products of prison labor.

The result reached by the WTO Panel in Shrimp-Turtle by assessing the chapeau first would render many, if not all of the subsections of Article XX

358. GATT art. XX.
359. For a very thorough examination of the applicability and scope of the chapeau of XX, see Sanford Gaines, The Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. Pa. J. Int’l Econ. L. 739.
360. This is apparent from the general structure of Article XX. See GATT art. XX.
361. United States—Gasoline Appellate Body, supra note 124, at 627.
362. See Shrimp-Turtle Appellate Body, supra note 139, ¶ 120.
363. Id.
364. Id.
365. Id.
useless. While the language of the chapeau is generally broad, the Appellate Body rejected a reading so broad as to prevent the application of the subsections. To interpret the chapeau in a way that would negate many if not all of the subsections would violate established principles of treaty interpretation.

To properly interpret the chapeau’s limitations, it is necessary to first define the measure under the particular subsection of Article XX. Defining the “measure” under a subsection before analyzing the application of that measure under the chapeau focuses the analysis of the measure under the chapeau on the application as opposed to the design of the measure. This mode of analysis, said the Appellate Body, enables the contours of the chapeau’s standards to shift with the type of measure being considered.

In addition to the order of analysis, the Appellate Body has adopted the following preliminary rules: first, the measure to be assessed under the chapeau must be the same measure found to violate a substantive provision of the GATT; second, the chapeau is concerned with the measure as applied; third, the burden of proof is on the country seeking to justify a measure under Article XX to show that the chapeau is not violated. Also, the Appellate Body has found that there are both implicit and explicit requirements embodied by the chapeau. The implicit requirements, discussed in subsection 2 below, include being mindful of the policy and general purpose of the chapeau. The explicit requirements are that the measure not constitute an “arbitrary or unjustifiable discrimination” nor a “disguised restriction on international trade.” These elements are examined separately in subsections 3 and 4 below.

366. Id. ¶ 121.
367. Id.
368. Id. (referring to the Vienna Convention on the Law of Treaties).
369. Id. ¶ 120. See also supra Part III.A.1.
370. Shrimp-Turtle Appellate Body, supra note 139, ¶ 120.
371. Id.
372. These considerations are “preliminary” in that they do not concern the analysis of the application of the measure. Rather, they are procedural rules that are assessed before that analysis. See United States—Gasoline Appellate Body, supra note 124, at 626-627.
373. Id. at 626.
374. Id. More specifically, the chapeau explicitly calls for analysis of the application of the measure, as opposed to the measure itself. See GATT art. XX chapeau (stating in relevant part that the measure is “[s]ubject to the requirement that such measures are not applied in a manner . . .”) (emphasis added); see also Shrimp-Turtle Appellate Body, supra note 139, ¶ 147.
375. Although the Appellate Body stated in United States—Gasoline that this burden was necessarily heavier than the burden under subsection (g), United States—Gasoline Appellate Body, supra note 124, at 626-627, later cases have not mentioned that requirement.
376. See id. at 627.
377. GATT art. XX chapeau.
2. General Purpose

In determining the general purpose of the chapeau, it should be remembered that the chapeau cannot be read in a manner that would override the provisions of another Article or provision of the GATT. Additionally, it is useful to recall the broader policy for including Article XX in the GATT in the first place, which the Appellate Body has stated is to ensure that the exceptions to the application of the GATT provided for in Article XX are not abused. Further, the chapeau applies not to the specific contents of the measure, but rather to the “manner in which that measure is applied.”

Reiterating this point in Shrimp-Turtle, the Appellate Body stated that the purpose of the chapeau is to prevent “abuse of the exceptions of Article XX.”

Thus, in analyzing the applicability of Article XX, one must keep in mind two important policies. First, Article XX is intended to justify some violations of the substantive provisions of the GATT. Second, limiting that policy is the fact that the language of the chapeau acts as a “check” on the justifications provided by the numerous subsections so as to prevent abuse.

3. “Arbitrary or Unjustifiable Discrimination Where the Same Conditions Prevail”

The first two cases in which the WTO Appellate Body addressed this element blurred the analysis of “arbitrary or unjustifiable discrimination.” In the first, United States—Gasoline, the Appellate Body found that the measure was both an “unjustifiable discrimination” and a “disguised restriction on international trade.” It reached this conclusion based on the fact that the United States had failed to negotiate with gasoline importers and that the United States had failed to consider the implications its measure would have on gasoline importers. Unfortunately, the Appellate Body in United States—Gasoline failed to delineate which facts violated which provisions of the chapeau, and why specifically it reached its result.

378. United States—Gasoline Appellate Body, supra note 124, at 627 (the Vienna Convention requires that an interpretation “give meaning to all the terms of a treaty”) (emphasis added).
379. See Herring-Salmon, supra note 41, ¶¶ 4.6-4.7 for discussion.
380. Shrimp-Turtle Appellate Body, supra note 139, ¶ 151; see also United States—Gasoline Appellate Body, supra note 124, at 626.
381. United States—Gasoline Appellate Body, supra note 124, at 626.
382. Shrimp-Turtle Appellate Body, supra note 139, ¶ 156.
383. Id. ¶ 157.
384. See id. ¶¶ 156-158.
385. Recall that this was the baseline establishment rule. United States—Gasoline Appellate Body, supra note 124, at 617.
386. Id. at 633.
387. Id. at 632.
388. See id. at 632-633.
In its second decision, *Shrimp-Turtle*, the Appellate Body did not do much better. There, the Appellate Body identified three elements to determine whether the measure constituted an "arbitrary or unjustifiable discrimination where the same conditions prevail."

Those were: (1) The "application of the measure must result in discrimination;" (2) "the discrimination must by ‘arbitrary’ or ‘unjustifiable;’" and (3) "the discrimination must occur between countries where the same conditions prevail." Though the Appellate Body in *Shrimp-Turtle* stated that the analysis of whether application of the measure results in discrimination was distinct from whether that discrimination was "arbitrary or unjustifiable," it failed to address discrimination separately. Instead, the Appellate Body analyzed "unjustifiable discrimination" and "arbitrary discrimination" under separate subheadings.

The Appellate Body found the following facts made the measure an "unjustifiable discrimination": (1) Section 609 was, in effect, an embargo on countries that did not or could not comply; (2) Section 609 failed to make exception for countries that had policies different than 609, even if the policies were equally effective at protecting turtles; and (3) the United States failed to negotiate the implementation of the requirements with all importing countries equally. The Appellate Body also found that Section 609 was an "arbitrary discrimination" as applied because there was no check on the administration of the certification process, and no way for a country denied a certificate to appeal that decision.

In response to the Appellate Body's decision, the United States made revisions to Section 609. These revisions resulted in the 1999 Revised Guidelines on Section 609. Malaysia challenged the revisions as a violation of the GATT, and the United States again asserted XX(g) as a defense. The Appellate Body was persuaded that the United States' revisions were sufficient to meet the concerns announced by the Appellate Body above and upheld Section 609. The Appellate Body in this case relied most heavily on the fact that the

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391. *Id.* ¶ 150.
392. *See id.* subheadings VI.C.2 (between ¶¶ 160-161), & VI.C.3 (between ¶¶ 176-177).
393. *See id.*
394. *Id.* ¶ 161.
395. *Id.* ¶ 163.
396. *Id.* ¶ 172.
397. *Id.* ¶ 177.
399. *Id.*
400. *Id.* ¶ 8.
401. *Id.* ¶ 30.
402. *Id.* ¶ 153.
United States had pursued negotiations with the complaining Member, Malaysia.\textsuperscript{403} It rejected Malaysia's argument that the chapeau required the conclusion of an agreement to avoid "discrimination" and held instead that a Member is "expected to make good faith efforts to reach international agreements that are comparable form one forum of negotiation to the other.

The Appellate Body further held that such "negotiations need not be identical," but "must be comparable" in the degree of effort made to reach an agreement.\textsuperscript{405} This is to say that the country should expend comparable resources and energies in the attempt to reach an agreement.\textsuperscript{406} A showing that a Member has made a good faith effort to reach an agreement, though not dispositive, makes it less likely that the measure will be found to be an "arbitrary or unjustifiable discrimination."\textsuperscript{407}

The Appellate Body also rejected Malaysia's argument that the 1999 version of Section 609, like the original 1996 version, was too inflexible to pass muster under the chapeau.\textsuperscript{408} The Appellate Body rejected this argument as well, and held that it was enough that the 1999 version permitted certification of other member's programs that were "comparable in effectiveness."\textsuperscript{409} The Appellate Body noted that measure should have "sufficient flexibility to take into account the specific conditions prevailing in any exporting" country.\textsuperscript{410} However, it did not require the measure contain provisions directly aimed at addressing the different circumstances of different countries.\textsuperscript{411}

Although Section 609 was eventually endorsed by the Appellate Body, none of the cases discussing the chapeau's application to XX(g) have given a clear framework for what the chapeau requires. It is unfortunate that the Appellate Body in the Shrimp-Turtle 2001 case did not refer to the framework for analysis set forth by the WTO Panel report in Asbestos, as that report provided a clear order of analysis in this area. In Asbestos, the Panel applied each of the three steps set forth by the Appellate Body's in Shrimp-Turtle individually and independently.\textsuperscript{412} That approach and the Panel's result are set forth here to illustrate a useful approach to applying the chapeau.

First, the Panel clearly addressed "discrimination."\textsuperscript{413} Then, after finding the French decree banning asbestos did not discriminate because it banned all asbestos from all countries equally, the Panel did not find it necessary to decide

\textsuperscript{403.} See \textit{id.} \S 122.
\textsuperscript{404.} \textit{id.}
\textsuperscript{405.} \textit{id.}
\textsuperscript{406.} \textit{id.}
\textsuperscript{407.} \textit{id.}
\textsuperscript{408.} \textit{id.} \S 135.
\textsuperscript{409.} \textit{id.} \S 144.
\textsuperscript{410.} \textit{id.} \S 149.
\textsuperscript{411.} \textit{id.}
\textsuperscript{412.} Asbestos Panel Report, \textit{supra} note 147, \S 8.226.
\textsuperscript{413.} \textit{id.}
whether such non-existent discrimination was "arbitrary or unjustifiable." It found that there was no discrimination in the application of the French decree because it treated all asbestos from all countries equally—it was simply banned. This gives evidence that in the future, "discrimination" will be assessed before an attempt to determine whether any discrimination is arbitrary or unjustifiable, even though the Appellate Body failed to do so in Shrimp-Turtle.

Procedure also played a large part in the Asbestos case. The Panel held that because the EC made a prima facie case that the chapeau was met, the burden of proving the chapeau was not met shifted to Canada. Canada failed to properly rebut the EC’s prima facie case because Canada had merely re-asserted that the "less favorable treatment" found under III:4 constituted discrimination. The Panel said that the discrimination under a substantive provision was not a relevant consideration in the analysis of the chapeau and Canada’s argument failed.

Unfortunately, the Appellate Body has not had reason to go beyond the first step of the analysis outlined in Shrimp-Turtle, and has not directly stated what characteristics the discrimination will need to justify a finding that the discrimination is "arbitrary" or "unjustifiable."

A final point to mention in this section is the obvious area for litigation embodied in the requirement that any "arbitrary or unjustifiable discrimination" be against "countries where the same conditions prevail." The case law is almost completely undeveloped on what is required to find that "the same conditions prevail" between two countries, but the Appellate Body has at least decided that the term "countries" applies to both importing and exporting countries. Yet, the issue of interpreting and applying the language, "where the same conditions prevail," has not yet been fully addressed.

4. "Disguised Restriction on International Trade"

The final explicit requirement in the chapeau of Article XX is that the measure, as applied, not be a "disguised restriction on international trade."
Prior to the Asbestos case, only two cases had addressed this element. The first, Canadian-Tuna, is an unpublished GATT Panel decision from 1982. There, the GATT Panel found there was no disguised restriction because the measure was publicly announced. In the second, United States—Automotive Springs, the measure was not a disguised restriction because it was published in the Federal Register, enforced by customs agents, and aimed at preventing patent violations.

In Asbestos, the WTO Panel first cited the language of the Appellate Body in United States—Gasoline that "the provisions of the chapeau cannot logically refer to the same standards by which a violation of the substantive rule has been determined." Since there was necessarily a finding of restriction to put the analysis within the provisions of the chapeau, the Panel concluded that the focus of this element should be on the word "disguised." Consulting the dictionary meaning, the Panel held that "disguised" required an "intent to conceal." Thus, the Panel proceeded to examine whether France intended to conceal the enactment of its decree. Recognizing that intent is a dynamic factor, the Panel adopted the method for determining intent as used in relation to III:4, that the design, architecture, and revealing structure could be used to determine intent.

The Panel found that France had no such intention. In fact, Canada’s assertion that France enacted the decree to calm the public concern supported that finding.

C. Summary of the Proposed Framework for Analysis

The objective of this subsection is to clarify and solidify the rules and methods of analysis regarding Article XX(g) of the GATT. Article XX(g) has received diverse treatment by the different bodies that have analyzed it, and Section III.A and III.B above have sought to assimilate those analyses to form a workable standard for use in future disputes. What follows is a summary of that standard.

424. Id. ¶ 4.8.
425. Id. ¶ 4.8.
426. United States—Imports Conciliation, supra note 423.
427. Id. ¶ 4.8.
428. Asbestos Panel, supra note 147, ¶ 8.236.
429. Id.
430. Id.
431. See id. ¶ 8.236-8.240.
433. Asbestos Panel, supra note 147, ¶ 8.238.
434. Ironic for Canada to have their argument turn on them so.
1. Analysis of XX(g)

To begin, it is imperative to address subsection (g) first. Within that subsection, it is logical to first analyze whether the thing to be protected is an exhaustible natural resource. This has become a term of art of two parts—exhaustible and natural resource. A thing is “exhaustible” if it can be depleted, and what is a “natural resource” must be interpreted in relation to the international law prevailing at the time of the decision.

Second, the “measure” must be “relating to conservation.” This requirement contains three subparts. First, it is necessary to ascertain precisely what action or law violated the GATT; that action or law is the “measure” for purposes of Article XX analysis. Second, the courts have built in a requirement that the measure be related to a conservation policy. Although it is difficult to distinguish “policy” from “related to,” the basic idea is that Article XX(g) will only apply to a measure that pursues conservation. This has been interpreted as a test of good faith, in that it requires that the goal of the measure be conservation and nothing else. This dovetails into the third requirement that the measure be “related to” the policy. This has been held to require the measure be “primarily aimed at” the policy, but “primarily aimed at” has been interpreted differently by each panel that has assessed it. Though this element has received a different interpretation every time it has been addressed, the basic idea is that the means enacted to conserve the exhaustible natural resource must be sufficiently related to the policy.

The final requirement of subsection (g) is that the measure be made effective “in conjunction with restrictions on domestic products or services.” This is best understood as a requirement of even-handedness to prevent a country from attempting to make other countries pursue conservation measures that the enacting country itself is not subject to. While the United States—Gasoline and Shrimp-Turtle disputes differed on where that domestic restriction could come from, it seems plain based on the policy of the requirement that the broader
analysis in *Shrimp-Turtle* should prevail. The language in Article XX(g) does not specify where the domestic restriction must come from; it merely says that there must be a domestic restriction.

2. Analysis of the Chapeau

If any of the elements of subsection (g) are not met, the measure fails immediately. If, however, all of these requirements are met, then the analysis can proceed to the chapeau. The chapeau acts to prevent abuse of Article XX. It does this by requiring the application of the measure not result in either (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail or (2) a disguised restriction on international trade. The decisions have added rules regarding the burden of proof—which is on the party asserting Article XX—and requiring that the policy of the chapeau be met.

It is not clear what constitutes arbitrary or unjustifiable discrimination, but it appears that “discrimination” should be analyzed before addressing whether such discrimination is “arbitrary or unjustifiable.” The Shrimp-Turtle Appellate Body decision in 2001 made it abundantly clear that this element requires good faith negotiations by the country seeking to apply Article XX to avoid a finding that any discrimination is unjustifiable. The only case that discussed arbitrary discrimination concluded that the rigidity of the measure, combined with a lack of a check on the application of the measure, constituted “arbitrary discrimination.”

Second, the chapeau requires that the application of the measure not result in a disguised restriction on international trade. This has been interpreted to mean that there must not be an “intent to conceal the restriction.” It is not yet clear what else this element might require.

If a country can satisfy all of the requirements of a particular subsection of Article XX, and can then show that the chapeau is also satisfied, Article XX acts as a check on the GATT. Specifically, as recognized in the preamble to the Marrakesh Agreement, Members should endeavor to pursue sustainable

449. See supra Part III.A.3 for analysis.
450. See GATT art. XX(g).
451. *Shrimp-Turtle* Appellate Body, supra note 139, ¶ 120.
452. Id. ¶ 156.
453. GATT art. XX chapeau.
455. See id. at 627.
459. Asbestos Panel, supra note 147, ¶ 8.236.
development and "protect and preserve the environment." Article XX(g) provides one means of pursuing this goal.

IV. CONCLUSION

The purpose of this Comment has been to provide a guide to the decisional law surrounding Article XX(g) of the GATT. The failure of the cases involving Article XX(g) to consistently follow a structured analysis has lead to unpredictability in how Article XX(g) might apply to future disputes. This Comment has sought to alleviate that problem by consolidating the relevant cases, comparing the analytical approaches applied in each, and combining those approaches to predict a method of analysis that future WTO Panels will likely follow. The hope is that this summary will help to create consistency in this area of law, and that such consistency will lead to predictability in the application of Article XX(g).

460. Marrakesh Agreement, supra note 9, at pmbl.