A Need for Compliance: The Shrimp Turtle Case and the Conflict Between the WTO and the United States Court of International Trade

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The shrimp/turtle conflict waged in the World Trade Organization and the Court of International Trade represents a recent example of the failure of the United States to comply with a respected, multilateral body opinion. The Court of International Trade's refusal to apply the Charming Betsy principle in this and several other past cases involving World Trade Organization Panel or Appellate Body opinions is one of the largest impediments to U.S. compliance. This Comment explores the shrimp/turtle cases in depth and suggests alternative measures that the Court of International Trade should have taken to allow for compliance with the World Trade Organization Appellate Body decision.

I. INTRODUCTION

Despite its smooth, elegant motion under water, the sea turtle has created a tremendous wake in the realms of environmental protection and free trade. Efforts by the United States to protect the sea turtle through section 609 of the Endangered Species Act[1] of 1973 have clashed against several nations' right to free trade as provided in the

1. 16 U.S.C. § 1537 (1994).

General Agreement on Tariffs and Trade (GATT),[2] forcing the World Trade Organization (WTO) to stake out its position in this difficult conflict.[3] The WTO's Appellate Body opinion concerning section 609 marked a small but important effort to bridge the conflict by recognizing the viability of limited unilateral environmental protection measures.[4] However, the Court of International Trade's determination that the 1998 Revised Guidelines,[5] promulgated to come into compliance with the WTO's Appellate Body decision, did not accord with section 609 marks a tremendous setback for the progress effected by the WTO.[6]

This Comment will focus on the issues surrounding section 609 and the WTO cases, emphasizing the rift between the WTO Appellate Body and the decision of the Court of International Trade. Part I of this Comment will discuss the plight of the sea turtle and the birth of section 609. After examining the reach of section 609, Part II will discuss the Court of International Trade's cases concerning the implementation of section 609. In Part II.B and C, the Comment will shift to the international implications of section 609, focusing on the recent WTO Panel and Appellate Body decisions. Part III of the Comment will analyze the most recent Court of International Trade decision concerning the 1998 Revised Guidelines. Finally, in Part IV, the Comment will focus on the conflict between the WTO and the Court of International Trade's most recent decision, and suggest alternative measures which the Court of International Trade could have taken to comply with the WTO decision. In conclusion, this Comment will discuss the importance of cooperative action in the international fora and address the failure of the United States and the Court of International Trade to take part in this discourse.

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2. General Assembly on Trade and Tariffs, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

3. *See generally* World Trade Organization: Report of the Panel on United States Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832 (1998) [hereinafter Panel Report], *party arguments available in* 1998 WL 256632.

4. *See* World Trade Organization: Report of the Appellate Body, United States Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118, ¶ 185 (1999) [hereinafter Appellate Report].

5. *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094 (1998).

6. *See* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1081 (Ct. Int'l Trade 1999).

II. THE FIGHT TO SAVE THE SEA TURTLE

The threat of extinction of any animal often inspires communities or nations to take far-reaching measures to protect them. This is especially true for an animal as unique, beautiful, and graceful as the sea turtle. There are eight species of sea turtles throughout the world's oceans, and six of these species migrate through United States waters.[7] Each of the six species of sea turtles native to U.S. waters is listed as either endangered or threatened under the Endangered Species Act of 1973.[8] In addition, the international community has responded by placing all species of sea turtles on Appendix I to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).[9] All but the "flatback" turtle are listed in Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals[10] and in Appendix II of the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.[11] The listing of the various species of sea turtles on CITES and these Appendices demonstrates the universal acknowledgement of the imminent threat to the future existence of these beautiful creatures.

The reasons for the widespread degradation of sea turtle populations are varied, but scientists and experts have concluded that the use of drift nets for shrimp fishing is, by far, the most prevalent reason.[12] Spurred on by growing concern for the well-being of the

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7. *See* Public Review of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, 55 Fed. Reg. 23,259, 23,260 (1990) (containing an executive summary of NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION 21 (1990)); *see also* Marlo Pfister Cadeddu, Note, *Turtles in the Soup? An Analysis of the GATT Challenge to the United States Endangered Species Act Section 609 Shrimp Harvesting Nation Certification Program for the Conservation of Sea Turtles*, 11 GEO. INT'L ENVTL. L. REV. 179, 180 (1998).

8. *See* 16 U.S.C. § 1531-1544 (1994); *see also* Cadeddu, *supra* note 7, at 181.

9. Convention on International Trade in Endangered Species of Wild Flora and Fauna, app. I (1975) [hereinafter CITES]. *See* Submission of the United States (Appellant) Before the World Trade Organization Appellate Body, AB–1998-4, ¶ 17, July 23, 1998 [hereinafter Submission of the United States], *quoted in* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1070 (Ct. Int'l Trade 1999).

10. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, app. I and II, 19 I.L.M. 11, 29 (1979).

11. *See* Submission of the United States, *supra* note 9, ¶ 17.

12. *See* Public Review of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, *supra* note 7, at 23,262-63. In 1990, the National Research Council of the National Academy of Sciences conducted the preeminent study on the mortality of the sea turtle, and found that shrimp trawling nets were by far the most prolific killer of sea turtles. *See* Cadeddu, *supra* note 7, at 181-82. Sea turtles become entangled in the net and die a slow death by suffocation because they can not reach the surface to breathe. *See* Public Review

world's population of sea turtles and their recent listing in the Endangered Species Act, the Federal Government directed the National Marine Fisheries Service (NMFS) to develop a new shrimp net device to prevent the incidental sea turtle catch.[13] The NMFS attempted to formulate several models, and finally in 1983 developed the Turtle Exclusion Device, or TED.[14] TEDs proved very effective, allowing sea turtles to escape from the shrimp nets almost ninety-seven percent of the time.[15] In addition, shrimp fishermen lost only one to three percent of their shrimp catch, and TEDs proved very affordable and easy to use.[16]

Despite all of the praise following the development of TEDs, U.S. shrimp fishermen remained skeptical of their use, and few opted to try them.[17] Responding to this widespread apprehension, the Secretary of Commerce issued regulations in 1987 which mandated the use of TEDs on all shrimp vessels.[18] Finally, after heated congressional debate and continued resistance from shrimp fishermen throughout the United States, these regulations took their final form in 1994.[19] Despite several limited exceptions, the regulations generally called for the mandatory use of TEDs on all shrimp trawl nets.[20]

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of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, *supra* note 7, at 23,262. Most of the sea turtles are found washed ashore during the shrimp fishing season, further supporting the theory that shrimp netting is the single, largest cause of turtle mortality. *See id.*

13. *See* Cadeddu, *supra* note 7, at 183.

14. *See* Public Review of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, *supra* note 7, at 23,264. The TED is a metal grillwork structure that is fixed at the mouth of the net that prevents the turtle and other larger bycatch from passing into the net. The sea turtle escapes from the net through a hatch, preventing its capture. *See* Bret Puls, Note, *The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy*, 8 MINN. J. GLOBAL TRADE 343, 346 (1999).

15. *See* Public Review of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, *supra* note 7, at 23,264.

16. *See* Submission of the United States, *supra* note 9, ¶ 17.

17. *See* Cadeddu, *supra* note 7, at 184-85.

18. *See id.* at 184. These regulations appear in their original form as 52 Fed. Reg. 24,244 (1987). A recent New York Times article has noted that despite all of the efforts by the United States to protect the sea turtle, Texas beaches are still strewn with dead, washed up sea turtles during the main shrimp fishing season. In 1999 alone, 450 dead and injured turtles washed up on the Texas coast. This is a 14% increase over the totals from 1998, suggesting perhaps that U.S. shrimp fishermen are not using TEDs, or possibly the TEDs are ineffective as they are being used today. *See In Texas, Turtle's Friends are Split Over Shrimping*, N.Y. TIMES, Feb. 13, 2000 at 1, 24.

19. *See* Cadeddu, *supra* note 7, at 184-85.

20. *See* 57 Fed. Reg. 18,446 (1992).

A. Section 609 of the Endangered Species Act

Due to the migratory nature of sea turtles, use of TEDs by local shrimp fishermen could not guarantee the welfare of sea turtles that traveled outside of United States territorial waters. Concern for the sea turtles as a shared global resource led Congress to pass section 609 of the Endangered Species Act in 1989.[21] Congress divided section 609 into two parts.[22] Section 609(a) specifically called for the Secretary of State, in conjunction with the Secretary of Commerce, to initiate negotiations with other nations as soon as possible for the development of bilateral and multilateral treaties that would address the conservation of sea turtles.[23] In particular, section 609(a) provided that the Secretaries of State and Commerce focus efforts on countries engaged in harmful netting practices in areas known to harbor endangered sea turtles.[24] Section 609(a) also encouraged the amendment of "any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section."[25] Finally, section 609(a) provided that the Secretaries of State and Commerce should present Congress with a comprehensive report of each shrimp fishing country's operations and its impact on sea turtle habitat one year after the implementation of the statute.[26]

Section 609(b) provided for more aggressive efforts to prevent the sea turtle's potentially imminent extinction.[27] In particular, Congress implemented a unilateral ban on the importation of shrimp products from countries employing commercial fishing technology harmful to species of sea turtles.[28] The President of the United States could lift the ban only if foreign governments complied with a general certification process.[29] The process required that foreign governments provide documentary evidence of the adoption of a regulatory program "governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United

21. *See* Endangered Species Act § 609, 16 U.S.C. § 1537 (1994).
22. *See id.*
23. *See id.* § 609(a)(1).
24. *See id.* § 609(a)(2).
25. *Id.* § 609(a)(4).
26. *See id.* § 609(a)(5)(A)-(C).
27. See id. § 609(b).
28. *See id.* § 609(b)(1).
29. *See id.* § 609(b)(2).

States."[30] Finally, Congress provided that the President might exempt countries from the ban in areas where there is no threat to sea turtles.[31]

B. Domestic Litigation over the Scope of Section 609

The unilateral trade ban measures adopted by Congress in section 609(b) served as a catalyst for both national and international litigation. Soon after the passage of section 609, the State Department issued the 1991 Revised Guidelines.[32] Fearing an adverse international reaction to the unilateral ban on all nations employing shrimp fishing measures harmful to sea turtles, the State Department narrowed the scope of section 609 to apply only to countries in the "wider Caribbean/western Atlantic region."[33] The Guidelines provided that nations in this region must commit to requiring shrimp vessels to use TEDs at all times, or use other scientifically viable methods of shrimp fishing which protected sea turtles.[34] In 1993, the State Department followed with another set of Revised Guidelines mandating the use of TEDs on all vessels in the "wider Caribbean/western Atlantic region," subject to only a limited number of exceptions for manually retrieved nets and some trawls.[35]

In response to the State Department's 1991 Revised Guidelines, Earth Island Institute and other environmental groups filed suit against the Secretaries of State and Commerce and several other government officials in the United States District Court for the Northern District of California.[36] The plaintiffs alleged that the defendants had failed to implement treaty negotiations with other

30. *Id.* § 609(b)(2)(A).

31. *See id.* § 609 (b)(2)(C).

32. Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 56 Fed. Reg. 1051 (1991).

33. *Id.* The wider Caribbean/western Atlantic region includes Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Columbia, Venezuela, Trinidad, Tobago, Guyana, Suriname, French Guyana, and Brazil. Of these fifteen nations, only Mexico was a major shrimp exporter to the United States. *See id.*

34. *See id.*

35. *See* Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9,015-16 (1993).

36. *See* Earth Island Inst. v. Baker, No. C 92-0832 JPV, 1992 WL 565222 (N.D. Cal. 1992). The plaintiffs in the case were Earth Island Institute; Todd Steiner, the director of Earth Island Institute; The American Society for the Prevention of Cruelty to Animals; The Humane Society of the United States; The Sierra Club; and The Georgia Fisherman's Association, Inc. The defendants in the case were Secretary of State James Baker; Secretary of the Treasury Robert E. Rubin; Assistant Secretary of State for the Bureau of Oceans; Secretary of Commerce Ronald Brown; and Assistant Administrator of Fisheries, National Marine Fisheries Service, Rolland A. Schmitten. In addition, The National Fisheries Institute was an Intervenor-Defendant. *See id.*

nations, as required under section 609.[37] In particular, the plaintiffs objected to the limited geographic scope of the Revised Guidelines, alleging that the defendants had failed to ban the importation of shrimp from all nations whose fishing practices harmed sea turtles as required by section 609(b).[38] The district court dismissed this action, ruling that because the claims involved trade bans on products imported to the United States, the proper venue for this case was the United States Court of International Trade (CIT), pursuant to 28 U.S.C. § 1581(i)(3).[39] The plaintiffs appealed this decision, but the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling dismissing the suit.[40]

C. The Court of International Trade cases

In response to the dismissal of their case, the plaintiffs filed suit in the CIT.[41] The plaintiffs' central claim was that the Departments of State and Commerce had mistakenly limited the scope of section 609 to apply to only the "wider Caribbean/western Atlantic region."[42] Section 609 on its face, they argued, required that trade bans be implemented to include all nations employing shrimp fishing techniques harmful to sea turtles.[43]

In response to these allegations, the defense argued that section 609(b) did not specify a geographic region for the implementation of a ban; thus, the defendants argued that their interpretation was reasonable and in accordance with the statute.[44] The defense inferred that Congress could not have intended a unilateral trade ban on all shrimp fishing nations, as such a ban was unprecedented, and the impact would be too far-reaching.[45] According to defendants, Congress merely intended to take reasonable steps to prevent "a situation that would create enormous market disruption."[46]

The defendants offered an alternative interpretation, arguing that Congress had intentionally limited the language of the statute.[47]

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37. *See* Earth Island Inst. v. Christopher, 6 F.3d 648, 650 (9th Cir. 1993).
38. *See id.*
39. *See id.* The CIT has exclusive jurisdiction over claims involving embargoes on the importation of products into the United States. *See* 28 U.S.C. § 1581(i)(3).
40. *See id.*
41. *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995).
42. *Id.* at 562.
43. *See id.*
44. *See id.* at 574.
45. *See id.* at 577.
46. *Id.*
47. *See id.*

Citing the Supreme Court's holding in *Saxbe v. Bustos*,[48] the defendants claimed that the Supreme Court provided for "great weight" to be given to longstanding administrative construction where Congress had revisited the article and left the practice untouched.[49] In applying *Saxbe* to the present matter, the defendants claimed that congressional silence implied acceptance of the Revised Guidelines approach.[50]

The CIT rejected both of the defendants' arguments, holding that the Revised Guidelines did not properly enforce section 609(b) by restricting the ban only to the Gulf of Mexico, Caribbean Sea, and western Atlantic areas.[51] The court began its analysis by referring to rule established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[52] The *Chevron* rule provides that if Congressional intent is clear and unambiguous in the statute, then the court may adopt this intent without deference to the agency's interpretation of the statute.[53] However, if the statute is ambiguous, then the court should defer, if it is reasonable, to the agency's interpretation.[54]

After examining section 609, the CIT determined that it was clear on its face and "not susceptible to differing interpretations."[55] The court noted that language of the statute repeatedly refers to "all foreign governments" and "each nation" implying that Congress was not silent on the scope of section 609 and certainly did not intend to limit its geographical horizons.[56] The Court concluded that the plain intent of Congress was to "halt and reverse the trend toward species extinction, whatever the cost," and therefore the defendants' revised guidelines misinterpreted this intent.[57]

Addressing the second argument, the court noted that determination of congressional acquiescence to the Administration's interpretation of section 609 required more evidence of "extended, meaningful interaction between the executive and legislative branches."[58] In the present matter, the 1993 Revised Guidelines had existed for little over a year, and Congress had not revisited section

48. 95 S. Ct. 272, 279 (1974).
49. *See Earth Island*, 913 F. Supp. at 577.
50. *See id.*
51. *See id.* at 580.
52. 467 U.S. 837, 844 (1984).
53. *See id.* at 842-43.
54. *See id.*
55. *Earth Island*, 913 F. Supp. at 575.
56. *Id.* at 577.
57. *Id.*
58. *Id.*

609 since its inception.[59] Therefore, the defendants' argument that Congress had acquiesced to agency determination was clearly erroneous and arbitrary.[60]

Near the end of its opinion, the court addressed an argument raised by the intervenor-defendant, National Fisheries Institute (NFI).[61] In its ancillary brief, NFI warned that the CIT's holding in the case carried with it significant repercussions on an international level.[62] GATT panels had recently held that two similar embargo provisions were violative of GATT principles, and that any GATT challenge to a liberal interpretation of section 609(b) "would likely produce the same result."[63] Due to the probable GATT response, NFI suggested that the Court apply the *Charming Betsy* principle to its interpretation of section 609.[64]

The *Charming Betsy* principle is a remarkably old concept derived from an 1804 United States Supreme Court case concerning trade conducted by the schooner Charming Betsy.[65] In its opinion, the Court determined that "an act of Congress ought never to be construed to violate the law of nations, if any other construction remains, and consequently can never be construed to violate neutral rights, or to effect neutral commerce, further than is warranted by the law of nations as understood in this country."[66] Under this doctrine, NFI suggested that a corollary of the principle must be that "even if all conflict with international obligations cannot be eliminated, still it is appropriate to seek to minimize or reduce conflict to the maximum extent possible."[67] For the present matter, this meant that the Court of International Trade should have changed its construction of section 609 so that it affected "the fewest nations and products possible, consistent with the basic statutory purpose."[68] Therefore, NFI argued that the CIT should construe section 609 in line with the basic international obligations of the United States under GATT, while upholding Congress's original statutory purpose.[69]

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59. *See id.*
60. *See id.*
61. *See id.* at 579.
62. *See id.*
63. *Id.*
64. *See id.*
65. *See* Alexander Murray v. Schooner Charming Betsy, 6 U.S. 64, 116 (1804) [hereinafter *Charming Betsy*].
66. *Id.* at 118.
67. *Earth Island*, 913 F. Supp. at 579.
68. *Id.*
69. *See id.*

Acknowledging the merits of this argument, the court still refused to follow NFI's suggested line of reasoning.[70] The court supported its decision by noting that "the record of enforcement of section 609 to date does not reveal troubling tensions with foreign sovereigns already deemed covered, including those not certified positively and thus subject to embargoes."[71] Therefore, the court stood firm, holding that despite a possible adverse GATT Panel reaction, the defendants were not properly enforcing section 609(b) in the 1993 Revised Guidelines.[72] The court ordered the defendants to "prohibit no later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce."[73]

Concerned with the potential international conflict that might occur from immediate implementation of a new set of guidelines based on the CIT's ruling, the government appealed to the court for a one-year period of time to implement the new program.[74] The CIT granted a hearing, but after deliberation, denied the petitioners' motion.[75] In its opinion, the court reprimanded the government for its inaction, noting that countries that may be adversely affected by the ban have been on adequate notice since 1991.[76] Consequently, the CIT upheld the May 1, 1996 deadline forcing the defendants to take more immediate action.[77]

Shortly before the deadline, the State Department issued the 1996 Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations.[78] The guidelines provided that foreign countries would be certified and not subject to a ban only if the shrimp being imported to the United States was harvested using TEDs that were comparable in effectiveness to the ones used in the United States.[79] Despite the CIT's ruling, the State Department's 1996 Revised Guidelines did not mandate that foreign nations provide evidence that

70. *See id.*
71. *Id.*
72. *See id.* at 580.
73. *Id.*
74. *See* Earth Island Inst. v. Christopher, 922 F. Supp. 616, 618 (Ct. Int'l Trade 1996).
75. *See id.*
76. *See id.*
77. *See id.* at 627.
78. 61 Fed. Reg. 17,342 (1996).
79. *See id.*

their entire fleet uses turtle-safe methods.[80] As a result, these guidelines failed to fully carry out the CIT's holding.

The Earth Island Institute and the other environmental groups involved in the prior litigation reacted quickly to the State Department's oversight by filing a motion with the CIT, claiming that the 1996 Revised Guidelines failed to conform to section 609 and the Court's prior decisions.[81] Earth Island argued that this new approach by the State Department was "'dangerous' and 'disingenuous' because it eliminated any incentive for countries to put TEDs on more than a handful of nets."[82] In effect, countries could escape the trade ban by designating only certain vessels to carry TEDs specifically for import to the United States, while the vast majority of the fleet still used harmful nets. Earth Island contended that this approach "eviscerates both of Congress' purposes in enacting the Turtle Law."[83] The new guidelines would harm local United States vessels required to use TEDs because other nations could undersell them abroad.[84] Furthermore, the end goal of protecting the various species of sea turtles around the world would be clearly frustrated by permitting the non-U.S. importing shrimp vessels to maintain their harmful netting practices.[85] The Earth Island Institute and the other petitioners therefore asked the court to enforce its prior rulings, and to mandate that the government "embargo all wild-caught shrimp exports from countries which do not adopt a regulatory scheme requiring TEDs that is comparable to that of the United States."[86]

The CIT agreed with the petitioners, and again issued a strongly worded opinion directed at the State Department.[87] The court held that the 1996 Revised Guidelines, which permitted foreign countries to export shrimp caught with TEDs to the United States while selling non-TED caught shrimp to other nations violated both the court's prior precedent and the overall intent of section 609.[88] While this opinion sounded a strong warning to the State Department, the court's holding was later overturned by the United States Court of Appeals for the Federal Circuit on jurisdictional grounds.[89] More importantly,

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80. *See id.*
81. *See* Earth Island Inst. v. Allbright, 147 F.3d 1352, 1355 (9th Cir. 1998).
82. *See* Earth Island Inst. v. Christopher, 942 F. Supp. 597, 604-05 (Ct. Int'l Trade 1996).
83. *Id.* at 600-01.
84. *See id.*
85. *See id.*
86. *Id.* at 601.
87. *See id.* at 603.
88. *See id.* at 605.
89. *See* Earth Island Inst. v. Allbright, 147 F.3d 1352, 1358 (Fed. Cir. 1998).

international opposition to section 609 and the 1996 Revised Guidelines reached a crescendo shortly after the Federal Circuit's decision, effectively overshadowing the importance of that holding.[90]

III. THE INTERNATIONAL RESPONSE

As predicted by the government during the *Earth Island* litigation, several nations, including Malaysia, Pakistan, Thailand, and India, requested consultation with the United States over the implementation of the 1996 Revised Guidelines and section 609.[91] Failing to come to any agreement, the parties requested the establishment of a panel derived from the Dispute Settlement Body of the WTO to hear the case and to adjudicate a decision concerning the possible violations of the GATT caused by the unilateral trade bans set forth in section 609.[92]

A. The GATT and the Tuna-Dolphin Dispute

Before examining the holding of the WTO Panel, it is important to first define the general purpose and history of GATT and its relationship to environmental protection. In 1944, representatives of the member states of the United Nations met in Bretton Woods, New Hampshire, with the goal of promoting the efficient use of resources by opening trade barriers and encouraging free trade among member states.[93] The resulting GATT principles were anchored in free trade norms, but the signatory states recognized the possibility that nations may have a compelling need at times to violate the principles of the treaty.[94] Therefore, the framers of the treaty incorporated a number of exceptions, including Article XX, which provided for general exceptions to adherence.[95]

Despite the incorporation of Article XX, many environmentalists feared that the ultimate goal of trade liberalization might greatly overshadow the need for environmental protection.[96] These fears were realized in the early 1990s with the Tuna-Dolphin cases.[97] Central to the Tuna-Dolphin dispute was the passage of the Marine

90. *See generally* Panel Report, supra note 3.
91. *See supra* note 3, ¶ 1.1.
92. *See id.* ¶¶ 1.2-1.3.
93. *See* Corine Sam, *World Trade Organization Caught in the Middle: Are TEDs the Only Way Out?*, 29 ENVTL. L. 185, 187 (1999).
94. *See id.*
95. *See id.* at 188.
96. *See id.*
97. *See generally* Sam, *supra* note 93.

Mammal Protection Act (MMPA).[98] Within the provisions of the MMPA and the subsequent Packwood Amendment, Congress mandated that the Secretary of Commerce issue a trade ban on all tuna products from countries which failed to use dolphin-safe nets with at least a comparable success rate of conservation to that of the United States.[99] After the Secretary of Commerce placed a ban on Mexico, Mexico claimed that the ban violated the principles set forth in GATT and requested a Panel to hear the case.[100]

The Panel's holding sent ripples of objection throughout the environmental community. The Panel concluded that Article III of GATT only permits trade restrictions on products and not on the production methods a nation chooses to employ.[101] Therefore, the United States' objection to the methods of harvesting dolphins was not a sufficient reason for the ban under Article III.[102] The Panel also found that the United States had violated Article XI of GATT, which only allows for prohibitions or restrictions that are monetary charges.[103] The United States' ban did not fit into this category.[104] Finally, the Panel determined that the United States could not employ the Article XX exemptions, because the United States had not sought other multilateral means of reaching an agreement with Mexico.[105] The Panel urged the United States to make a greater effort at forming multinational agreements instead of taking unilateral action.[106] Based on these decisions, the Panel found that the United States must lift its ban on Mexico, even if this action violated the United States' own laws.[107]

B. WTO Panel Decision

As a result of increased frustration by member states at the relative weakness of the GATT Panel, the member nations of GATT formed the WTO Dispute Settlement Body to better address issues such as the conflict between free trade and the environment.[108] This was the body under which Malaysia, Pakistan, Thailand, and India

98. *See id.* at 189.
99. *See* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 965 (N.D. Cal. 1990).
100. *See* Sam, *supra* note 93, at 190.
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.*

filed their objections to section 609 and to the ban established by the 1996 Revised Guidelines. The complainants first noted that each nation had implemented turtle protection projects, and the United States could not force them to comply with its own methods of turtle conservation.[109] In addition, the complainants defended their respective methods and countered that the United States could not argue that the TED technology was the only successful method of protecting sea turtles.[110] Finally, the complainants alleged that the United States had violated Articles I, XI, and XIII of GATT, and that section 609 did not qualify as an exception to these principles under Article XX.[111]

The complainants argued that the U.S. ban on shrimp products was inconsistent with Article XI of GATT.[112] Article XI provides in part that "[n]o prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of a product of the territory of any other contracting party."[113] Article XI therefore prevents member states from implementing any form of nonmonetary restriction on importation. The complainants argued that the U.S. ban on the importation of shrimp did not fall into the category of "duties, taxes, or other charges," and therefore was prohibited by Article XI.[114] To support their argument, the complainants cited the Tuna-Dolphin Panel Reports that in many ways mirrored almost exactly the facts of the Shrimp-Turtle matter.[115] Therefore, the complainants argued, based on previous GATT Panel decisions, the WTO Panel should find the United States in violation of Article XI.[116]

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109. *See* Panel Report, *supra* note 3, ¶¶ 3.4-3.15. Each country claimed that they already had in place a viable protection and education program. *See id.* India alluded to various hatchery programs, as well as attempts to train and encourage shrimp fishermen to adopt TEDs. *See id.* ¶¶ 3.4-3.6. Malaysia noted that they had been protecting turtles through various programs since 1932. *See id.* ¶ 3.8. Some of these programs included hatcheries and incubation programs, establishing turtle sanctuaries, and even banning the sale of harvested turtle eggs. *See id.* Pakistan and Thailand also alluded to several restoration programs, and noted that their religious culture mandated that it was sinful to kill turtles. *See id.* ¶¶ 3.11-3.15. Thailand also noted that it had ratified CITES and taken several measures to implement turtle conservation programs in line with its international obligations. *See id.* ¶ 3.14.

110. *See id.* ¶¶ 3.14-3.15.

111. *See id.* ¶ 3.1.

112. *See id.* ¶ 3.136.

113. GATT, *supra* note 2, art. XI:I.

114. *See* Panel Report, *supra* note 3, ¶ 1.136.

115. *See id.*

116. *See id.*

In addition, the complainants contended that the United States had violated Article XIII:1 of GATT, a provision that mandates equal treatment of all countries subjected to a prohibition or restriction.[117] The complainants argued that the United States failed to implement the ban in a like manner to all affected nations.[118] The complainants noted that the initial 1993 Revised Guidelines of section 609 applied only to the Caribbean nations, effectively giving them three years to comply with the regulations imposed by the ban.[119] However, after the State Department issued the Revised Guidelines of 1996, all of the newly affected nations around the world had only four months to comply.[120] This difference in treatment, the complainants argued, clearly violated the "like treatment principle" of Article XIII, and therefore the United States ban should be lifted.[121]

The complainants also argued that the United States violated Article I of GATT, which provides generally that any trade advantage, privilege, or immunity from a trade embargo on a certain product granted to one nation should be accorded equally to other nations.[122] Known as the "most-favored-nation principle," Article I provides that any member state violates the GATT if it does not apply its trade measures uniformly to all other member nations.[123] The complainants claimed that because some nations may still import shrimp into the United States while others are prevented under section 609, this disparate treatment violates Article I.[124] In addition, the complainants argued that the three-year cushion given to the Caribbean nations served as an advantage, thereby creating a trade imbalance *contra* to Article I.[125] In response, the United States claimed that the ban imposed under the 1996 Revised Guidelines and section 609 was consistent with Articles I and XIII, noting that the United States measures applied evenly to all shrimp-fishing nations.[126] However, the United States submitted that if the Panel finds section 609 in violation of Article XI, then the Panel does not have to reach a finding on Articles I and XIII:1.[127]

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117. *See id.* ¶¶ 3.137-3.139; *see also* GATT, *supra* note 2, art. XIII:1.
118. *See* Panel Report, *supra* note 3, ¶¶ 3.137-3.139.
119. *See id.* ¶ 3.139.
120. *See id.*
121. *See id.*
122. *See id.* ¶ 3.135; *see also* GATT, *supra* note 2, art. I:1.
123. *See* GATT, *supra* note 2, art. I.
124. *See* Panel Report, *supra* note 3, ¶ 3.135.
125. *See id.*
126. *See id.* ¶ 3.143.
127. *See id.* ¶ 7.21.

Even if the Panel found that section 609 was inconsistent with Articles I, XI:1, or XIII of GATT, the United States argued that its actions qualified as an exception under Article XX.[128] Article XX of the GATT reads:

> 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 disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> . . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[129]

The United States argued that under XX(g), it could enact a ban to protect sea turtles because such creatures were considered an "exhaustible natural resource."[130] The United States also argued that Article XX(g) applied to both biological as well as renewable resources, and because the sea turtle faced near extinction, it was clearly an exhaustible resource.[131] Alternatively, the United States argued that section 609 fell under the exception provided in Article XX(b), which stated that measures could be taken unilaterally to protect animal life if necessary.[132] The United States claimed that the measures taken under section 609 were "necessary" because the sea turtles were listed under CITES as threatened with extinction and the measures taken by the complainants had failed to curb the increased depletion of sea turtle populations.[133] Therefore, the United States argued, the term "necessary" should be defined by the Panel as the "least GATT-inconsistent measure."[134]

The United States further argued that section 609 was in line with the *chapeau*, or preamble, of Article XX, which provided "affirmatively that protection and conservation of the environment were essential objectives that were to be supported by the WTO

128. *See id.* ¶ 7.24.
129. GATT, *supra* note 2, art. XX.
130. *See* Panel Report, *supra* note 3, ¶ 3.242.
131. *See id.*
132. *See id.* ¶ 3.209.
133. *See id.* ¶ 3.222.
134. *Id.* ¶ 3.228.

regime."[135] Therefore, the United States argued that the WTO Agreement had expressly provided for the principles of sustainable development and the preservation of the environment, and not just for the promotion of free trade.[136] The United States also submitted that section 609 was not merely a protectionist device but an ardent attempt at protecting an endangered and valued creature.[137]

In response, the complainants argued that section 609 did not fall under the exemptions granted in Article XX.[138] The complainants argued that the U.S. interpretation would potentially erode the objectives of GATT by allowing individual member states to take unilateral actions under the guise of conservation, thereby disrupting trade.[139] The complainants urged that international cooperation in implementing environmental programs by member states must be sought where possible under Article XX, and therefore the U.S. measure could not qualify as an exception because alternative measures were available to the United States.[140] The complainants urged that the WTO Panel should follow past GATT Panel holdings and the past intent of the drafters of the GATT principles by electing to maintain the channels of free trade.[141]

The WTO Panel issued its final decision on April 6, 1998.[142] The Panel first determined that the United States had violated Article XI:1 of GATT because the trade ban implemented by the United States did not fall within the monetary bans permitted by this Article.[143] More importantly, the Panel decided that section 609 did not qualify as an exception under Article XX.[144] In its analysis, the Panel decided to examine first whether section 609 was consistent with the *chapeau* of Article XX.[145] The *chapeau* provides that, as a prerequisite of employing one of the possible exemptions to the GATT principles under Article XX, the measures taken must not constitute an "arbitrary or unjustifiable discrimination between countries where the same condition prevails."[146]

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135. *Id.* ¶ 3.147.
136. *See id.* ¶ 3.146.
137. *See id.* ¶ 3.278.
138. *See id.* ¶ 3.1.
139. *See id.* ¶ 3.155.
140. *See id.* ¶ 3.228.
141. *See* First Submission of Thailand, United States—Import Prohibition of Certain Shrimp and Shrimp Products, May 20, 1997, *available in* 1997 WL 304829, at *9-*22.
142. *See* Panel Report, *supra* note 3, ¶ 10.
143. *See id.* ¶ 7.17.
144. *See id.* ¶¶ 7.62-7.63.
145. *See id.* ¶¶ 7.31-7.62.
146. GATT, *supra* note 2, art. XX.

In addressing whether the action of the United States was "unjustifiable," the Panel considered not only the principles of Article XX itself, but also GATT and the WTO principles as a whole.[147] The Panel determined that the central meaning of the *chapeau* was to prevent the exceptions of Article XX from undermining the "multilateral trading system," or the ability for member states to compete freely in the open market under the security and protection of GATT.[148] In the present matter, the Panel determined that section 609 forced other nations to comply with United States' environmental protection policy, and this served as a "threat to the multilateral trading system" by preventing uniformity of treatment to various GATT member states.[149] As a result, the Panel reasoned that section 609 violated the *chapeau* of Article XX.[150] Furthermore, because section 609 violated the *chapeau* of Article XX, the Panel determined that it did not have to review the exemptions under Articles XX(b) and (g).[151]

C. WTO Appellate Body Decision

The Panel's decision did not stand long before the United States appeal to the WTO Appellate Body.[152] In the appeal, the United States focused its argument on the Panel's findings concerning Article XX.[153] Specifically, the United States claimed that the Panel failed to employ the ordinary meaning of the text of Article XX by adopting the "threat to the multilateral trading system" standard.[154] Arguing that the Panel greatly limited the exceptions available to a nation seeking to protect its environment, the United States felt that Article XX was rendered powerless.[155] The United States offered an alternative reading of the *chapeau*, arguing that it sought to "prevent the abusive application of the exceptions for protectionist or other discriminatory aims."[156] Therefore, the United States concluded that Article XX permits differential treatment where it is related to a legitimate policy goal.[157] Thus, the Panel had "committed a legal

147. *See* Panel Report, *supra* note 3, ¶ 7.33.
148. *See id.* ¶ 7.44.
149. *See id.* ¶¶ 7.49, 7.60-7.61.
150. *See id.* ¶ 7.62.
151. *See id.* ¶¶ 7.29, 7.63.
152. *See* Appellate Report, *supra* note 4, ¶ 8.
153. *See id.* ¶¶ 9-28.
154. *See id.* ¶¶ 10-11.
155. *See id.* ¶ 15.
156. *Id.* ¶ 20.
157. *See id.*

error" by reading into the plain meaning of the *chapeau* the general trade concerns provided in GATT.[158] The GATT provisions were drafted to maintain free and open trade, the United States argued, but did not serve as the ultimate and overriding goal of the WTO agreement.[159] Indeed, underlying the GATT principles is a concern for the environment as well, as evidenced by the exceptions under Article XX.[160]

The United States insisted that section 609 fell within the parameters set by the *chapeau*, namely the test of "unjustifiable discrimination."[161] Asserting that section 609 applied the same conditions of compliance to its own fleet, the United States maintained that it had also taken extensive measures to help other nations comply.[162] As a result, the United States concluded that section 609 fairly applied to shrimp fishing nations in a narrow and focused manner.[163]

In addition, the United States alleged that section 609 fell under the exception of Article XX(g).[164] The United States argued that the international recognition that sea turtles are an endangered species under Appendix I of CITES is direct evidence that the international community views sea turtles as an "exhaustible resource."[165] TED use, the United States contended, was an effective method of protecting this resource, and therefore any measure to fairly and equally encourage other nations to utilize this method was justifiable under Article XX(g).[166]

As an alternative explanation, the United States claimed that section 609 was "necessary to protect human, animal or plant life or health," within the standard set in Article XX(b).[167] Given that certain types of shrimp fishing greatly endangered the turtle's survival, the United States reasoned that its efforts were clearly necessary to protect the continued existence of the sea turtle. Section 609, then, also fell within the exception provided by Article XX(b).[168]

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158. *Id.* ¶ 16.
159. *See id.* ¶¶ 16-17.
160. *See id.* ¶ 17.
161. *Id.* ¶¶ 20-21.
162. *See id.* ¶ 22.
163. *See id.*
164. *See id.* ¶ 25.
165. *Id.*
166. *See id.* ¶¶ 26-27.
167. *Id.* ¶ 28.
168. *See id.*

In a groundbreaking opinion, the WTO Appellate body vacated the WTO Panel's decision, but ultimately determined that section 609 violated the *chapeau* of Article XX.[169] The WTO Appellate Body began by criticizing the interpretive approach taken by the WTO Panel in reaching its decision.[170] First the Appellate Body agreed with the United States that the Panel failed to interpret correctly the plain meaning of the *chapeau*.[171] The Appellate Body concluded that, by incorporating the "whole of GATT 1994 and the WTO Agreement" into the *chapeau's* meaning, the Panel created a largely overbroad and ineffective standard contrary to the plain meaning of the *chapeau*.[172] The Appellate Body, citing its former precedent, determined that the true meaning of the *chapeau* was "the prevention of 'abuse of the exceptions of [Article XX].'"[173] Therefore, the Appellate Body overruled the Panel's "threat to the multilateral trading system" standard.[174]

Citing its own precedent, the Appellate Body reiterated the correct method of analysis in Article XX cases.[175] The Appellate Body noted that the application process is two-tiered.[176] In reading the *chapeau* of Article XX, the Panel should have examined first the "justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."[177] The Appellate Body's approach to interpreting the statute would therefore give individual significance to the exceptions, thereby allowing for the possibility of recognizing certain unilateral actions which would be closed off under the prior analysis.

Having determined the proper interpretive procedure, the Appellate Body then turned to an examination of the merits of the United States' exception under Article XX(g).[178] In examining the meaning of Article XX(g), the Appellate Body first determined that, given the internationally recognized importance of biodiversity, living animals could be considered an "exhaustible resource."[179] In addition,

169. *See id.* ¶¶ 186-87.
170. *See id.* ¶ 114.
171. *See id.* ¶ 115.
172. *Id.* ¶ 116.
173. *Id.*
174. *Id.* ¶¶ 116, 122.
175. *See id.* ¶¶ 18-19.
176. *See id.* ¶ 118.
177. *Id.*
178. *See id.* ¶ 125.
179. *Id.* ¶ 131.

the Appellate Body determined that the sea turtle is clearly an exhaustible resource, given their inclusion in Appendix I of CITES as a species threatened with extinction.[180] Therefore, the sea turtles constituted an "exhaustible natural resource," and application of Article XX(g) would be appropriate.[181]

The Appellate Body reiterated that Article XX(g) requires that any unilateral trade embargo must be designed for the conservation of an exhaustible resource,[182] and that the measures be "made effective in conjunction with restrictions on domestic production or consumption."[183] The Appellate Body first determined that section 609 was designed specifically for the conservation of sea turtles.[184] In addition, the Appellate Body found that the scope and reach of section 609 was consistent with the objectives of the WTO.[185] Ultimately, the Appellate Body concluded that section 609 did "relate to the conservation" of sea turtles, as required by Article XX(g).[186] Finally, noting that the United States requires its own fleet to use TEDs, the Appellate Body determined that section 609 constituted an "even-handed" measure, therefore fulfilling the final requirement of Article XX(g).[187] Having met all of the requirements of Article XX(g), the Appellate Body held that section 609 fell within the exception provided by Article XX(g).[188] Having determined that section 609 fell within the scope of Article XX(g), the Appellate Body concluded that it was not necessary to decide the issues dealing with Article XX(b).[189]

The Appellate Body was left to ascertain, however, if section 609 violated the *chapeau* of Article XX.[190] The Appellate Body determined that section 609 was both arbitrary and unjustifiable under the terms of the *chapeau* because it discriminated against the appellees.[191] The Appellate Body began by noting that the *chapeau* is essential to any examination of a measure under Article XX, because the *chapeau* maintains "a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of

180. *See id.* ¶ 132.
181. *Id.* ¶ 134.
182. *See id.* ¶ 135.
183. GATT, *supra* note 2, art. XX(g); *see also* Appellate Report, *supra* note 4, ¶ 143.
184. *See* Appellate Report, *supra* note 4, ¶ 142.
185. *See id.* ¶ 141.
186. *Id.* ¶ 142.
187. *Id.* ¶ 144.
188. *See id.* ¶ 145.
189. *See id.* ¶ 146.
190. *See id.* ¶ 147.
191. *See id.* ¶ 184.

Article XX . . . and the substantive rights of other members under GATT 1994."[192] In its examination, the Appellate Body asserted that any reading of Article XX necessarily required a balancing approach.[193]

The Appellate Body applied this balancing approach by examining whether the application of section 609 resulted in an unjustifiable discrimination.[194] First, the Appellate Body determined that section 609 coercively created a method of conservation that did not take into account varying conditions around the world.[195] In effect, the mandated use of TEDs was too rigid, and the Appellate Body felt it needed to be more malleable to differing conditions.[196] In addition, the Appellate Body criticized the United States for failing to seek multilateral agreements before imposing the ban.[197] The failure of the United States to provide some recourse for noncomplying nations was unjustifiable in the opinion of the Appellate Body.[198] The Appellate Body noted that the United States engaged in negotiation to provide for the protection of sea turtles in the Inter-American Convention.[199] The success of this multilateral agreement served as proof of the possibility for success in future multilateral agreements.[200] Furthermore, the Appellate Body determined that the fact that the United States had negotiated with some countries and not others constituted unjustifiable discrimination.[201] Finally, the Appellate Body noted that the different geographical scope of the Revised Guidelines of 1993 and of 1996 served to maintain differential treatment with nations seeking compliance.[202] As noted earlier, the 1993 Guidelines had only applied to the Atlantic and wider Caribbean countries, whereas several years later the United States altered the scope to apply to all shrimp fishing nations.[203] This created an imbalance as to the notice provided the various nations.[204] Caribbean and the Atlantic region countries had well over three years to comply, while the other nations falling under the 1996 Revised Guidelines had

192. *Id.* ¶ 156.
193. *See id.* ¶ 159.
194. *See id.* ¶ 160.
195. *See id.* ¶ 164.
196. *See id.*
197. *See id.* ¶ 166.
198. *See id.*
199. *See id.* ¶ 169.
200. *See id.*
201. *See id.* ¶ 172.
202. *See id.* ¶ 173.
203. *See id.*
204. *See id.*

merely four months.[205] The Appellate Body determined that the imbalance as to the phase-in period for the various shrimp fishing nations was clearly unjustifiable discrimination.[206] Based on all of these factors, the Appellate Body concluded that section 609 failed to fall within the meaning of the *chapeau* of Article XX.[207]

The Appellate Body also found that section 609 arbitrarily discriminated against shrimp fishing nations.[208] The Appellate Body criticized the certification process for its *ex parte* approach that in effect denied countries any formal opportunity to argue their position or defend their methods of turtle conservation.[209] The *ex parte* approach applied by the United States, the Appellate Body noted, lacked transparency due to the informal and casual nature of the process.[210] Therefore, the notification procedure failed to provide fairness and evenhanded decision-making.[211] Having balanced the concern for the environment against the GATT principles which protected member states against infringement of their rights to free trade, the Appellate Body concluded that section 609 as interpreted under the 1996 Guidelines could not stand.[212] The United States formally accepted the Appellate Body's decision on November 6, 1998.[213]

IV. THE AFTERMATH OF THE WTO APPELLATE BODY DECISION

Concerned with a potentially unfavorable WTO Appellate decision, the State Department issued the 1998 Revised Guidelines.[214] In these guidelines, the State Department provided that certification would be determined on a shipment-by-shipment basis.[215] Therefore, shrimp fishing nations could still operate boats that did not employ TEDs if they simply exported the shrimp to other countries.[216] This regression to a previous interpretation of section 609 in the face of

205. *See id.*
206. *See id.* ¶ 176.
207. *See id.*
208. *See id.* ¶ 184.
209. *See id.* ¶ 180.
210. *See id.* ¶¶ 180-181.
211. *See id.*
212. *See id.* ¶ 186.
213. *See US Agrees to Shrimp Restrictions*, AP ONLINE, Nov. 7, 1998, *available in* 1998 WL 22416163.
214. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094, 46,095 (1998).
215. *See id.* at 46,096.
216. *See id.*

prior contrary holdings by the CIT again provided the impetus for the Earth Island Institute and others to file suit against the Commerce and State Departments in that court.[217]

The CIT began its decision by describing much of the prior litigation concerning section 609.[218] In its analysis of the legal history leading up to the present matter, the court emphasized its rationale in the several opinions rendered leading up to the WTO Panel decision.[219] While retracing these opinions, the court stressed that "the will of Congress remain[ed] unambiguous upon reading and rereading its manifestation in section 609," and the Revised Guidelines issued by the Secretaries of State and Commerce continuously misinterpreted the clear will of Congress.[220]

Turning to the issue of the geographical scope of section 609, the court praised the defendants for adhering to its prior decision that section 609 did not restrict the geographical scope of the statute.[221] The court also noted that the TED requirement added in the 1993 Revised Guidelines, and again present in the 1998 Revised Guidelines, was a previously approved component of the certification process.[222] While applauding the efforts of the United States, the Court ultimately disagreed with the defendants' application of the certification process.[223] The United States government argued that the 1998 Revised Guidelines provided for a shipment-by-shipment approach that would "encourage more vessels from uncertified countries to equip their nets with TEDs."[224] The court, echoing its prior sentiment, disagreed, refusing to follow this line of reasoning and concluded that the shipment-by-shipment approach failed to comport with the express approach drafted by Congress in section 609.[225] The court determined that paragraph one of section 609 "is specifically contingent upon the certification procedure established by section 609(b)(2)."[226] The court reasoned that these two clauses must be read together and within the context of the language used by Congress in section 609(a).[227]

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217. *See* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1077 (Ct. Int'l Trade 1999).
218. *See id.* at 1065-76.
219. *See id.* at 1067-69.
220. *Id.* at 1068.
221. *See id.* at 1079.
222. *See id.*
223. *See id.* at 1080-81.
224. *Id.* at 1080.
225. *See id.* at 1080-81.
226. *Id.* at 1081.
227. *See id.*

To support its position, the Court referred to the State Department's continuing embargo on Brazil.[228] While Brazilian shrimp fishermen had adopted TEDs on all or most of their ships, the State Department still found that, under the general meaning of the prohibition under section 609(b)(1), Brazil's shrimp fishing "may" still adversely affect the sea turtle.[229] Therefore, the court argued, the State Department's previous actions demonstrated that it had considered the country as a whole, and not individual fishermen, when determining the scope of the embargo.[230]

While agreeing with the WTO Appellate Panel that this method of certification arbitrarily discriminated against Brazil, the Court argued that it was dispositive that the 1998 Revised Guidelines should apply equally across the board.[231] Thus, according to the court, nations not using TEDs should be subject to the embargo.[232] Therefore, in light of its past opinions on the matter, the court again concluded that the Secretaries of State and Commerce had failed to draft the 1998 Revised Guidelines in accordance with section 609.[233] The court decided to reserve its judgment on the plaintiffs' motions until the defendants' annual report to Congress on any responses to the March 1999 Notice of Revisions.[234]

V. THE CONFLICT

While this most recent decision by the CIT may seem appropriate given the long line of precedent set in previous cases, the court has arguably erred by forcing the Administration to apply a standard that the international community has clearly rejected. After the WTO Appellate Body decision, the CIT can no longer justify its hard line interpretation of section 609. Deference should be given to decisions of a well-respected and approved multilateral body, especially one with such intimate and important relations to United States foreign policy. In addition, the court could have avoided the conflict by applying the *Charming Betsy* principle,[235] as was suggested in the CIT's first *Earth Island* case in 1995.[236] Therefore, while the court's intentions of protecting the sea turtle were

228. *See id.* at 1079, 1081.
229. *Id.*
230. *See id.* at 1081.
231. *See id.*
232. *See id.*
233. *See id.*
234. *See id.*
235. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).
236. *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559, 579 (Ct. Int'l Trade 1995).

admirable, and arguably effective, the court should have tried to seek compromise with the multilateral body decision.

A. The Need for Deference

The WTO Appellate Body decision, formally accepted by the United States in August of 1998, changed the legal standing of section 609 dramatically.[237] Finally, the WTO recognized the importance of environmental concerns in balance with free trade.[238] In its conclusory remarks, the Appellate Body stated that if member states wished to take action to protect endangered species or to protect the environment, they should act within the confines of internationally accepted practices and the WTO.[239] The Appellate Body's insistence on consensual actions, either through bilateral or multilateral agreements, represents the common, accepted practice within international fora.[240] As states realize the interconnectedness of the environment and the world market, the need for consensus building mechanisms like the WTO will continue to grow in importance.[241]

The WTO's recognition of consensus agreements as exceptions to GATT will most likely fuel greater agreement regarding environmental concerns in the future.[242] There are several current examples of multilateral agreements that include trade restrictions that might violate GATT: The Basel Convention restricts trade of a range of hazardous wastes, while the Montreal Protocol employs trade-related environmental measures to end the production and use of certain chemicals.[243] These measures clearly have an adverse effect on trade, and may violate the free trade principles of the GATT. However, given the multilateral nature of these agreements, countries may argue that their trade-related actions are in accordance with Article XX of GATT and therefore valid.[244] Furthermore, nations employing bans on the trade of hazardous waste or harmful chemicals could argue that signatory nations to the Montreal Protocol or the Basel Convention had waived their rights under the GATT and therefore have no recourse.[245]

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237. *See US Agrees to Shrimp Restrictions*, *supra* note 212.
238. *See* Appellate Report, *supra* note 4, ¶ 185.
239. *See id.* ¶ 186.
240. *See* Douglas F. Brennan, *Trade and Environmental Goals at a Crossroads: Challenges for Global Treaties and National Regulation*, 20 INT'L ENV'T REP. 133, 135 (1997).
241. *See id.*
242. *See id.*
243. *See id.*
244. *See id.* at 137.
245. *See id.* at 135.

Given the far-reaching implications of the WTO's Appellate Body decision, it is remarkable that the CIT could not alter its position as to the interpretation of section 609. This is especially true given the United States' history of noncompliance with international agreements where its role was crucial to the survival and success of those international regimes. In the last decade, the United States has often relied on the WTO to settle trade disputes harming United States producers. In 1996, the United States threatened to file suit with the WTO over Japan's testing procedures for apples which it felt harmed United States farmers seeking to sell within that market.[246] In addition, the United States and Europe have battled over bananas and hormone-treated meats, and each time have filed suit within the WTO.[247] In particular, the WTO Appellate Body handed down a decision on January 16, 1998, which held that European Union (EU) trade bans on the importation of animals and meat from animals treated with six different growth hormones clashed with the Sanitary and Phytosanitary Measures under the Agreement on Technical Barriers to Trade within the GATT regime.[248] However, the EU refused to accept the Appellate Body's decision and continued the bans on hormone treated meats.[249] In response, the United States returned to the WTO and requested that it impose sanctions on several European agricultural products.[250] The WTO approved this request on June 3, 1999, and granted sanctions for $116.8 million in damages for the United States.[251]

While relying heavily on the WTO as a means to protect its own industry and farm production, the United States often shrinks from its responsibilities to refrain from protectionism. In 1997, there was a movement to ban certain leghold traps used for trapping animals, and while the international community came to a consensus to ban these traps, the United States remained one of only a handful of countries to refuse to comply with the ban.[252] In addition, the United States' failure to ratify the Kyoto Protocol and a myriad of other international

246. *See* Anne Counsell, *Tokyo Defends Tests on Apples*, FIN. TIMES, Sept. 10, 1996, at 5.

247. *See, e.g.*, *US Starts to Play the Long Game on Dispute over Hormone-Treated Meat Exports to EU*, FIN. TIMES, May 17, 1999, at 5.

248. *See* World Trade Organization: Report of the Appellate Body on EC Measures Concerning Meat and Meat Products (Hormones) (Jan. 16, 1998), *available in* 1998 WL 25520.

249. *See* Janelle Carter, *US Aims to Punish EU in Beef Spat*, AP ONLINE, May 14, 1999, *available in* 1999 WL 17803632.

250. *See id.*

251. *See* Naomi Koppel, *US, Canada Get $124 M in Sanctions*, AP ONLINE, July 13, 1999, *available in* 1999 WL 17810182.

252. *See* Neil Buckley, *Leghold Traps Deal Approved*, FIN. TIMES, July 24, 1997, at 5.

agreements suggests an overall failure to join in the building of international consensus and development of customary law. Fear of a loss of sovereignty drives United States foreign policymakers to disregard international obligations that might infringe too greatly on the powers of Congress and other agencies.[253] Therefore, the cat continues to chase its tail. If the United States, as the strongest trade power in the world, will always act upon a double standard toward WTO dispute settlement decisions, then the WTO will never garner the kind of international respect it needs to enforce its decisions.

Perhaps it is therefore not surprising that the CIT failed to acquiesce to the WTO Appellate Body's decision. However, this does not excuse its inability to recognize the WTO's position. The CIT should have acknowledged that the environmental problems that the world faces today are global in scope and demand multilateral agreement and action. The well-wrought opinion by the Appellate Body represents the struggles of the WTO and the international community to deal with the difficult issue of trade and the environment. Albeit a small one, it is a step toward supporting environmental protection.[254] Therefore, the CIT should have acted to support the Appellate Body decision and to establish the United States as a strong supporter of the very organization it helped to create.

B. The Way Out: The Charming Betsy Principle

The ability of the United States to comply with WTO opinions has diminished in the past because of the United States courts, and in

253. *See* Andrea Knox, *The World Trade Organization at a Crossroads*, WORLD TRADE MAGAZINE, Oct. 1, 1999, *available in* 1999 WL 3495598.

254. With the increased conflict between trade and the environment, the WTO formed a subcommittee on trade and environment (CTE) to deal with conflicts between multilateral environmental agreements (MEAs) and the WTO rules, as well as other pressing environmental/trade issues. *See* Steve Charnovitz, Note, *Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 342 (1997). In 1996, the conference of the parties to the CTE met in Singapore and issued a report on the deliberations between the parties. *See* Eileen Drage O'Reilly, *Environment: Ministers Voice Disappointment with Weakness of CTE Report*, 13 INT'L TRADE REP. 1925 (1996). The report was met with little enthusiasm, as many of the issues at stake were not settled. *See id.* In particular, the CTE failed to deal directly with the issue of MEAs that conflict with the WTO. *See Environment: Officials Disagree on WTO Role in Trade, Environment Relationship*, 13 INT'L TRADE REP. 28 d40 (1996). Additionally, the CTE did not address the WTO rules against boycotts. *See id.* As this meeting demonstrates, the need for support from the United States is vital for the WTO to attack these issues with results that will effectively protect the environment. Without support, the international community will continue to struggle to make meaningful international environmental policy. *See* Charnovitz, *supra*, at 374.

particular, the CIT.[255] With the advent of the WTO dispute settlement body, the CIT has faced several cases where United States law conflicts with WTO mandates, and in each case the CIT has determined that "the WTO report itself has no binding effect on the court."[256] Seemingly, the *Charming Betsy* principle provides a way for the CIT to mediate between United States law and international obligations in order to find a way to comply with the international consensus. However, the CIT has struggled to define the scope and application of the principle despite a clear mandate from the United States Supreme Court.[257]

In *Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Supreme Court attempted to alleviate the dichotomy between the *Charming Betsy* principle and the type of agency review required under the *Chevron* rule.[258] Under *Chevron*, the administrative agency interpreting the statute is allowed great deference where Congressional authority is ambiguous.[259] If the administrative agency's actions are clearly contrary to the express language of the statute, then a court must step in to ensure that the agency follows its enabling act and Congressional intent.[260] In reviewing international disputes involving violations of international obligations by the United States, the *Debartolo* court found that the *Charming Betsy* principle must be used in conjunction with *Chevron* analysis.[261] The Court stated that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[262] Therefore, to align the two legal principles, the Court stated that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[263] As applied to international obligations, the Court's reasoning leads to the conclusion that the *Chevron* rule may yield to the *Charming Betsy* principle in statutory

255. *See generally* Footwear Distrib. and Retailers of Am. v. United States, 852 F. Supp. 1078 (Ct. Int'l Trade 1994); Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).

256. *See Hyundai*, 53 F. Supp. 2d at 1343.

257. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392 (1999).

258. See id.

259. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781-82 n.9.

260. *See id.*

261. *See Debartolo*, 108 S. Ct. at 1397.

262. *Id.*

263. *Id.*

review, thereby affording courts greater discretion in interpreting United States obligations under international law.[264] If there is any ambiguity in the statute, the reviewing court should construe the statute so as to avoid violating international law.[265]

Support for this reasoning may readily be found in the Restatement (Third) of the Foreign Relations Law of the United States, section 321.[266] This section provides that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith."[267] Therefore, this section implies that "international obligations survive restrictions imposed by domestic law."[268] One former judge from the European Court of Justice even argues that because GATT and the WTO Panel decisions come out of a litigious process, they should have the force and effect of res judicata.[269]

Despite this strong support for granting WTO opinions binding authority, the CIT has continued to refuse to accept them as binding in nature. In *Footwear Distributors and Retailers of America v. United States*, the CIT reviewed a claim concerning shoe distributors who challenged a United States refusal to reimburse Brazil for exactions taken on exported shoe products.[270] The plaintiffs argued that the recent GATT Panel decision granting relief to Brazil should govern how the CIT ruled in the case.[271] After examining the issues surrounding the binding nature of GATT panel decisions, the CIT determined that international decisions are within the province of the executive branch, and not the judiciary.[272] The Court stated that, "courts generally refrain from disturbing the delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of foreign relations."[273] Therefore, despite the existence of the *Charming Betsy* principle, the court determined that it would not challenge the administration's interpretation of an

264. See Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).

264. *See* Footwear Distrib. and Retailers of Am. v. United States, 852 F. Supp. 1078, 1091 (Ct. Int'l Trade 1994).

265. *See id.* at 1091-92.

266. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1987).

267. *Footwear Distrib. and Retailers of Am.*, 852 F. Supp. at 1092.

268. *Id.*

269. *See id.*

270. *See id.* at 1080.

271. *See id.* at 1087.

272. *See id.* at 1096.

273. *Id.*

ambiguous statute.[274] Therefore, the GATT opinion was not followed, although it was formally accepted by the U.S. government.[275]

In a more recent case, *Hyundai Electronics Co. v. United States*, the CIT actually applied the *Charming Betsy* principle, but disagreed with the WTO Panel's ultimate decision.[276] In this case, the Department of Commerce had decided to deny Korean producers of dynamic random access memory semiconductors the right to export their products to the United States due to a fear that the Koreans would dump them on the market.[277] After three years, the Koreans petitioned the United States to lift the ban, but the Department of Commerce held strong, relying on the "not likely" standard.[278] Under this standard, the ban would stay in place if the Department of Commerce determined that the Koreans were "not likely" to not dump their product on the market.[279]

When the Commerce Department refused to lift the ban, the Korean companies brought a complaint to the WTO.[280] The WTO panel charged with hearing the complaint held that the "not likely" standard was inconsistent with Article 11.2 of the WTO's Agreement on Implementation of Article VI of GATT, and that therefore the United States could not continue to apply that standard.[281] The Korean companies then filed suit in the CIT to enforce the WTO holding, but the CIT refused to hear the case.[282] After examining the arguments put forth by the WTO Panel report, the CIT disagreed with the Panel's interpretation of international law.[283] The court argued that the "not likely" standard did in fact comply with Article 11.2, and

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274. *See id.*
275. *See id.* at 1085.
276. 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).
277. *See id.* at 1337.
278. *See id.*
279. *See id.*
280. *See id.* at 1342.
281. *See id.* Section 11.2 of the WTO's Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade reads as follows:

> The authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive antidumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately.

282. *See Hyundai*, 53 F. Supp. 2d at 1345.
283. *See id.* at 1342-43.

therefore the standard did not violate international law.[284] Because of this unusual finding, the CIT was able to stay in compliance with the *Charming Betsy* principle in affirming the "not likely" standard, even though it held contrary to the WTO Panel's decision.[285] Under the CIT's interpretation of Article 11.2, the United States could apply the "not likely" standard.[286] If *Charming Betsy* requires that United States law should be construed so as to avoid violations of international obligations, then the Court was arguably justified in its decision. However, it is important to question who defines what is international law.

As the CIT opinions in *Footwear* and *Hyundai* demonstrate, the *Charming Betsy* principle has been twisted and molded into a largely weakened legal tool. Therefore, it is not surprising that the CIT refused to apply it in the Shrimp-Turtle case. However, the Shrimp-Turtle case was arguably much different from either *Footwear* or *Hyundai*. In *Footwear*, the CIT upheld the Commerce Department's regulations on Brazilian footwear, and therefore did not apply the *Charming Betsy* principle.[287] In *Hyundai*, the Court again refused to follow the WTO Panel opinion, but actually argued that it was using the *Charming Betsy* doctrine in its final decision.[288] In the Shrimp-Turtle case, the Court not only refused to apply the *Charming Betsy* principle and comport with the WTO Appellate Body decision; it also overturned agency interpretation.[289] This is a much more active judicial attack on the ability of agencies to flexibly deal with international obligations. If the CIT really holds true to its own principle that it should refrain from taking an active role in the arena of foreign relations and allow the executive branch to serve as the sole governmental arm in the international arena, then arguably the CIT should have deferred to the agency by applying the *Charming Betsy* principle in the Shrimp-Turtle case.

The *Charming Betsy* principle is crucial to the ability of United States courts and the United States government to remain active participants in international fora. The CIT could have remained within the statutory directives of Congress and also remained within its precedential history with a more lenient final ruling in the Shrimp-

284. *See id.*
285. *See id.* at 1345.
286. *See id.*
287. See Footwear Distrib. and Retailers of Am. v. United States, 852 F. Supp. 1078, 1096 (Ct. Int'l Trade 1994).
288. *See Hyundai*, 53 F. Supp. 2d at 1345.
289. *See* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1080 (Ct. Int'l Trade 1999).

Turtle case. In the 1995 *Earth Island* case, the court established a precedential safeguard to allow it to comply with a potentially harmful WTO opinion. The court's failure to employ the *Charming Betsy* principle in the Shrimp-Turtle case calls this opinion into question.[290]

Generally, the CIT has failed to recognize the important role it plays in the international forum of consensus. The court's position is a difficult one because the will of Congress should dictate administrative review. This poses one of the greatest difficulties in the United States' ability to comply with international multilateral agreements. However, the courts are not powerless. The United States District Court for the Southern District of New York held in *United States v. Palestine Liberation Organization* that United States statutory law does not supercede U.S. international obligations.[291] In that case, Congress had passed the Anti-Terrorism Act, and immediately after its passage the Department of Justice filed suit in district court to force the closure of the Palestine Liberation Organization (PLO) Observer Mission to the United Nations in New York.[292] The PLO argued that the closure of the mission violated the Headquarters Agreement, a binding United Nations treaty to which the United States was a signatory nation.[293] In the landmark opinion, the Court held that the Anti-Terrorism Act did not supercede the Headquarters Agreement.[294] Therefore, the United States was forbidden by its international obligation to close the PLO Mission office.[295]

The CIT should take note of the precedent set by the U.S. District Court in New York and examine carefully its position in relation to the future success or failure of the WTO in the United States. Where Congress has left room for interpretation, as seems evident in section 609, the CIT should attempt to give deference to any administrative body seeking to comply with an international consensus. The United States courts hold an important position in the

290. *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559 (1995).

291. 695 F. Supp. 1456 (S.D.N.Y. 1988).

292. *See id.* at 1460.

293. *See id.* at 1461.

294. *See id.* at 1471. The Court noted in its opinion that the United States had a longstanding compliance with the Headquarters Agreement, and the United States did not dispute that removing the PLO Observer Mission violated its obligations under the agreement. The Court determined that the Anti-Terrorist Act's legislative history did not clearly manifest Congressional intent to override the U.S. obligation under the Headquarters Agreement. Therefore, the Court held that the Anti-Terrorist Agreement did not supersede the Headquarters Agreement. *See id.*

295. *See id.*

ratification process. The CIT's ability to stall this process is a significant threat to the ability of the United States to enter into agreements and to promote the consensus building model of international law. Therefore, the Court of International Trade should consider its important position and not hold strong to its repeated strict interpretation of section 609.

Despite the shortcomings of the CIT's most recent opinion, its prior strong stance on the environment in the face of governmental pressure in the Shrimp-Turtle cases was clearly admirable. By maintaining an early tough stance on its interpretation of section 609, the CIT forced the WTO's hand, and brought about some needed change on the international level. While the battle to save the sea turtle has not ended, the court should have realized an important victory and fallen in line with the multilateral body decision.

VI. CONCLUSION

The WTO is a relatively young international organization, and is therefore still struggling to settle the controversy between the environment and free trade. Its rulings are supposed to be binding on all signatory nations, and yet it is often forced to take difficult stances in politically charged situations with little support. The United States' support of such an institution is critical to its survival on such tough issues as the environment and trade. As markets shrink and the global environment suffers, the need for multilateral agreement increases daily. The WTO, the Kyoto Protocol, and other examples of multilateral agreements are crucial for the survival of all species, from the sea turtle to the human race, but these multilateral bodies cannot survive without the support of the United States.

Given an opportunity to reaffirm the United States' support of bodies like the WTO, the CIT missed its chance and perhaps damaged the overall ability of the United States to effect environmental change in the future. The sea turtle has great existence value and is certainly worth protecting, but concerned governments like the United States may only accomplish its protection through multilateral efforts. The Court of International Trade and other United States courts must recognize the principle of collective action, and attempt to be more compliant with international decisions that have domestic implications.