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SOVEREIGNTY, UTILITY, AND FAIRNESS: USING U.S. TAKINGS LAW TO GUIDE THE EVOLVING UTILITARIAN BALANCING APPROACHTO GLOBAL ENVIRONMENTAL DISPUTES IN THE WTO

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It is necessary that those who are sovereigns should not be ***856** subject to commands emanating from any other and that they should be able to give laws to their subjects, and nullify and quash disadvantageous laws for the purpose of substituting others; but this cannot be done by one who is subject to the laws or to those who have the right of command over him. [FN1]

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. [FN2]

For nearly two decades, the United States has used threats of trade restrictions as a fundamental instrument of international fisheries and marine conservation policy. [FN3] Trade embargoes have been threatened or actually imposed for a variety of extraterritorial [FN4] marine conservation purposes including concerns over commercial whaling, [FN5] dolphin mortality in tuna fishing ***857** operations, [FN6] the use of high seas driftnets, [FN7] and, most recently, the drowning deaths of sea turtles in shrimp fishing nets. [FN8]

On several occasions these marine environment-related trade restrictions have been challenged as illegal obstacles to free trade under the dispute settlement provisions of the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO). [FN9] Most recently, on October 12, 1998, the Appellate Body (AB) of the WTO ruled that the United States violated the GATT/WTO agreement when it imposed an embargo on shrimp from India, Malaysia, Pakistan, and Thailand for failing to adopt sea turtle protection policies that were comparable to those in place in the United States. [FN10] The AB, although acknowledging that the trade restrictions served a legitimate environmental objective recognized under article XX of the treaty, found that the restriction was applied in an unjustified ***858** and arbitrary manner in violation of the treaty. [FN11]

Rather than strike down the trade restriction on the basis of a tightly construed interpretation of article XX, as had been the standard practice of GATT/WTO dispute settlement panels in the past, in the Shrimp/Turtle decision the AB used a balancing approach to determine whether the U.S. measures were applied in an unjustified or arbitrary manner. [FN12] The AB ruled against the United States for two substantive reasons. First, it found the trade measures unjustified because they were intended to coerce the targeted nations into changing their domestic environmental practices rather than conserving exhaustible resources. [FN13] Second, it concluded that the United States failed to engage in serious negotiations with the targeted nations and instead arbitrarily demanded that the nations adopt U.S. environmental standards to avoid trade restrictions. [FN14] In addition, the tribunal pointed out that the United States failed to protect the targeted nation's procedural due process rights when it treated some nations differently than others in implementing its policy. [FN15]

The U.S. government has agreed to bring its policy into compliance with the AB decision rather than pay compensation to the four nations. [FN16] However, serious questions remainregarding whether the United States will be legally or politically capable of complying with the tribunal's mandate. [FN17] Moreover, and more importantly, the Shrimp/Turtle decision does little to clarify the circumstances under which the United States and other WTO Member States may use trade restrictions for environmental purposes without risking future adjudicatory confrontations. In this regard, the decision is notable for its exceedingly narrow and ***859** confined wording and its refusal to provide guidance on several fundamental issues. [FN18]

Despite improvements as a result of the creation of a permanent AB, which has reversed some of the more glaring

inconsistencies in prior panel decisions, current GATT/WTO case law in the environmental area continues to suffer from a confusing and sometimes contradictory set of decisional rules. [FN19] Many of the opinions contain tortured and "impressionistic" definitions and seem to shift between "textual," "contextual," and "functional" interpretations of the treaty depending on the whim of individual tribunals. [FN20] Some of the inconsistencies may be attributed to procedural weaknesses within the GATT/WTO dispute settlement system itself. In this regard, it is not surprising that there is a lack of uniformity and consistency in a system in which initial dispute settlement is accomplished through party-controlled ad hoc panels using relatively informal procedures. [FN21] However, it should be noted that despite certain procedural improvements resulting from the creation of the WTO, many decisions are still marked by the highly discretionary and value-laden views of individual judges or panels rather than by a coherent and unified set of legal and/or philosophical principles. [FN22]

Weaknesses in the current system have been addressed in a number of important and useful studies that have sought to assess GATT/WTO case law and propose improved methods of adjudicating dispute settlement claims in the environmental area. [FN23] A few scholars have looked more specifically at the theoretical ***860** and ethical underpinnings associated with free trade versus the environment and have debated differing moral philosophical models. [FN24]

Significant scholarly attention in recent years has focused on linkages between international trade and other areas of societal concern. This area of inquiry has examined the normative conflict between international trade law and other areas of international law such as human rights law, labor law, property law, and environmental law. [FN25] At issue is whether the GATT/WTO trading system is overly committed to economic efficiency to the detriment of other non-trade values. Much of this debate extends the nearly two centuries old feud between proponents of utilitarian-based moral theories as presented and refined by the 19th century philosophers Jeremy Bentham, John Stuart Mill, and Henry Sedgwick versus proponents of rights-based contractarian or liberal egalitarian moral theories, advocated by philosophers such as Immanuel Kant and John Rawls. [FN26]

This Article will not attempt to describe or critique the myriad philosophical theories of justice that could be adopted by GATT/WTO panels whenever trade and other societal values intersect. [FN27] Thoughtful expositions on these theories may be found elsewhere. [FN28] Nevertheless, it will delve into the utilitarian/contractarian ***861** divide because of its historical importance and its current influence in the normative conflict between GATT/WTO trade rules and extraterritorial environmental restrictions. [FN29]

This Article rejects the commonly asserted notion that GATT/WTO case law in the environmental arena reflects a strict utilitarian approach to decision- making. [FN30] Instead, it suggests that GATT/WTO rulings are shifting from a doctrinally-based decisional approach rooted in an unwavering defense of the integrity of the international free-trading system, regardless of utility, toward a more utilitarian balancing approach. Recent dispute settlement decisions, most notably the AB's Shrimp/Turtle decision, have expressed a greater willingness to engage in legitimate utilitarian balancing by weighing not only the costs to the international trading system, as had been the organization's traditional practice, but also the benefits provided by a particular environmentally induced trade measure. [FN31] It further asserts that this trend toward utilitarianism should be viewed positively and need not necessarily be perceived as rejecting non-trade social values, as long as it is suitably tempered by an element of fairness and justice. In fact, a useful model exists for this new modified utilitarian approach based upon some of the general principles underlying the rulings of the Supreme Court of the United States in disputes involving the "takings" clause of the U.S. Constitution. [FN32]

The utilitarian approach modified by an additional element of fairness was first described as the appropriate ethical foundation for U.S. takings law in an influential article by Professor Frank Michelman in 1967. [FN33] In its simplest form, Michelman's article ***862** asserted that private property owners should be compensated for governmental interference whenever the demoralization caused by the failure to compensate outweighs the cost of compen- sation. [FN34]

There are important parallels between the utilitarian foundations underlying the Supreme Court of the United States' takings jurisprudence as described by Michelman and others and GATT/WTO environmental jurisprudence. [FN35] In both scenarios a judicial tribunal is asked to mediate conflicting rights between a government seeking to enforce a regulation in what it perceives as the public interest against the equally legitimate right of a party to be free from having to absorb a disproportionate burden of the cost of that public benefit. In other words, both are intended to serve as a constraint upon discriminatory regulation over the allocation of resources. In the takings context, this conflict is in the specific form of a governmental regulation impinging on a private property owner's

so-called reasonable investment-backed expectations. [FN36] In the trade/environment context, the conflict is between one government's right to protect some aspect of the international environment versus another nation's expectation that its conventional and customary rights as a sovereign will protect it from such restrictions. In both situations, there is a justifiable fear that the regulating government will subjectively and unilaterally identify undesirable conduct and seek to impose corrective sanctions. Although the sources of rights and obligations are different under the two scenarios, ethical considerations of utility, efficiency and fairness in determining whether compensation is justified or unjustified are similar and warrant closer exam- ination. [FN37]

***863** Interestingly, the AB's Shrimp/Turtle decision contains elements that are entirely compatible with the type of modified utilitarian approach that this Article advocates without explicitly referring to it as such. [FN38] One of the purposes of this Article is to describe where these similarities of approach currently exist and how they can be expanded and applied more effectively in the future using the U.S. model. [FN39]

This Article further contends that the ad hoc nature and general inconsistencies of GATT/WTO adjudicative rulings should be viewed as an inevitable feature of all forms of utilitarian analysis in the absence of legislative guidance, just as it has been in the context of U.S. takings jurisprudence. [FN40] It consequently advocates that WTO Member States take a more active role in providing guidance in the trade/environment arena and move beyond the current practice of relying exclusively on the discretionary judgments of individual dispute settlement tribunals. Predictability and security among Members will only come about as a result of some consensual form of agreement on theappropriate perimeters of any utilitarian calculus that may be employed to settle future disputes.

Part I of this Article provides a brief explanation of why the so-called conflict between free-trade principles and environmental policy has arisen. Part II analyzes how GATT/WTO tribunals have interpreted the environmental provisions contained in article XX. [FN41] Further, it explores the process of interpretive change in GATT/WTO dispute settlement holdings from what is termed doctrinalism to utilitarianism. [FN42] Part III discusses the theory of utilitarianism and its rival theory, contractarianism. [FN43] Part IV discusses the role of Michelman's modified utilitarian approach in U.S. takings law and why it may be helpful to analogize GATT/WTO environmental jurisprudence with U.S. domestic law. [FN44] Part V concludes with some observations regarding the value of a modified utilitarian approach in resolving a variety of real and hypothetical global environmental disputes and recommends steps that the WTO should take to more effectively incorporate ***864** the approach into its future decision-making processes. [FN45]

I

How GATT/WTO Regulates Conflicts Between Trade and Environment

Conflict between free trade obligations under the GATT/WTO regime and the right to protect the environment may arise whenever an environmentally concerned State Party with rigorous laws enacts regulations that have either a direct or indirect effect of burdening imports from a State Party that protects the environment less rigorously. Conflict can take three primary forms. [FN46] The first type occurs when a State Party enacts domestic environmental regulations for the purpose of protecting the quality of the environment or the health, safety, and morals of citizens within their territorial boundaries. In theory, GATT/WTO provides States Parties wide latitude to impose regulatory measures within their own territory as long as the measures have a legitimate regulatory purpose and do not treat foreign and domestic products differently. [FN47] Nevertheless, disputes may arise when the domestic regulation has the effect of creating an unwarranted burden on market access that is prohibited by GATT/WTO.

An example of this type of conflict occurred in the Reformulated Gasoline case, where a U.S. air quality regulation created a more onerous standard for gasoline produced by foreign refiners than U.S. produced gasoline. [FN48] The dispute settlement panel and AB ruled against the United States, finding that the discriminatory element of the regulation was not necessary to attain the environmental objective, and that other less discriminatory alternatives ***865** were available. [FN49] Another recent example is the Beef Hormone decision, in which U.S. cattle, treated with natural and synthetic growth hormones, were banned from European Union (E.U.) markets as a potential health risk. [FN50] The GATT/WTO tribunals once again ruled that the regulation was an unwarranted restriction on free trade. In this instance, the E.U. health measures failed because the tribunals determined that the regulations were not based on existing international standards and were not supported by scientific evidence. [FN51]

A second type of conflict may emerge when one nation tries to "level the playing field" by imposing anti-dumping

or countervailing duties on another nation to compensate for the targeted nation's less environmentally protective policies. [FN52] Unless such duties are based on a justified regulatory purpose, they will likely be viewed as a violation of GATT/WTO obligations.

The third, and most relevant type of conflict for purposes of this Article, occurs when one nation imposes trade restrictions on another nation as a method of coercing it to improve its environmental behavior beyond the territorial limits of the restricting nation. The sea turtle protection measures imposed by the United States in the Shrimp/Turtle decision and the other examples discussed in the introductory section of this Article exemplify the third category of conflict. [FN53] These externally or outwardly-directed trade measures are especially controversial and subject to challenge because they are intended to promote policies or values in foreign countries or in the global commons rather than protecting domestic consumers. When confronted with these policies, a targeted nation is likely to ask the question: "Why must we adopt the environmental values of another nation?" And the targeted nation will likely treat the coercive trade measures ***866** as an affront to its rights as a sovereign nation. [FN54]

Externally or outwardly-directed trade measures may be imposed unilaterally or collectively as part of a bilateral or multilateral agreement. Currently, GATT/WTO does not distinguish between unilateral and collective trade measures and may find a State Party imposing such measures in violation of the trade agreement even though its actions are authorized under a multilateral environmental agreement (MEA). [FN55] The most commonly mentioned MEAs that may be found in violation of GATT/WTO because of trade restriction provisions include CITES, [FN56] the Montreal Protocol, [FN57] and the Basel Convention. [FN58] Although the issue has not yet been formally addressed by a GATT/WTO dispute settlement panel, a waiver may be possible when all of the affected parties are also States Parties to the MEA under the well known international rules of treaty interpretation, lex posterior and lex specialis. [FN59] However, when a nation is targeted by ***867** trade restrictions and is not a party to the MEA or is the subject of unilateral trade restrictions, the only possibility of being relieved from its free trade obligations under GATT/WTO is through the general exceptions contained in article XX. [FN60]

II

Applying the Environmental Exceptions in Article XX

The GATT/WTO regime establishes three essential disciplines on States Parties as a method of effecting free and open trade. Article I requires so- called "most favored nation treatment" among members. [FN61] This provides that members must not discriminate against "like products" from any other member state and must treat all such products identically. Article III, known as the "national treatment" principle, requires that internal taxes and regulations be applied to imported products no less favorably than similar domestic products. [FN62] Article XI limits quantitative import restrictions to duties, taxes, or other charges, and generally prohibits quotas, import prohibitions, and export prohibitions.

Article XX contains exceptions to these essential disciplines. [FN63] ***868** If one or more of these essential disciplines is violated, article XX provides justification for the violation if the measures are necessary to carry out legitimate social policies. Without the exceptions in article XX, nations such as the United States would be in clear and indefensible violation of GATT/WTO whenever they impose an import restriction on any product for environmental purposes. However, several of the exceptions deal either directly or peripherally with environmental concerns. [FN64] The most important of the exceptions for purposes of protecting the global environment are article XX (b) "necessary to protect human, animal or plant life or health"; and article XX (g) "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." [FN65] Every article XX exception is conditioned upon meeting the requirements in what is commonly termed the "chapeau" or preambular clause of the article. The chapeau prohibits any exception if it constitutes: (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade. [FN66] All of the environmentally related GATT/WTO decisions to date have involved, at least in part, the interpretation of ***869** article XX(b) and/or (g). [FN67]

A. Traditional Doctrinal Interpretations of Article XX(b) and (g) Exceptions

The balancing approach applied in the Shrimp/Turtle decision is a sharp departure from the traditional approach taken by GATT/WTO tribunals interpreting article XX exceptions. The traditional approach viewed the doctrine of free and unhindered trade as a paramount value and left little opportunity to take competing societal values, such as

environmental protection, into account. [FN68] These earlier panels viewed the exceptions narrowly as a means of fending off any destabilizing threats to the continued existence of the international free-trading system. [FN69] They questioned the validity of claimed conflicts between the promotion of free trade and environmental protection because they saw free trade as the primary means to stimulate economic growth and efficiency, which in turn is an essential prerequisite to environmental protection. [FN70] Moreover, they believed that the continuing process of trade liberalization was the overriding intent of all Member States and, as a consequence, placed significant obstacles in the path of any nation that sought to invoke an exception under article XX by limiting them to as narrow a class of activities as possible. [FN71]

***870** For example, under traditional article XX(b) analysis, the term "necessary" was confined to exempt only those limited instances where there was no alternative measure available that was less GATT-inconsistent. [FN72] Similarly, article XX(g) analysis construed the terms "measures" and "related to" very narrowly. [FN73] In order to be granted the exception, "measures" had to be "primarily aimed at" the conservation of natural resources. [FN74] In all practical terms, panels began to interpret the term "relating to" in article XX(g) the same way as they interpreted "necessary to" in article XX(b). According to Robert Hudec:

The trouble was that article XX(g) merely required that the measure "relate" to the conservation objectives listed. To keep article XX(g) from becoming a wholesale license for excusing GATT violations, panels had worked out an ingenious (and arguably disingenuous) way of interpreting "related" so that it meant the same thing, more or less, as "necessary." [FN75]

Moreover, the traditional interpretation of "necessary" in article XX(b) seems erroneous. Professor Thomas Shoenbaum contends ***871** that the grammar and syntax of article XX(b) makes it clear that the purpose of the clause is to protect living things and that the "least trade restrictive" requirement turns this meaning on its head by changing the purpose to protect against departures from the trade agreement. [FN76]

Limiting article XX(g) exceptions was also accomplished by characterizing "measure" in the necessity analysis to include only the trade restricting component rather than the entire regulatory scheme. [FN77] If the "necessity" analysis was more broadly applied to the regulatory scheme as a whole, rather than each component inconsistent with GATT, it would have been much more difficult for a tribunal to strike down the regulatory measure. [FN78]

This narrow parsing of article XX exceptions was also employed to strike down the U.S. restrictions on imported tuna in the two best known decisions involving extraterritorial trade actions, the Tuna/Dolphin decisions. The 1991 Tuna/Dolphin I decision involved a dispute between Mexico and the United States over the primary embargo of tuna imposed on Mexico and several other nations as a result of non-compliance with the dolphin protection standards called for in the United States Marine Mammal Protection Act. [FN79] The 1994 Tuna/Dolphin II decision concerned a dispute between the E.U. and the United States about the intermediate embargo imposed against nations that processed or imported tuna from Mexico and other countries that were subject to the primary embargo. [FN80]

In both decisions, the panels found no exception after applying its traditional "necessity" and "primarily aimed at" analyses to articles XX(b) and (g). [FN81] In reaching the decisions, both panels pointedly expressed displeasure at the unilateral approach taken ***872** by the United States to solve an international environmental problem. The Tuna/Dolphin I panel went so far as to assert that the article XX(b) "necessity" test could never be met for conservation purposes outside of national jurisdiction without prior efforts at negotiating internationally. [FN82]

The panel in Tuna/Dolphin II was less rigid in its analysis of extraterritorial trade measures and implied in dicta that article XX may allow members to pursue environmental protection measures outside national territory. [FN83] However, it found that the U.S. measures at issue failed the article XX(b) "necessity" test because instead of having a direct conservation or protective effect, the regulation was only effective if it succeeded in coercing other nations to adopt policies within their own jurisdictions that had the desired environmental effect. [FN84] The fact that the U.S. trade measures could not, by themselves, conserve or protect exhaustible natural resources in the absence of changes in domestic policies of the targeted states was held to violate the requirements in article XX(g). [FN85] Applying its traditional article XX(g) analysis, the panel held that the measures could not possibly be "primarily aimed at" conservation when success is dependent on another nation changing its domestic policies as a consequence of economic coercion. [FN86]

In summary, the traditional approach to interpreting the article XX exceptions was founded upon a fundamental conviction that the promotion of free trade should trump any other equitable or societal value and that the treaty's

drafters intended that the exceptions provided in article XX be construed as narrowly ***873** as possible. [FN87] No attempt was made to balance the size, severity, or irrevocability of the detrimental activity that triggered the exception against its likely impact on the free trade system or its economic impact on a particular targeted nation. [FN88] Nor was any balancing attempted that weighed the goal of least trade restrictiveness with the domestic cost of such a regulatory approach. [FN89]

Under a strict utilitarian approach, an action, rule, or policy is morally permissible if, and only if, there is no alternative with better consequences. [FN90] When the impartiality of the utilitarian calculus has been short-circuited to prevent some of the potential benefits and costs from being weighed, the approach cannot be legitimately termed utilitarian.

The doctrinal rigidity employed in early GATT/WTO decisions justified the use of tortured definitions and overly restrictive conditions. The rule that all exceptions be denied unless a no-less-trade-restrictive alternative is available is a clear example. [FN91] Because ***874** GATT did not require that any particular interpretive method be employed, panels freely adopted a variety of interpretive techniques to restrain the perceived excesses of individual Member States. [FN92] However, underlying all of these rulings was a doctrinaire belief that free trade should be the preeminent value. Given the decisive influence that the GATT Secretariat's Office of Legal Affairs has traditionally wielded in the formulation of individual panel decisions it is not surprising that the integrity of the international free-trade system was treated with such paramount importance and that non-trade values were given short shrift. [FN93]

Significantly, not only did the traditional doctrinal method of analysis preordain the substantive outcome of most disputes, but it also insulated panel members from having to ponder and perhaps adopt a particular moral theory in its decisions. As long as any trade measure could be invalidated as not falling within a narrowly interpreted article XX exception, there was no need to determine whether the decision created arguably economically inefficient outcomes, distributional inequities or violations of fundamental human rights. However, this "head in the sand" doctrinal approach has given way to a somewhat more balanced approach as a result of reforms created by the establishment of the WTO in January 1995.

B. Reforms After the Creation of the Permanent Appellate Body

The dogmatic panel decisions that flourished under the diplomacy-based legal and political environment in GATT changed ***875** radically under the WTO dispute settlement regime. The evolved trade organization's more structured and legalistic dispute settlement system, coupled with a permanent appellate body to review panel decisions, brought needed discipline to the work of individual panels. [FN94] Moreover, the WTO adopted as part of its official preamble a policy statement that explicitly proclaimed that environmental concerns and sustainable development should be balanced with promotion of international free trade. [FN95]

The AB quickly undertook to remedy much of the procedural and analytical sloppiness that had previously characterized many of the earlier panel decisions. For example, it insisted that WTO agreements be interpreted pursuant to the relevant provisions of the Vienna Convention on the Law of Treaties, and encouraged panels to engage in a more detailed and rigorous legal analysis than in the past. [FN96] Such reforms were inevitable given the AB's permanent status and its institutional charge to review panel decisions for legal errors. [FN97] Moreover, failing to reform the obvious legal deficiencies in previous panel decisions would have jeopardized its own credibility as well as the credibility of the entire WTO dispute settlement system.

1. 1996 Reformulated Gasoline Decision

The 1996 Reformulated Gasoline decision was the first AB decision under the reformed WTO/AB framework. [FN98] The AB upheld the decision by the lower panel, which found that the United States' different baseline requirements for domestic and foreign gasoline producers unjustifiably discriminated against foreign producers of gasoline. [FN99] However, the AB's legal analysis ***876** departed significantly from the original panel's. First, it discredited the traditional interpretation that "related to" and "in conjunction with" in article XX(g) actually means "primarily aimed at." [FN100] It pointed out that nothing in the text of the treaty mandated such an interpretation. [FN101] It went on to find that all of the initial requirements to maintain an article XX(g) exception had been met. [FN102] Having found that the U.S. measure met the requirements for an article XX(g) exception, the AB moved on to determine whether the measure constituted "arbitrary or unjustifiable discrimination" under the chapeau. Never before, in the fifty year history of GATT/WTO, had a dispute settlement tribunal agreed to examine an article

XX exception under the chapeau, and to attempt to precisely clarify its meaning. [FN103]

By applying the chapeau rather than screening out the measure under article XX(g), the AB undertook the controversial task of engaging in the subjective process of defining and applying the ambiguous terms "arbitrary discrimination," "unjustifiable discrimination," and "disguised restriction." [FN104] It noted that the primary purpose of the chapeau was to prevent abuse of the article XX exceptions by finding:

"Arbitrary discrimination," "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side by side; they impart meaning to one another. . . . Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination," may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in article XX. [FN105]

***877** Because the United States failed to cooperate with the governments of Venezuela and Brazil in finding a method of mitigating the administrative problems and costs associated with treating foreign and domestic producers equally, the AB found that the baseline establishment rules, in their application, constituted "unjustifiable discrimination." [FN106]

Interestingly, despite having criticized the lower panel for using the traditional "necessity" test, the AB seemed to imply a "necessity test" in its own interpretation of the chapeau when it found: "In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of [a]rticle III:4 had occurred in the first place." [FN107] The application of the "necessity" test under the chapeau to find any regulation as "unjustified discrimination" if it is found not "necessary" to the policy objective it is claimed to serve harkened back to the traditional doctrinal approach. [FN108] According to Petersmann, the assertion of this "necessity test" in the chapeau as well as the ambiguities associated with trying to determine whether a nation is engaged in an abusive or illegitimate use of the exceptions significantly weakened the decision. [FN109]

Notwithstanding these weaknesses, the Reformulated Gasoline decision represented an important, if evolutionary, step forward from previous panel decisions. By rejecting the traditional doctrinally-based analysis of the article XX exceptions and moving to an analysis under the chapeau, the AB signaled its willingness to implement the policy mandated in the preamble to the WTO Treaty, which called on the organization to weigh environmental sustainability against the protection of the international free trade system. The job of defining the legal substance of this aspirational goal was left to future panels. Unfortunately, the next panel to be presented with an opportunity to squarely address the meaning of the article XX chapeau failed to do so. Rather than address the issue, the Shrimp/Turtle panel chose to backslide and embrace the most excessive form of traditional doctrinal analysis.

***878** 2. Original Shrimp/Turtle Panel Decision: Doctrinalism At Its Worst

Prior to discussing the legal analysis employed by the panel, some additional background is instructive. Since 1990, the United States has had a policy to embargo imports of shrimp from nations that are not certified as adequately protecting endangered sea turtles. This policy came about as a result of Amendments to the Federal Endangered Species Act, known as section 609. [FN110]

In 1996, after years of domestic political squabbling and several federal lawsuits concerning the scope and implementation of the shrimp embargo, the United States imposed a world-wide import ban on shrimp from nations that were not certified as having sea turtle protection programs equivalent to those in effect in the United States. [FN111] Soon after the embargoes were imposed, India, Malaysia, Pakistan, and Thailand brought a legal challenge to the Dispute Settlement Body of the WTO, arguing that the U.S. policy violated the free trade obligations of the GATT. [FN112]

On April 6, 1998, in a widely-criticized and analytically suspect decision, the settlement panel found against the United States on every substantive point and ordered it to bring its law into compliance with the treaty. [FN113] In reaching its conclusion, the panel once again adopted a traditional doctrinal approach by choosing to circumvent any analysis of whether the U.S. embargo of shrimp fell within one of the exceptions in article XX. Instead, in ***879** an unrestrained exercise in Lochnerian reasoning, [FN114] the panel determined that it was not necessary to examine the exceptions themselves because the U.S. trade measures "could put the multilateral trading system at risk." [FN115] It described the fact that the United States did not adequately engage in negotiations with each nation prior to imposing its unilateral measures as especially risk-producing, [FN116] and found that the measures were intended

to coerce nations into adopting environmental standards comparable to those in the United States. [FN117] Piling one circular argument on top of another, the panel ruled that any trade measure that undermined the WTO multilateral trading system violated the chapeau of article XX and whenever the chapeau is violated the exceptions are not available because this would be an abuse of the exceptions. [FN118] Moreover, it stated that it had to look beyond the individual impact on the multilateral trading system of a particular measure, and also had to consider "whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system." [FN119] In sum, the panel found that certain unilateral trade measures that it felt may jeopardize the multilateral trading system (either individually or collectively at some hypothetical point in the future), by definition, cannot be covered by article XX and must fail. [FN120]

***880** 3. Shrimp/Turtle Appellate Body Decision

The United States appealed to the AB on July 13, 1998. [FN121] The AB issued its ruling on October 12, 1998. [FN122] Although harshly critical of much of the legal analysis employed by the original panel and supportive of the United States on a couple of key issues, [FN123] the AB ultimately ruled that the trade restrictions employed by the United States were an "arbitrary and unjustifiable discrimination between countries where the same conditions prevail" under article XX's chapeau. [FN124] The AB ordered the United States to either bring its measures into conformance or pay compensation to the four claimants. [FN125]

Several aspects of the decision seem to signal a more environmentally friendly outlook by the WTO. [FN126] For example, the AB ruled for the first time that unsolicited amicus briefs by non-governmental environmental organizations were not prohibited under the WTO's Dispute Settlement Understanding. [FN127] Moreover, in what is viewed by the U.S. government and many observers as a significant step forward, the AB found that the U.S. trade restrictions on shrimp, despite their extraterritorial nature, did qualify for exception under article XX(g) that allows States Parties to adopt measures "relating to the conservation of exhaustible natural resources . . . ." [FN128] It sharply rebuked the original ***881** panel for refusing to determine whether an exception existed under article XX(b) or (g), before engaging in an analysis of the chapeau. [FN129] The AB ruled that the proper method of analysis requires a two-tiered approach. [FN130] Only after an exception has been found to exist may the tribunal move to the chapeau to determine whether the measure violates its terms. [FN131]

a. First Tier Analysis of Article XX(g) Exception

In its first tier analysis, the AB engaged in an examination of each clause of article XX(g) to determine if the U.S. measures qualified as an exception. The AB examined whether sea turtles could be deemed an "exhaustible natural resource." [FN132] It quickly rejected the argument put forward by India, Pakistan, and Thailand that exhaustible natural resources are limited to "mineral" or "non-living" resources by noting that there is a global consensus today that recognizes that living resources can also be finite and exhaustible. [FN133] According to the tribunal, because all seven of the sea turtle species covered by section 609 are listed as threatened with extinction in appendix 1 of the Convention on International Trade in Endangered Species (CITES), [FN134] as well as being migratory in nature, it is not unreasonable that the United States should take an interest in sea turtles beyond its national waters. [FN135]

Next, the AB examined whether the U.S. measures "'relate to' the conservation of exhaustible natural resources." [FN136] It determined that section 609 of the Endangered Species Act is not a simple, blanket prohibition of the importation of shrimp without regard to the mode of harvesting or mortality of the turtles. According to the tribunal, the means and ends that the United States applied to protect turtles was every bit as "substantial" as ***882** that which the tribunal found in the Reformulated Gasoline decision. [FN137] In addition, it noted that section 609 was not "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species." [FN138] It therefore upheld the measures as "'relating to' the conservation of an exhaustible natural resource." [FN139]

Finally, the AB addressed whether the measures are made effective in conjunction with restrictions on domestic production or consumption. Here the tribunal noted that the United States imposed identical turtle conservation measures on its own domestic shrimp fishing fleet and, therefore, this requirement was also met. [FN140] Consequently, the AB ruled that the U.S. trade measures legitimately fell under the article XX(g) exception. [FN141] Because article XX(b) was only invoked by the United States as an alternative to article XX(g), the tribunal declined to determine if XX(b) was also available. [FN142]

It is impossible to predict exactly what effect the AB's first tier analysis may have on future trade/environment

disputes. While it took a less doctrinal approach to the article XX exception, reasserting the philosophy applied in the Reformulated Gasoline decision, it provided little else in the way of guidance to future panels.

Much of the decision's language can be characterized as either overly broad or exceedingly narrow. For example, criteria such as substantial relationship that is every bit as substantial and "not disproportionately wide" are extremely broad and subject to discretionary interpretation. [FN143] In contrast, the AB's seemingly liberal acceptance of extraterritorial trade restrictions for the protection of sea turtles in areas outside of U.S. jurisdiction was ***883** narrowly-tailored to include only those exhaustible resources that are both highly-migratory and endangered. [FN144] In other circumstances where extraterritorial trade sanctions are likely to be employed in the future, a combination of highly migratory and endangered status will rarely, if ever, occur. For instance, should the United States at some point in the future impose an embargo under the United States Pelly Amendment as a result of the resumption of commercial whaling of minke whales in the South Atlantic or some other non-endangered marine species, it is unlikely that the AB will be as sanguine about finding the extraterritorial measure in conformance with article XX(g). [FN145]

b. Second Tier Analysis of Chapeau

The AB next engaged in the second tier analysis to determine if the U.S. measures violated the chapeau. Preliminary to interpreting and applying the chapeau to the facts, the tribunal reiterated and expanded the general findings established in its Reformulated Gasoline decision, namely that the purpose of the chapeau was to prevent abuses of the article XX exceptions. It cited language from Reformulated Gasoline, that the article XX exceptions should not be applied "so as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement." [FN146] Comparing the purpose of the chapeau to the principle of good faith under international law, it explained that a treaty obligation "must be exercised bona fide, that is to say, reasonably." [FN147] Using terms such as "balance" and "equilibrium," the AB stressed reasonableness to mean the balance that must be struck between the right of a Member to ***884** invoke the article XX exceptions with the duty of that Member to respect the treaty rights of other members. [FN148]

According to the AB, the standards in the chapeau are "necessarily broad in scope and reach." [FN149] Consequently, what is characterizable as "arbitrary or unjustifiable discrimination" in respect to one category of trade measures, such as those that protect public morals, may be different than one relating to prison labor. [FN150]

It also took great pains to acknowledge the preamble to the WTO Agreement and its mandate to balance the "optimal use of the world's resources" with the "objective of sustainable development." [FN151] It commented that the preambular language must "add colour, texture and shading to our interpretation of the agreements." [FN152]

The AB then examined whether the U.S. measures constituted "unjustifiable discrimination between countries where the same conditions prevail." [FN153] Unjustifiable discrimination was found based upon the lack of flexibility associated with the U.S. trade measures. The tribunal found that the shrimp embargo was coercive in nature because it was placed on all nations that did not adopt conservation policies that were identical to those in effect in the United States. [FN154] As a consequence, nations like Australia, which has strict turtle conservation policies in place, but has chosen not to use TEDs as the centerpiece of that policy, were still subject to U.S. embargo. [FN155] Similarly, a majority of Malaysian fishermen use TEDs, but their shrimp were still embargoed because the Malaysian government did not receive U.S. certification. [FN156] The AB asserted that the U.S. measure, in its application, was more concerned about requiring other Members to adopt the same environmental regulations that it imposed on ***885** its domestic shrimp fishermen than in protecting and conserving sea turtles. [FN157]

(i) Replacing the "Necessity" Test With a Balancing Test

Unlike the holding in the Reformulated Gasoline decision, which seemed to resurrect the principle that the regulation had to be "necessary" to accomplish the environmental policy objective to be deemed free of "arbitrary or unjustified discrimination," the Shrimp/Turtle tribunal introduced a balancing component into its analysis. [FN158] In a potentially far- reaching holding, it found that "unjustified discrimination" results: "[N]ot only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries." [FN159] In other words, rather than merely reviewing the measure as being either necessary or unnecessary to the conservation goal it claims to produce, it is now also appropriate for the dispute

settlement body to balance the type and quality of the trade measure imposed against a Member with the individual circumstances prevailing in that country. Whether the nation imposing the trade sanction will be granted a high or low level of judicial deference in making this regulatory decision remains unclear. [FN160] However, in order for the dispute settlement body to review whether the measure allows for an "inquiry into the appropriateness ***886** of the regulatory program," it must have the authority to balance the proposed trade measure with the individual circumstances existing in the targeted nation. To adequately conduct this balancing test, the tribunal may need to examine a broad range of criteria including the scientific validity and severity of the potential environmental damage, the potential effectiveness of the conservation measures that are enforced by the trade restriction, the existing conservation and protective measures employed by the targeted Member nation, and the motivations of the parties. [FN161]

In the Shrimp/Turtle dispute, the AB concluded that the U.S. measures allowed for no inquiry into the regulatory programs in the targeted countries and, therefore, there was no need to engage in a balancing exercise. [FN162] Future disputes may be less black and white, however. By expanding its analysis of "arbitrary and unjustified discrimination" under the chapeau to include not only the content and application of the regulatory measures themselves, but also the underlying physical and regulatory conditions in the participating countries, the AB has introduced new and untested variables into the dispute settlement process. Whether these new elements will be viewed as creating beneficial flexibility or crippling uncertainty remains to be seen. Further clarification is essential so that future disputants can gauge the types of criteria that may be examined, as well as the level of intrusiveness of the analysis. It should be noted that the modified utilitarian analysis advocated in this Article is intended to provide additional predictability.

(ii) Failure of United States to Engage in International Negotiations

The AB next focused on the failure of the United States to engage the disputants and other Members exporting shrimp to the United States in serious negotiations with the objective of concluding bilateral or multilateral agreements for the protection ***887** and conservation of sea turtles. [FN163] It noted that despite language in section 609 calling on the Secretary of State to initiate international negotiations, the United States did not engage in "any serious, substantial efforts to carry out these express directions of Congress." [FN164] Because of the highly migratory nature of sea turtles, the AB asserted that their conservation demanded "concerted and cooperative efforts." [FN165] It cited as particularly relevant in this regard, Principle 12 of the Rio Declaration on Environment and Development, which states in part: "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental Measures addressing trans boundary or global environmental problems should, as far as possible, be based on an international consensus." [FN166]

It praised the United States for negotiating the regional Inter-American Convention for the Protection and Conservation of Sea Turtles, noting, however, that it is the only example of U.S. cooperation on the issue. [FN167] However, it turned the Convention against the United States by using it as an illustration of the feasibility of international cooperative efforts and as an example of the fact that the United States arbitrarily negotiated with some, but not all, of the Members subject to the shrimp embargo. [FN168]

The AB characterized import prohibition as the "heaviest weapon" in a WTO Member's arsenal of trade measures and implied that the United States could have attempted to achieve cooperative efforts through "recourse to such international mechanisms as exist." [FN169] It is unclear what kinds of international mechanisms the AB was referring to, but it must have been referring to some variety of third party mediation or adjudication. [FN170]

***888** In practical terms, the AB seemed to create something akin to a per se rule against unilateral trade measures in the absence of initial attempts at negotiation. It placed a heavy burden on the United States to prove that it engaged in "serious, across-the-board negotiations" before its unilateral trade restrictions would not be deemed "arbitrary or unjustified discrimination." Unfortunately, the AB provided little concrete guidance as to what constitutes "good faith negotiations" or how much deference a Member will be granted in meeting this burden. Instead, it suggests that the outcome will depend on a balancing of factors that await further identification and clarification.

(iii) Procedural Violations

Finally, the AB engaged in an analysis of the U.S. government's application of section 609 and found it severely flawed. The tribunal specifically found that it was "unjustified discrimination" for the United States Department of

State to provide some nations three years to "phase-in" their TED programs, while granting others only four months. [FN171] It was not persuaded by the U.S. arguments that the differences in "phase-in" times resulted from decisions by the United States Court of International Trade and the more developed character of TED technology in recent years. [FN172] Discounting these contentions, the tribunal reminded the United States that it bears responsibility to the general community of states for the acts of every branch of its government, including the judiciary. [FN173] Moreover, it pointed out that, despite advancements in TED technology, the Members targeted by the embargo needed time to implement compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels, develop the necessary regulatory and enforcement programs, and find alternative markets for its shrimp during the interim. [FN174]

Of additional concern to the tribunal was the "informal and casual" manner in which the United States conducted its certification ***889** process. [FN175] Applicant countries were provided no opportunity to be heard, to respond to arguments made against them, to receive a reasoned written decision, or to have that decision reviewed by an appellate body. [FN176] Accordingly, the tribunal found that the procedural flaws in the U.S. measures amounted to "unjustifiable discrimination" and "arbitrary discrimination." Having determined that the United States engaged in "arbitrary or unjustified discrimination," the tribunal found no need to examine whether the measures also constituted a "'disguised restriction on international trade." ' [FN177]

4. Summary of GATT/WTO Shift Toward A Balancing Approach

The AB's Shrimp/Turtle decision clearly illustrates the shift in GATT/WTO judicial reasoning that has occurred as a result of the Uruguay Round Trade Agreements and the creation of the WTO. Its willingness to apply the Vienna Convention on Treaties [FN178] and to incorporate the doctrines of "good faith" and "non-abuse of rights," as well as to balance environmental benefits against the free-trade expectations of Member States, represents a sharp and very significant change from previous GATT/WTO panel decisions. Traditionally, panels relied on strained textual and functional definitions to prevent article XX exemptions from being applied, especially outside the regulating nation's boundaries. [FN179] This evolution from a rigid doctrinally-based system, in ***890** which rules were conditioned upon their usefulness in protecting the integrity of the international free-trade system, toward a more utilitarian balancing approach was made possible by three recent institutional changes in the GATT/WTO dispute settlement system. [FN180] These include: (1) the change in the WTO dispute settlement regime from a non-binding to a binding system; (2) the establishment of a permanent appellate body with a mandate to review errors of law; and (3) consensus among the most powerful members of the WTO that international environmental protection must be recognized by the trade organization as a legitimate area of concern. [FN181]

Under the doctrinal approach, even if it could be shown that a particular trade-backed environmental regulation created substantial utility by providing significant environmental benefit at a very low cost to the targeted nation, the measure would have still been struck down for not having satisfied the traditional "necessity-based" definitional tests. [FN182] By modifying this traditional screening device, the road is clear for future GATT/WTO adjudicatory tribunals to incorporate a different ethics-based theoretical model into their decision-making processes. [FN183] The next section will explain in more detail what these ethics-based approaches may look like and why a version of utilitarian balancing, modified by a fairness component that satisfies the reasonable treaty and sovereignty-based expectations of GATT/WTO Members, should be adopted in the future.

***891** III

Ethical Approaches to Trade/Environmental Disputes

A. Utilitarianism

In its simplest and classic form, "utilitarianism" stands for the theory that ethical actors should make decisions that maximize happiness or human benefit. [FN184] According to this criteria, a law is good when it increases pleasure, happiness, or well-being, and bad if it causes collective misery, pain, and suffering. The utilitarian calculus is necessarily "consequentialist" in outlook. The moral validity of a rule or law depends on what consequences it has on the welfare levels of a particular society. [FN185] How welfare utility is determined depends on how one defines value or utility.

Robin West has identified three types of utilitarian value systems. [FN186] "Hedonic utilitarianism" is that identified most closely with Jeremy Bentham, who maintained that the "goodness" or "badness" of a law depends

on the subjective, internal, and hedonistic experience of those who are impacted. [FN187] The criterion of utility is measured by reference to subjective lived experience that manifests itself as internal well-being. Hedonic utilitarianism values the coarsest and most cretin-like human desires equally to the most cultured and refined. As long as people like it and want it, it must increase the welfare of the community and is morally justified. [FN188]

***892** This definition of utility is not shared by the second type of utilitarianism known as "ideal utilitarianism," advocated by John Stuart Mill. [FN189] Mill agreed with Bentham that human happiness was the ultimate moral measure of laws and policies, but disagreed that this value should be determined by the happiness enjoyed or desired by presently existing people. Instead, he was skeptical that the preferences of our presently constituted selves and advocated that the utilitarian calculation be based on the preferences of our "ideal selves" and consequently our ideal happiness. He suggested that the values be based on some form of "ideal hedonic judge" who represents the ideal combination of education, health, mental and emotional maturity, and refinement.

An obvious weakness of both hedonic and ideal utilitarianism is the inherent difficulty of defining and prioritizing subjective levels of happiness or misery. [FN190] In an effort to make the classical theory more operational in practice, a third type of utilitarianism has emerged, known as "preference-based utilitarianism." Preference-based utilitarianism has replaced hedonic and ideal utility values with a calculation that is based instead on preference satisfaction. Economists have been especially solicitous of the preference-based model because it falls so conveniently within the Pareto-optimal paradigm. [FN191] In practice, this preference-based approach would label a new rule or policy good whenever one person expresses a preference for it and everyone else in the world is indifferent. Reflected in utilitarian terms, if a preference is satisfied and no one else is harmed, it must increase overall ***893** happiness. [FN192] Obviously, the actual utilitarian calculation is much more complex. Because individual mental states and preferences are difficult or impossible to calculate in most instances, the sum or average of individual preferences or welfare is used to determine the correctness of acts or policies. [FN193] Furthermore, because the overall welfare of a given group or society is determined by the sum or average of individual preferences, the calculation may reflect certain majoritarian and illiberal values seemingly at odds with many nations' liberal and rights-based traditions. [FN194]

Preference-based utilitarianism, as applied by modern economists and jurists, has clearly become the predominant form of utilitarianism, as well as the form that is most closely associated with international trade law and policy. [FN195] The normative model underlying trade law reflects a widely-held international preference for free trade based on the consensual conviction that facilitation of efficient exchanges of goods improves the economic well-being of human beings. [FN196] Few intellectual theories in the history of humankind have been as dominant for as long of a period of time as David Ricardo's theory of comparative advantage. [FN197] Simply stated, Ricardo's theory asserts that international trade will increase global wealth by allowing countries to specialize in the production of goods and services in which they have a ***894** comparative advantage and to import goods when they do not have an advantage. [FN198] With few exceptions, the empirical literature supports the general view that free trade contributes to increased international economic growth as well as other forms of welfare such as consumer choice, enhanced economies of scale, accelerated rates of technological innovation, and cultural integration. [FN199]

In light of the seemingly irrefutable linkage between free trade principles and increased economic growth and welfare, it is understandable that the world's leading free trade organization, GATT/WTO, has adopted a utilitarian approach as the normative basis of its legal system. [FN200] Under this utilitarian approach, free trade is good because its consequences of maximizing economic welfare are perceived to meet the preference satisfactions of the organization's Members. [FN201]

If free trade were a compartmentalized system of discrete and self-contained economic relationships that had no horizontal or vertical spillover effects, few would question the utilitarian foundation of GATT/WTO. [FN202] However, the past decade has shown that trade regulation has profound horizontal and vertical spillover effects on important non-trade social values. Trade policies have horizontal spillover effects between groups with differing interests. For example, groups that have an interest in protecting sea turtles or dolphins are affected by the trade-related decisions of other groups, such as fish exporting Member States who are ***895** exercising their treaty rights. [FN203] In addition, spillover effects also overlap vertically where an organization like GATT/WTO must share power with state and regional bodies with similar regulatory mandates. [FN204]

Traditional utilitarian approaches, as applied by GATT/WTO, are especially ill-equipped to deal with the conflict between trade values and non-trade spillover effects. Critics contend that the extraordinary weight accorded by the organization to economic welfare utilities and the concomitant enhancement of national sovereignty that results from

protecting the authority of each Member State to set its own economic and political policies (within the free trade constraints imposed by GATT/WTO) make it institutionally incapable of dealing with non-trade social issues. [FN205] To frame this criticism in different terms, GATT/WTO excels at creating economic efficiency, but fails at allocating resources in a way that satisfies equitable notions of justice or rightness.

B. Contractarianism

Some commentators contend that utilitarian consequentialist decision-making in GATT/WTO has elevated the utility of free trade to such an extent that other social values are either rejected out of hand as incapable of matching free trade's maximizing utility or are threatened to be cast off at some later date if the utilitarian calculus changes. These commentators have argued that the organization adopt a more contractarian ethical model. [FN206] Contractarianism, also known as contractualism, is based on the core idea that an acceptable moral view should seek ***896** to reflect an agreement among members of a given society. [FN207] Its approach to moral reasoning is in direct conflict with that of utilitarianism, which chooses the best way to satisfy a person's preferences and propensities, whatever they may be. Instead, contractarism seeks to restrict their desires and aspirations by certain "principles of justice which specify the boundaries that men's systems of ends must respect." [FN208] In other words, it seeks to create certain moral duties or rights that are not dependent upon a person's ability to rationally maximize self-interest, but instead are based on their inherent worth and dignity as human beings. Modern international human rights law uses a contractarianistic deontological approach by expressing human dignity and worth in absolute terms incapable of being traded away or compromised for utilitarian consequentialist reasons. [FN209]

A contractarianist approach has also been advocated as an appropriate moral theory in the environmental arena. [FN210] Within the trade/environment movement, the theories of Immanuel Kant have come to symbolize the contractarianist approach to environmental stewardship. [FN211] Kant's so-called "categorical imperative," which has been defined as "an action . . . objectively necessary in itself," has been used to describe certain environmental objectives that should not be compromised by any variety of utilitarian balancing. [FN212]

Species preservation has been described by some as falling within this ethical category. [FN213] Although it would be easy to find a variety of utility maximization justifications for not saving an ***897** endangered species, there is general agreement that humans have a moral obligation to take steps to prevent species from becoming extinct. [FN214]

C. Practical Problems Associated With Both Approaches

Regardless of the epistemological strengths or weaknesses of each approach, neither the utilitarian nor contractarian approach is well suited, in a practical sense, to address the trade/environment disputes that are coming before GATT/WTO dispute settlement tribunals on an increasingly frequent basis. [FN215] As previously discussed, the so-called utilitarian approach employed by GATT/WTO devolved into a rigid doctrinally-based system that failed to engage in legitimate utilitarian balancing. [FN216] Instead, it had taken on an increasingly anti-environmental and anti-human rights persona that had caused much of the public to believe that its primary interest is in preventing non-trade values from being incorporated into the global free trade debate. [FN217] While recent reforms within the WTO have corrected some of these real or perceived obstructionist tendencies, the organization is still viewed by much of the world community as incapable of adequately balancing non- trade interests within its decision-making processes. [FN218]

Similarly, calls for contractarian ethical approaches also suffer from serious credibility problems, especially as they relate to trade/environment linkages. Contractarian approaches by definition require agreement among community members subject to specific imperative rights or obligations. In this regard, the primary motivation underlying all contractarian moral principles is a desire to "justify one's actions to others on grounds they could not reasonably reject." [FN219] In other words, this is the desire to find principles which others similarly motivated could not reasonably reject.

***898** Consequently, an essential component of all contractarian ethical theories is that there be some settled agreement on what is important to well being. For example, in John Rawls' famous neo-Kantian alternative to utilitarianism, A Theory of Justice, he proposes an index of "primary social goods" including "rights and liberties, opportunities and powers, income and wealth." [FN220] He then contends that if placed within the "veil of ignorance" imposed by the "original position," [FN221] any rational actor would choose to minimize his or her risk

by selecting a result that safeguards basic social and economic institutions according to their tendency to promote the interests of the least well off in society. [FN222] However, for Rawlsian theory to be meaningful, there must be general agreement that the "primary social goods" are in fact universally desired "goods." If they are not of value to all rational actors, then his theory could not possibly promote its goal of creating distributive justice. Clearly, Rawls' choice of "primary social goods" is reflective of long-standing, universally held standards. [FN223] Similarly, in the area of international humanrights law there are also standards that are sufficiently universalist to meet any criteria of settled agreement. Examples falling within this category would include prohibitions of torture or genocide. [FN224]

However, unlike the "primary social goods" in Rawls' study or certain universal principles of human rights, it is much more difficult, if not impossible, to achieve universal acceptance of specific environmental goals and standards, especially in the international arena. [FN225] At this point in humankind's history, any contention ***899** to the effect that protecting the natural environment is a global "primary social good" in the Rawlsian sense would be met by skepticism at best, or, at worst, denounced as a product of cultural imperialism. [FN226] While there may be grounds to include something akin to "access to a healthy environment" in any list of "primary social goods" , the term is so broad and subject to varying interpretation as to be unworthy of consideration. [FN227] Along similar lines, there would be little disagreement among all nations that endangered species should be preserved, if possible. [FN228] However, to turn this qualified consensus on species preservation into a universalist categorical imperative would at this time be impossible to achieve. [FN229]

This in no fashion derogates the impressive strides that the international community has made in dealing with global environmental ***900** problems. [FN230] These successes have come about through traditional legal mechanisms such as treaties, progressive development of customary law, and various forms of "soft" legal processes. [FN231] Progress will continue to be made to protect and preserve the international environment, but it is highly unlikely in the near term that this progress will come about as a result of international organizations like GATT/WTO, adopting contractarian moral theories to guide their decision-making processes.

Given the clear public perception problems and institutional difficulties associated with strict utilitarianism and the political, moral, and legal impracticality of contractarianism, GATT/WTO needs to look at other ethical models to guide its decision-making. Unless the trade organization finds some common ground between those groups that desire vigorous protection of free trade and those that advocate non-trade interests, it risks losing legitimacy within the international community and of possibly being swept aside in favor of more credible institutional options. [FN232] The next section will examine a very different jurisprudential paradigm for possible guidance in this regard.

IV

Comparing the GATT/WTO Trading System and U.S. Takings Law

A. Why Compare?

Many of the same concerns that have been expressed in regard to the aims and moral approaches of allocating resources through international trade have also been raised in regard to domestic laws governing the allocation of private property rights in the United States. [FN233] This concern is framed as a debate over the ***901** aims and purposes of the "takings clause" in the Fifth Amendment to the U.S. Constitution and its impact on the ability of the government to regulate or "take" private property without due compensation. [FN234] More specifically, the parallel debate in the context of trade law and U.S. takings law involves finding an answer to the following question: Under what circumstances should a government be permitted to regulate conduct that is determined by that government to be either detrimental to the public interest or necessary to promote a public interest without having to compensate those whose rights are affected by that regulation? [FN235]

The question as posed to the international trade community involves the authority of one nation, for example, the United States, to impose a trade embargo as a method of regulating the environmental policies of another nation, for example, Thailand, in order to protect a natural resource of international concern, such as sea turtles. In this situation, a GATT/WTO tribunal would be asked to determine whether the United States is justified in seeking to impose such regulations under the treaty's provisions or instead must compensate Thailand for the financial losses caused by the U.S. government's action. [FN236]

A similar question is posed in the United States whenever government regulators seek to promote the public interest by restricting the use of private property in some fashion. Under such circumstances, a court may be asked to determine whether the regulation in question amounts to a valid exercise of governmental police powers and thereby not requiring compensation or instead ***902** crosses the line to become an unconstitutional governmental taking requiring just compensation. [FN237]

To properly answer either of these questions, a court or tribunal would, of course, need to apply the appropriate normative legal principles applicable to each system of law. The normative rules under the GATT/WTO system are discussed above. [FN238] Here, the aims and purposes of the "takings clause" in the Fifth Amendment to the U.S. Constitution are discussed, as well as the impact on the ability of the government to regulate or "take" private property without due compensation.

B. U.S. Takings Law and Michelman's Modified Utilitarian Theory Based on Fairness

Since its inception as a nation, the United States has struggled to find a fair and principled method of balancing the conflicting aims of governmental regulation to promote such public uses as environmental and historical preservation and infrastructure development, with the equally legitimate rights of its citizens to use private property as they see fit unhindered by governmental interference. The Supreme Court of the United States has fashioned a framework intended to guide courts and legislatures in determining when a regulatory action crosses the line between a valid exercise of police powers not warranting compensation versus a regulation that triggers governmental compensation under the Fifth Amendment's takings clause. [FN239] These rules have been both criticized by generations of judges, practitioners, and academics as doctrinally and conceptually inconsistent, [FN240] and praised by others as pragmatically sensible. [FN241] It is beyond the ***903** scope and purpose of this Article to enter into this vast and contentious debate. [FN242] For purposes of this Article, the discussion must necessarily be limited to an examination of U.S. takings law as it is, rather than as it might be.

The rules developed by the Supreme Court to determine whether an unconstitutional taking has occurred are relatively easy to summarize yet have proved quite complicated to implement in practice. Depending on the type of regulatory action involved, either a per se takings test or an ad hoc balancing test will be employed. A per se takings will automatically be found if the government action either: (1) involves a permanent physical occupation of the property; [FN243] or (2) deprives the owner of "all economically productive or beneficial uses of land," and is not preventing a common law nuisance-like activity. [FN244] In all other regulatory situations not calling for a per se finding of a taking, the court uses an ad hoc balancing analysis. The Court held that three factors are of particular importance: "(1) the economic impact of the regulation on the claimant [the person who was required to pay money or whose property suffered a diminution in value]; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." [FN245] This so-called Penn Central [FN246] multi-factor test is guided by considerations of "fairness and justice." [FN247]

Although fairness has always played a role in U.S. takings jurisprudence, ***904** the terms were not given precise meaning until the publication of a scholarly article by Frank I. Michelman in 1967. [FN248] In fact, the Supreme Court's Penn Central factors, especially the notion of investment-backed expectations, directly mirror the assertions in Michelman's essay. [FN249] Michelman's Property, Utility, and Fairness has not only been recognized as the theoretical fountainhead of much of the Supreme Court's modern takings jurisprudence, but is also viewed as the most influential academic study in the field. [FN250]

Michelman examined a number of theories of property and suggested that the theories of David Hume and Jeremy Bentham "furnish the germ of a theoretically satisfying approach to compensation questions." [FN251] According to Michelman, Hume believed that normative concepts of property evolved from an original perception of advantage in association and that such association would be impossible without rules governing acquisition and exchange. [FN252] Bentham carried this insight further by treating property as "a basis of expectations" founded on a belief that existing rules governing the relationships among men with respect to resources will continue in existence. [FN253] Bentham suggested that human motivations that result in productive pursuits will not operate in the absence of secure expectations that they will, in the end, enjoy a substantial share of the product that has come about as a result of their labor or investment. [FN254] Michelman points out that if one agrees with Bentham's premise, then one must agree that any unpredictable or capricious redistribution (i.e. a regulatory action without fair compensation) is potentially destructive to the expectations that Bentham regards as the essence of property. [FN255]

***905** Bentham further suggests that a utilitarian's concern for security in property-based expectations as a method of achieving economic productivity does not necessarily foreclose the utility of collective adjustments of market-based activities. [FN256] Because utilitarian theory maximizes satisfactions and not simply economic output, there will be circumstances where "it is sometimes right for society to adopt a measure which cannot practically be purged of a capriciously redistributive effect frustrating to justified expectations." [FN257] Moreover, for a utilitarian, "[s]ecurity of expectation is cherished, not for its own sake, but only as a shield for morale." [FN258] Consequently, a governmental restriction should be viewed as compensable, if not, to compensate would be critically demoralizing. [FN259] Explained slightly differently, compensation for regulatory actions is justified on utilitarian grounds as a method of forestalling demoralization which impairs the productive output of goods. By examining how a particular governmental action affects the emotional state of the parties affected by that action, Michelman introduces the element of fairness into the utilitarian calculus. Given the assertion that in the absence of serious demoralization, a utilitarian should be willing to accept a valid social measure that cannot practically avoid a redistributive effect that frustrates some property-based expectation, Michelman next sets out to specifically identify when governmental compensation is required and when it is not.

Michelman first defines the efficiency gains of a governmental regulatory measure as the "excess of benefits produced by a measure over losses inflicted by it." [FN260] However, he notes that positive efficiency gains, while prima facie desirable under utilitarian ethics, are an imperfect indicator because they do not take into consideration demoralization costs caused by capricious redistribution. Michelman suggests that a thorough and just accounting also considers what he calls "demoralization costs" and "settlement costs." Demoralization costs are defined as the dual costs of: (1) the disutility in dollars of those who have lost as a result of governmental regulation and their sympathizers from the realization that no compensation will be paid; and (2) the present dollar value of lost future production caused by demoralization of uncompensated ***906** losers and their sympathizers who are disturbed that they themselves may not receive compensation on future occasions. [FN261] Settlement costs are the time, effort, and monetary expense necessary to compensate affected individuals sufficiently to avoid demoralization costs. [FN262]

Michelman contends that whenever a governmental action entails both efficiency gains and some variety of capricious redistribution, either demoralization or settlement costs must be incurred. If these costs exceed the efficiency gains then the governmental action should be rejected under a simple utilitarian balancing test. If either the demoralization costs or settlement costs are lower than the efficiency gains then the lower of these two costs should be paid. The correct utilitarian calculation would therefore require compensation "whenever demoralization costs exceed settlement costs, and not otherwise." [FN263]

According to Michelman, the per se rules adopted by the Supreme Court are a reflection of this modified utilitarian calculus. [FN264] For example, physical invasions by the government should always be compensable because physical possession of property is one of the most cherished prerogatives. Consequently, "[t]he psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader." [FN265] Similarly, a governmental action that deprives an ***907** owner of all economic or beneficial use should be viewed as "especially painful" and thereby warranting of compensation. [FN266]

The purpose of a modified utilitarian test guided by fairness is therefore, not to determine what is or is not efficient, but to determine "whether it is so obviously efficient as to quiet the potential outrage of persons 'unavoidably' sacrificed in its interest." [FN267]

C. Implications of Michelman's Approach on GATT/WTO Trade/Environment Disputes

Michelman's recognition that a comparison of demoralization and settlement costs are an essential feature of any utilitarian analysis has implications beyond the U.S. domestic setting. The notion that utilitarian balancing should include an examination of the expectations of parties affected by any regulatory decision has relevance on the international stage as well. While the normative rules governing trade-environment conflicts in GATT/WTO and regulatory takings under U.S. law are different, the underlying utilitarian theoretical foundations of the two systems as well as the emotional and psychological tensions created by the two doctrines are strikingly similar. Under both situations, there is a utilitarian concern in meeting (or at least not defeating) well-settled expectations as a method of achieving economic productivity. The regulated parties in both arenas may feel discriminated against by being unfairly deprived of certain perceived ***908** fundamental rights as a result of having to absorb a disproportionate share of the cost of providing a public benefit to others. In the case of regulatory actions within the United States,

the fundamental rights at stake are the "private property" rights mentioned in the Fifth Amendment of the U.S. Constitution. [FN268] More specifically, they are the right to possess, use, and dispose of one's property. [FN269] In the case of international trade restrictions, the fundamental rights at stake are those conventional rights explicitly provided under the GATT/WTO Agreement and enforced pursuant to the maxim pacta sunt servanda, [FN270] as well as customary rights associated with national sovereignty, including sovereignty over national territory and general authority over nationals. [FN271]

The analogy between national sovereignty and private property is longstanding and should be considered as more than simply a heuristic tool. [FN272] As Friedrich Kratochwil has described, "sovereignty was developed by legal scholars such as Grotius, Pufendorf, and Selden as a rule-constituted practice analogous to private property in Roman law." [FN273] The parallels between the right of perfect title and possession granted to the owner of a fee simple absolute estate and the claims to supreme authority exercised by sovereign nations under modern international law are obvious and important, if not truly identical. [FN274] A full discussion ***909** of the similarities and differences of the two institutions would not be a profitable undertaking for our purposes. [FN275] Nor is it necessary to examine the claim that embargoes and other trade measures do not really intrude on a targeted country's national sovereignty, but instead are merely domestic conditions for trade. [FN276] It is simply important to note that under existing utilitarian-based decisional models, whether in the domestic takings context or international trade context, there is self-interest in protecting the prerogatives and expectations of those who possess well-established and long recognized entitlements. [FN277] Just as "productive pursuits will not operate in the absence of secure expectations" when private property rights are radically disturbed, [FN278] economic productivity will suffer if treaty- based rights and established notions of national sovereignty are threatened or even perceived in good faith as threatened. [FN279]

***910** Under either scenario, certain varieties of regulatory action will likely elicit more intense psychological reactions than others. [FN280] For example, just as it can be assumed that physical occupation of private property by the government will likely trigger an especially intense emotional reaction among domestic property owners, so it can be assumed that a similarly intense reaction is likely when a foreign trade restriction is imposed for the purpose of coercing another nation into changing its domestic environmental practices within its own territorial boundaries. [FN281]

Although U.S. courts have for some time engaged in a rough comparison of demoralization and settlement costs as a method of achieving fairness in its takings jurisprudence, [FN282] the traditional doctrinal approach used by GATT/WTO has insulated it from having to engage in a comprehensive utilitarian balancing analysis until quite recently. [FN283] Because extraterritorial environmental disputes were traditionally screened out by GATT/WTO panels as not falling within a particular article XX exception, utilitarian balancing of the kind required in U.S. takings cases was not possible until the recent AB rulings in the Reformulated ***911** Gasoline and Shrimp/Turtle decisions. [FN284] In these decisions, the AB began the process of reversing the traditional bias against the article XX exceptions by eliminating some of the definitional and interpretive obstacles imposed by panels in the past, and by acknowledging the necessity of a balancing analysis under the chapeau. [FN285] While providing a basis for utilitarian analysis, the AB's efforts have provided little practical guidance to future dispute settlement panels or affected States Parties. [FN286] Its recent decisions have left important questions unanswered regarding the methodology of any balancing test under the article XX chapeau, including the selection of criteria and how the selected criteria should be weighed and evaluated. [FN287]

It is this Article's contention that Michelman's modified utilitarian balancing test provides the framework for an improved theoretical decisional model for GATT/WTO. By explicitly and openly balancing efficiency gains with demoralization and settlement costs to achieve fairness, GATT/WTO dispute settlement tribunals will incorporate the legitimate expectancy interests of its Members into its decision-making processes. By using a set of discrete criteria in its balancing effort, Members will be provided with a more understandable and defensible method of identifying "arbitrary or unjustifiable discrimination" than the current interpretations allow. [FN288] This, in turn, will benefit members by enhancing ***912** predictability and by changing the negative public perceptions of the organization. Rather than being viewed as an uncaring bureaucracy which consistently places a significantly higher priority on trade issues than on non-trade social and environmental values, it has a chance to be perceived as an unbiased and legitimate arbiter of trade- related disputes. [FN289]

The next section returns to the Shrimp/Turtle decision and describes why some aspects of the decision already reflect a modified utilitarian approach, although not characterized as such to date. It concludes with recommendations on how the approach may be expanded and applied to other global trade/environment disputes.

V

Using a Modified Utilitarian Approach to Resolve Global Environmental Disputes

A. Shrimp/Turtle Revisited

Reviewing Michelman's modified utilitarian approach to see how it may be incorporated into the GATT/WTO dispute settlement regime reveals the following simplified theoretical model: efficiency gains (in the form of public benefit received as a result of the promotion of certain welfare values, including but not limited to, the specific environmental protection measures proposed) are balanced against a trade measure's demoralization costs (disutility caused by loss of current and future production as a result of the destruction of treaty or sovereignty-backed expectations) plus the settlement costs (transaction costs necessary to compensate affected parties for demoralization costs). If the efficiency gains are lower than the demoralization costs or settlement costs then the measure should be rejected or withdrawn as unjustified under simple utilitarian balancing. If the demoralization costs are higher than settlement costs then compensation should be paid, but not otherwise.

Interestingly, while the AB's Shrimp/Turtle decision obviously did not explicitly use Michelman's terminology to interpret the article XX chapeau, much of the decision unknowingly adopted Michelman's fairness approach in its reasoning. The prominent ***913** place that the AB accorded "good faith" and "non-abuse of rights" as fundamental precepts in any interpretation of the article XX chapeau, by definition, incorporates a balancing of efficiency and demoralization costs. [FN290] According to the tribunal, in order to satisfy these principles under international law, any assertion of a right that "impinges on the field covered by [a] treaty obligation, . . . must be exercised bona fide, that is to say, reasonably." [FN291] Reasonableness was defined as the exercise of a right in such a way as to be appropriate and necessary for the purpose of the right and which treats all parties in a fair and equitable fashion without the intent of procuring from them an unfair advan- tage. [FN292] Examining whether public benefits outweigh demoralization costs associated with the violation of specific treaty and sovereignty-backed expectations seems a logical and necessary, if unstated, feature of any good faith or abuse of rights analysis.

In addition, the AB's primary findings which: (1) prohibit one member from enacting trade measures for the purpose of coercing another member into changing its domestic conservation policies to bring them into conformance with the restricting members policies; [FN293] (2) establish a categorical rule against unilateral trade measures in the absence of some form of negotiation; [FN294] and (3) demand that minimal procedural due process protections be implemented, all fit squarely into Michelman's model. In all of these instances, the AB roughly balanced efficiency-related concerns with demoralization costs and settlement costs. [FN295]

***914** The AB recognized in several places in its decision that the protection of endangered and highly migratory sea turtles creates efficiency (public benefit) and that TEDs are an effective method, if not the sole method, of achieving this laudable goal. [FN296] After making this finding of efficiency, it proceeded to examine the effects of U.S. regulatory measures on targeted members in terms focusing on demoralization costs resulting from damage to targeted states' treaty and sovereignty-backed expectations. For instance, the AB found it unacceptable in international trade relations "for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program to achieve a certain policy goal." [FN297] Additionally, it criticized section 609 for establishing "a rigid and unbending standard by which [U.S.] officials determine whether or not other countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States." [FN298] Finally, the tribunal's concerns about demoralization costs became starkly clear when it wrote: "The unilateral character of the application of [[s]ection 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability." [FN299] The AB necessarily believed that despite the public benefits created by the U.S. turtle protection measures, the disruption to established GATT/WTO treaty-based expectations and the intrusion on sovereign rights caused by the "rigid and unbending" standards imposed by the United States created unacceptably high demoralization costs. [FN300]

A similar analysis was undertaken when the tribunal harshly criticized the United States for failing to engage in "serious across-the-board negotiations" before enforcing its import ***915** prohibitions. [FN301] It was especially critical given the "highly migratory species of sea turtles, . . . [which] demands concerted and cooperative efforts on the part of many countries . . ." [FN302] According to the tribunal, the WTO itself and a variety of other international instruments and declarations express the need for international consensus rather than unilateral action whenever trans-boundary or global environmental problems arise. [FN303] Moreover, in the absence of negotiation,

the United States should not have used "the heaviest 'weapon' in a Member's armoury of trade measures." [FN304]

The AB's indignation at the U.S. failure to engage in negotiations seems to reflect its concern over demoralization costs relating to two overriding policy goals. [FN305] First, the productivity losses that would likely ensue from a perception by Members that GATT/WTO is incapable of preventing the proliferation of unilateral and conflicting trade requirements. [FN306] Second, broader concerns over the erosion of the positivist state- centric international legal system that serves as the foundation of GATT/WTO authority as a result of unilateral actions of this kind. [FN307]

Finally, the tribunal expressed serious concerns regarding the disparate treatment given to different nations by the United States in the areas of technology transfer and procedural due process. [FN308] Differences in phase-in periods, levels of technological assistance, and basic due process protections associated with the certification process were found to be arbitrary and therefore in violation of the article XX chapeau. [FN309] While the AB framed these concerns in terms of equity and fairness, they could just as easily have been described as demoralization costs created as a consequence of one member imposing arbitrary and unpredictable***916** conservation measures on other members. The practical manifestation of these demoralization costs would be a loss of productivity as a result of the broad perception by Members that the trade organization is incapable of preventing their treaty-based and national sovereignty-based rights from being jeopardized by unilateral and arbitrarily enforced trade restrictions by other Member States.

On the other side of the ledger, the AB found the settlement costs to the United States not particularly substantial. In several places in the decision, it commented on the ability of the United States to successfully negotiate the Inter-American Convention for the Protection and Conservation of Sea Turtles (Inter-American Convention). [FN310] It made pointed references to that portion of section 609 in which Congress encouraged the Secretary of State to initiate bilateral and multi-lateral negotiations for the protection and conservation of sea turtles and stated that except for the Inter-American Convention, there had been no "serious, substantial efforts to carry out these express directions of Congress." [FN311] According to the tribunal, if the United States was capable of settling its dispute with some Members by negotiating a regional agreement, it is reasonable to assume that a course of action short of import prohibitions was available at a non-prohibitive cost. [FN312]

In the end, the AB incorporated (albeit unknowingly) all three of Michelman's criteria into its substantive analysis of whether the U.S. trade measures created "arbitrary or unjustifiable discrimination." [FN313] It found efficiency (public benefit) levels high, yet also found demoralization levels of equal or greater intensity. In addition, it found settlement costs relatively low. Consequently, it decided that the United States should bring its trade measures into conformance with the treaty or pay compensation as set out in the applicable provisions of the WTO Dispute Settlement Understanding. [FN314]

***917** Although the likely outcomes with or without a modified utilitarian analysis turn out to look very similar under the facts of the Shrimp/Turtle case, under other slightly varied factual scenarios the outcomes may be much different. For example, if the Shrimp/Turtle facts were altered and settlement costs turned out to be quite high compared to demoralization costs, Michelman's model would suggest that the U.S. trade measures should not be found arbitrary or unjustified and compensation not required. If one were to examine this altered factual scenario under the AB's current approach, it would not matter if the settlement costs were higher than the demoralization costs, because the U.S. trade measures would still likely be found unjustified as a result of their inflexible and coercive nature and because of the United States' failure to engage in across the board negotiations. [FN315]

To better understand how a modified utilitarian approach could be applied to a broader range of potential trade/environment disputes that may emerge in the future, it may be helpful to examine some additional hypothetical scenarios. [FN316] But, before undertaking this task, this Article examines what happens when a restrictive trade measure is imposed to prevent an environmental harm rather than to create an environmental benefit.

B. The Harm Prevention/Benefit Extraction Dichotomy

The absolute authority of private property owners has never included the right to engage in activities that are harmful to neighbors. [FN317] In the United States, harmful activities of this kind constitute a common law nuisance and may be prevented by the government without compensation. [FN318]

Similarly, a customary international norm has emerged which ***918** prohibits nations from engaging in activities

that cause damage to the environment of other states or of areas beyond national jurisdiction. [FN319] Just as no compensation is warranted in the U.S. domestic context when the government seeks to prevent a common law nuisance, no compensation is justified when a nation engages in activities that cause serious extra-territorial harm internationally. [FN320]

The dichotomy between harm prevention versus benefit extraction has historically played an important role in the United States in determining when a governmental regulation moves from a noncompensable police power to a compensable power of eminent domain. [FN321] However, the difficulty in distinguishing when harm prevention crosses the line and becomes benefit extraction has caused many commentators as well as the Supreme Court of the United States to rethink the dichotomy's validity. [FN322] In Lucus v. South Carolina Coastal Commission, [FN323] Justice Scalia went so far as to state that the harm/benefit test should play no role in the Court's taking analysis noting that "[a] given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors."

Several scholars have argued that despite the uncertainty, the harm/benefit dichotomy may be adequately distinguished in the United States using a "normal behavior" model based upon generally accepted community standards. [FN324] While it may be possible ***919** to identify some commonality of community standards within the United States, such standards are much harder to identify among the diverse members of the international community. Nevertheless, identifying internationally harmful conduct may present, under certain circumstances, a very useful screening device to determine if compensation under GATT/WTO is warranted at all.

It is still unsettled whether or not GATT/WTO tribunals should apply customary international rules in their interpretation of covered trade agreements. [FN325] Nevertheless, if a particular activity is prohibited as wrongful conduct under an existing rule of customary international law, a strong argument can be made that a GATT/WTO dispute settlement tribunal should automatically find a nation that imposes a restrictive trade measure to prevent that wrongful activity justified under the article XX chapeau. For example, if country A imposes a trade embargo on fisheries products from country B because country B allows serious and continuing trans-boundary pollution to damage productive fisheries habitat located in country A's territorial waters, there should be no question that country A was justified and need not rescind its trade measure or compensate country B as long as its claim is supported by reasonable scientific evidence. [FN326]

While the example of trans-boundary pollution presents a clear violation of international customary law, it is unlikely that most future scenarios will be so easily categorized. In fact, it has been asserted that states have an obligation under customary international law to use conservation measures such as TEDs to ***920** protect endangered species like sea turtles. Some commentators have contended that article 194(5) of the United Nations Convention on the Law of the Sea (UNCLOS), which provides that states shall take measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," establishes a broad affirmative duty to protect certain species of marine mammals and sea turtles from environmentally unsound commercial fishing practices. [FN327] The United States, and most other nations recognize UNCLOS as generally reflecting customary international law, binding on even those states that have not become members. [FN328] Consequently, according to these commentators, there is an international customary rule prohibiting shrimp fishing practices that harm endangered species such as sea turtles. [FN329]

Despite these assertions, it is not settled that UNCLOS article 194(5) creates such broad customary obligations. The author has argued, for instance, that a broad application of article 194(5) misinterprets Part XII of the Convention, which specifically addresses pollution as a causal agent and does not deal with other causal agents such as improper commercial fishing practices, habitat loss through urban development, or many other potentially injurious activities that are not pollution-related. [FN330] While ***921** a customary obligation of this kind may spring from some other source of international authority, it does not originate in UNCLOS article 194(5). [FN331]

This discussion describing the difference of scholarly opinion regarding the obligation under customary international law to protect endangered sea turtles from inappropriate fishing techniques is intended to illustrate that good faith differences of opinion regarding the scope and application of specific customary norms are neither unique nor uncommon in the international environmental arena. [FN332] Similar disagreements will accompany most claims of wrongful environmental conduct. It is therefore essential that if a GATT/WTO tribunal employs the prevention of harm versus extraction of benefit dichotomy as a method of screening out claims undeserving of compensation, the test should be applied narrowly to include only those activities that clearly violate widely

accepted customary norms. If applied in this restricted fashion, the international consensus reflected in the customary norm should be a reliable indication that the trade measure is not arbitrary or unjustified for purposes of the article XX chapeau.

C. Using a Modified Utilitarian Approach to Resolve a Variety of Global Environmental Disputes

In those circumstances where no clearly identifiable customary norm has been violated by the state targeted by specific trade measures, a modified utilitarian approach may be employed to ***922** help resolve a variety of global environmental disputes. A balancing of the efficiency or public benefit of a particular conservation measure against its demoralization cost and settlement cost will provide a useful guide to whether the measure should be deemed arbitrary or unjustified under the article XX chapeau. This Article previously set forth how such a test could be employed under the facts presented in the Shrimp/Turtle case. [FN333] It may now be helpful to list, in a more systematic fashion, some of the factors that a GATT/WTO tribunal should examine when conducting a modified utilitarian balancing analysis. This list of factors is intended to serve as a rough guide to some of the issues that should be weighed in any analysis. The precise mix of factors as well as the weight given to each factor is clearly not self-defining and ultimately depends on the value system of the chosen decision-maker. Following the list of factors will be a discussion of how some of these factors may be applied to several different factual settings involving global environmental conflict.

1. Factors Relevant To Any Assessment of Efficiency or Public Benefit To the International Community

a. What are the characteristics of the natural resource being protected?

(1) Is the resource threatened or endangered?

(2) Is it highly migratory and thereby of interest to many nations?

(3) Is it a straddling or shared resource?

(4) Does it have unique physical or other characteristics that elicit a heightened sense of concern by many nations?

(5) Is it especially susceptible or sensitive to the harm that is being prevented?

(6) Is it viewed as an essential or important component of a regional or global ecosystem?

(7) Is there broad consensus for conservation of the particular resource?

(8) Does the resource hold an especially unique or valuable place in the economic or cultural values of the trade restricting nation or the international community as a whole?

***923** b. What are the characteristics of the conservation techniques being imposed?

(1) Has the conservation technique been clearly shown to be effective in protecting the resource?

(2) Are there less expensive or more effective alternatives?

(3) Will the cost of implementing the conservation technique place an especially high financial burden on the targeted nation?

(4) Will the targeted nation enjoy "reciprocity of advantage" as a result of benefits conferred by the conservation technique? [FN334]

(5) Do the proposed conservation techniques impose a significantly greater burden on some nations than others?

(6) Is there broad international consensus approving the use of the particular conservation technique?

(7) Does the restricting nation have its own strong sovereignty-based claim to prevent the importation of a product

pursuant to a showing of an especially strong environmental benefit coupled with an especially effective conservation method?

2. Factors Relevant To Any Assessment of Demoralization Costs

a. What is the extent to which the trade restriction interferes with distinct sovereignty-based or treaty-based expectations?

(1) Is the action being taken unilaterally or within a broader cooperative framework? [FN335]

***924** (2) What type of trade restriction is being imposed? Is it a complete embargo? Is it narrowly tailored and proportional to the alleged harm?

(3) Do the conservation techniques need to be applied within the territorial boundaries (either land or maritime) of the targeted nation?

(4) Is the intent of the trade measure to immediately protect a particular resource or is it instead intended to coerce the targeted nation into changing its domestic policies as a method of protecting the resource at some point in the future?

(5) Have a small number of nations or regions been singled out for special treatment or is the trade restriction broadly applied?

(6) Does the nation imposing the trade restriction suffer a reciprocal burden that is proportional in size and degree to the targeted nation?

(7) Has the restricting nation significantly contributed to the harm that is being prevented by the trade restriction?

(8) Has the restricting nation engaged in good faith negotiations with the targeted nation? Were the trade restrictions imposed only after these negotiations failed?

(9) Does the conservation technique imposed by the trade restriction completely prohibit the economic activity engaged in by the targeted nation or merely require a small or moderate change in behavior?

(10) Have all nations subject to the conservation measures been treated equally and have all been accorded minimal procedural due process safeguards?

(11) Does the resource hold an especially valuable place in the economic or cultural values of the targeted nation?

3. Factors Relevant to Any Assessment of Settlement Costs

a. What Is The Extent To Which Trade Restricting Nation Can Avoid Demoralization Costs by Compensating Targeted Nation?

(1) Is there a high or low probability that a negotiated settlement could be achieved under the specific circumstances?

(2) What level of compensation to the targeted nation would likely be necessary to achieve the intended environmental goal?

***925** (3) Would negotiations or settlement costs apply to only a small number of nations or would negotiations involve a large and diverse group of nations?

(4) Given all of the circumstances, is it reasonable to assume that the trade restricting nation could compensate the targeted nation for the losses incurred as a result of the imposition of conservation techniques? Are there non-economic factors (historical, cultural, religious, etc.) that would prevent a solution?

(5) Could the restricting nation have turned to some international forum independent of GATT/WTO to assist in finding a satisfactory solution? [FN336]

D. Some Comments on How these Factors May Be Applied to Specific Global Environmental Problems

1. Tuna/Dolphin I

Under the factual scenario presented in the Tuna/Dolphin I case, [FN337] factors tending to show a high level of efficiency/public benefit are less evident than in the Shrimp/Turtle situation. Most importantly, unlike sea turtles, dolphin stocks in the Eastern Tropical Pacific were not threatened with extinction. [FN338] While there was international concern for the protection of dolphins and porpoises because of their intelligence and unique physical and behavioral characteristics, no global consensus had emerged at the time to adopt the specific conservation measures mandated by the United States and enforced pursuant to its trade restrictions. [FN339] In fact, there was disagreement within the U.S. government itself, regarding whether it had sufficient scientific data to ***926** accurately enforce the dolphin conservation measures. [FN340] Moreover, at the same time that the United States began to implement its trade restrictions, a parallel effort was underway under the auspices of the Inter-American Tropical Tuna Commission to develop an alternative set of fishing methods intended to reduce dolphin mortality to 5000 annually by 1999. [FN341] Consequently, at the time of the Tuna/Dolphin I decision, in contrast with the Shrimp/Turtle situation, there was no international consensus to protect the particular resource in question, nor was there consensus that the United States mandated conservation techniques represented an effective method of conserving the resource. [FN342]

Demoralization costs should be viewed as moderately high under the facts of the Tuna/Dolphin dispute. Unlike the Shrimp/Turtle trade restrictions, which rested on the application of conservation measures within the targeted nation's territorial sea and internal waters, the trade restrictions in the Tuna/Dolphin I dispute were primarily imposed within the global commons. However, the U.S. action singled out only those nations that fished in the Eastern Tropical Pacific and did not place similar requirements on tuna fishing operations taking place in other parts of the ocean. The conservation measures were intended to be coercive in the sense that the trade restrictions could only be lifted if a nation proved that it had enacted laws requiring all of the vessels in its tuna fishing fleet to comply with U.S. mandated conservation standards. Moreover, although U.S. tuna fishermen were required to comply with even stricter conservation standards at the time of the Tuna/Dolphin I decision, it could be argued that the United States significantly contributed to the environmental harm during the 1970s and 80s when its fishing fleet, which traditionally dominated the fishery, killed hundreds ***927** of thousands of dolphin and porpoises. [FN343]

Settlement costs should probably be viewed as moderately low. Several apparent negotiated solutions to the Tuna/Dolphin conflict seemed to be at hand as the dispute worked its way through GATT. [FN344] Delays in achieving a negotiated solution were primarily the result of a deep-division among domestic environmental groups in the United States. [FN345] This domestic disagreement represented the continuation of a longstanding philosophical rift between preservationists and conservationists in the American environmental community. It had little to do with the economic costs of reaching a negotiated settlement, which were never viewed as particularly substantial. [FN346]

2. Tuna/Dolphin II Decision

The Tuna/Dolphin II decision provides a significantly different set of factors to examine for purposes of a modified utilitarian analysis. [FN347] The efficiency/public benefit values of the secondary embargo that was placed against nations that imported tuna from primary embargoed nations seems weaker than in either the Tuna/Dolphin I or Shrimp/Turtle scenarios. The connection between the conservation measure and the protection of the resource was clearly more attenuated and the international consensus for such measures even more lacking. [FN348] As Steve ***928** Charnovitz has posited, if the United States is able to ban tuna from the European Union because it purchases tuna from Mexico, can it also ban tuna from Canada to encourage Canada to ban purchases of tuna from the European Union? [FN349]

In addition to this relatively weak conservation connection, the secondary embargo could be viewed as especially demoralizing. Its intrusion on the sovereign rights of the targeted nation was notable because the prohibition "could not, by itself, further the U.S. conservation objectives" and instead could only succeed by forcing the embargoed nation to change its domestic policies to meet the U.S. mandated environmental standards. [FN350] Furthermore, the total embargo by the United States of imports of tuna from intermediary nations placed a burden on the fishermen of those nations that was far greater than the burden on U.S. fishermen, who needed only to comply with

certain fishing regulations that prevent the incidental killing of dolphins. [FN351] Finally, it could be argued that the U.S. conservation measures singled out only a few nations when it excluded the vast majority from its secondary embargo as a result of certain definitional changes. [FN352] For all of these reasons, the demoralization costs associated with the secondary embargo in the Tuna/Dolphin II decision should be deemed very high. Settlement costs of the Tuna/Dolphin II dispute were similar to the costs associated with Tuna/Dolphin I. Because the efficiency/public benefit values were relatively low and the demoralization costs quite high, it is unlikely that settlement costs would affect a finding that the secondary embargo was not justified.

3. Hypothetical Trade Restrictions for Resumption of Commercial Whaling

It is now useful to examine how a modified utilitarian approach may be applied to a future hypothetical environmental dispute over the resumption of commercial whaling. In recent years, Norway has resumed its commercial harvest of whales and Japan has increased the numbers of whales taken for scientific ***929** research purposes. [FN353] Although these actions do not violate either nation's legal obligations under the International Convention for the Regulation of Whaling, [FN354] they may violate a U.S. environmental statute known as the Pelly Amendment to the Fisherman's Protective Act. [FN355] This statute grants broad authority to the Secretaries of Commerce and Interior to certify whether a foreign nation is acting in a fashion that diminishes the effectiveness of an international fisheries conservation agreement or of an international fishery conservation program for endangered or threatened species. [FN356] Certification authorizes the President to prohibit the importation of "any products from the offending country for any duration." [FN357] On at least twenty occasions, the United States has certified that particular nations have diminished the effectiveness of international environmental agreements or programs and have threatened them with trade restrictions. [FN358] For example, Norway in 1993, and Japan in 1995, were certified because of their international whaling practices. [FN359] In neither instance did the United States carry out its threat and actually impose trade restrictions. However, it is possible that these or other nations may seek to expand their whaling operations in the future to such an extent that the United States actually ***930** imposes a trade embargo under authority of the Pelly Amendment.

Japan's increasingly strident calls for the elimination of the Southern Ocean Sanctuary presents a hypothetical scenario that could trigger such a reaction by the United States. [FN360] For hypothetical purposes, assume that Japan decides to withdraw from the International Whaling Convention [FN361] and resumes commercial whaling in what has been designated as the Southern Ocean Sanctuary. Assume also that as a consequence, the United States imposes a trade embargo on all imports of fisheries products from Japan under the provisions of the Pelly Amendment. Further assume that Japan brings a formal dispute settlement claim in WTO/GATT contesting the U.S. embargo.

In applying the modified utilitarian approach to this hypothetical scenario, and if the U.S. conservation measures qualified for an article XX (b) or (g) exception, the panel would turn its attention to the chapeau and determine whether the measure represents arbitrary or unjustifiable discrimination. [FN362] To make this finding the court would first examine the efficiency/public benefit value of the measures. If Japan harvested a whale species that was threatened or endangered, the public benefit of the conservation measure should be viewed as very high. [FN363] Conversely, if ***931** Japan limited its harvest to Antarctic stocks of minke whales, which have a healthy and sustainable population, the value should be somewhat lower. [FN364] Regardless of the species, however, there seems to be a strong international consensus against the resumption of the commercial exploitation of whales. [FN365] Moreover, the global commons adjacent to the Antarctic Continent are viewed by the international community as a natural laboratory of special value and worthy of protection for the benefit of all of the world's people. [FN366] There is little question that U.S. conservation measures that seek to prevent the resumption of commercial whaling should be viewed as presenting high efficiency/public benefit values.

Demoralization costs, while quite significant to Japan and the small number of nations that continue to hunt whales, should not be viewed as particularly high to the international community as a whole. Unlike the embargoes in the Shrimp/Turtle and Tuna/Dolphin I cases, that affected large numbers of targeted nations, or the embargo in the Tuna/Dolphin II case, that lacked a close regulatory nexus and was highly intrusive, an embargo against Japan would likely engender very little outrage or sympathy from other GATT/WTO Members. [FN367] Finally, the action was taken to protect resources within a portion of the global commons that is recognized as being highly prized and intensively managed by the international community. [FN368] In sum, although there will be demoralization ***932** costs to Japan and a few other pro-whaling nations, these values should be viewed as significantly lower than any of the previous examples.

Also in contrast to the previous examples, settlement costs to compensate Japan for its demoralization costs are likely to be quite high. Japan has consistently argued that a modest harvest of whales is necessary to meet the cultural, dietary and economic needs of certain small coastal communities. [FN369] It has stressed the nation's one thousand year whaling history and the traditional importance of whale meat in the Japanese diet. [FN370] The oceans have always served as the primary supplier of Japan's overall protein needs. [FN371] Consequently, maintaining its legal rights to exploit ocean resources continues to be one of Japan's major foreign policy priorities. [FN372]

Given the symbolic importance of whaling to Japanese society and its priority status within the foreign policy interests of the Japanese government it is highly unlikely that the United States could successfully negotiate compensation for demoralization costs suffered by Japan and its sympathizers. Moreover, domestic political considerations would likely prevent the United States from offering any monetary compensation. Under these unique circumstances, settlement costs would be especially high.

In conclusion, if a modified utilitarian approach is applied to this hypothetical scenario, U.S. actions should be found to be justified. The combination of relatively high efficiency/public interest values, low demoralization values, and high settlement costs is consistent with a finding that the United States could impose its trade sanctions without compensation. [FN373]

***933** A summary of these factors and how they may apply in the Shrimp/Turtle, Tuna/Dolphin I, Tuna/Dolphin II, and hypothetical Japanese commercial whaling scenarios may be found in Figure I below.

Figure I. Should Party Imposing Trade Restrictions Pay Compensation?
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

E. Recommendations for Putting a Modified Utilitarian Approach Into Practice

The most obvious difficulty in implementing a modified utilitarian balancing analysis lies in the process of identifying and prioritizing the various values that make up the utilitarian equation. This Article has described a number of proposed factors that are relevant to the utilitarian balancing process. [FN374] In some instances, these factors represent well established community-based values, while in other instances they more closely resemble the author's own intuitive notions of an appropriate calculation of efficiency/public benefit values versus demoralization and settlement costs. [FN375] While there may be some logic a priori in valuing the protection of endangered over non-endangered species or placing a high demoralization value on a nation's refusal to engage in negotiations prior to imposing trade measures, such valuation determinations still represent the subjective judgment of the designated decision-maker and do not necessarily reflect the consensual will of WTO's membership. [FN376] Although an adjudicatory body could select and apply these values independently, such an approach would ultimately suffer from the same value-driven deficiencies found in earlier GATT/WTO decisions. [FN377]

***934 *935** Rather than delegating the task to the discretionary devices of individual dispute settlement panels, it would be clearly preferable that the selection, scope, and weight of these factors represent the measured consensus of the parties to GATT/WTO. It is only through the process of deliberative political debate that a modified utilitarian approach can acquire the kind of legitimacy necessary to effectively promote the aspirational goal of deciding trade/environment conflicts in a fair and equitable fashion.

The best forum to begin this process of deliberative debate is the WTO's Committee on Trade and Environment (CTE). [FN378] The permanent CTE was established to promote responsiveness of the multilateral trading system to the global environmental objectives of sustainable development. [FN379] To date, the CTE has not been particularly effective in moving forward with its mandate. [FN380] However, the CTE still represents the most appropriate forum for negotiating an agreement for the purpose of listing and prioritizing criteria to be employed in a modified utilitarian analysis ***936** of environmentally-based trade measures. [FN381]

This consensus will not be easy to achieve given GATT/WTO's traditional reluctance to engage in any policy debate concerning global environmental problems and its automatic transferal of all trade/environment conflicts to judicial dispute settlement. [FN382] However, judicial bodies are reactive rather than pro-active in finding solutions for trade/environment conflict. It is only through a carefully thought-out and comprehensive set of governing policies that GATT/WTO can achieve some level of predictability that may actually prevent conflict from arising in the first place. [FN383]

This proposed comprehensive set of guiding principles is somewhat similar to the "scale of trade measures" advocated by Daniel Esty in his path breaking study on trade and the environment. [FN384] These guidelines would facilitate analysis by future dispute settlement bodies by providing them with an agreed upon set of factors and priorities relevant from the standpoint of modified utilitarian approach. Of course, no precise formula should be developed, and case by case decisions should still be an essential feature of the GATT/WTO dispute settlement process. [FN385] ***937** However, a carefully crafted set of guiding principles will lend legitimacy to future dispute settlement decisions and will provide nations that may be thinking of employing trade restrictions as well as nations targeted by restrictions some sense of the likely outcome should the conflict move into dispute settlement. By improving the ability of each party to predict how its rights and obligations will be interpreted under the treaty, nations will be better able to adjust their environmental behavior to avoid potential trade restrictions as well as to gauge whether a GATT/WTO challenge will likely succeed or fail. [FN386]

Conclusion

This Article asserts that a modified utilitarian approach based on fairness will provide an increased level of legitimacy and predictability to GATT/WTO dispute settlement decisions concerning the global environment by incorporating the expectancy interests of its Members. In its recent environmental decisions, the AB has set the stage for an improved decision- making model by moving away from the traditional doctrinally-based approach rooted in an unwavering defense of the international free-trading system and toward a more balanced utilitarian approach. Under this approach, it is recognized that non-trade values, including extra-territorial environmental protection, may legitimately fall within the exceptions provided in article XX of the GATT/WTO Treaty. However, the AB has not as yet found any trade restriction imposed for environmental purposes capable of meeting the requirements for justification contained in article XX's chapeau, nor has it adequately articulated under what circumstances such trade measures may be deemed acceptable. In the absence of specific guiding criteria or the expression of a clear theoretical or ethics-based decisional model from GATT/WTO, Member States continue to be unsure of the likely outcome when their trade-related environmental actions are challenged under the organization's dispute settlement provisions.

In an effort to discover a more predictable and morally satisfying decisional model, this Article examines strict utilitarianism and contractarianism as potentially viable alternative theories. Strict utilitarianism is rejected because it presents serious public perception problems and erodes institutional legitimacy. Contractarianism is also not viewed as viable due to its political, ***938** moral, and legal impracticability. Instead, it advocates that GATT/WTO adopt a modified utilitarian model based on fairness which has been applied in principle by the Supreme Court of the United States as a method of determining the circumstances under which private property owners should be compensated for governmental restriction of private use for public purposes.

The analogy between governmental actions in the domestic setting of the United States and international trade setting is useful because in both scenarios judicial tribunals are asked to mediate conflicting rights between a government seeking to enforce a regulation in what it perceives as the public interest against the equally legitimate right of a party to be free from having to absorb a disproportionate burden of the cost of that public benefit. In other words, both are intended to serve as a constraint upon discriminatory regulation over the allocation of resources.

In the international context, States Parties to GATT/WTO have certain expectations that need to be protected from discriminatory environmentally- related trade restrictions based upon their conventional and customary rights as sovereign nations. Concomitantly, States Parties also have an expectation that they will be able to restrict trade in order to conserve exhaustible natural resources or to protect the health of humans, animals, and plants. GATT/WTO has attempted to reconcile these conflicting expectations in article XX by permitting certain trade restrictions for environmental purposes as long as they do not constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade." [FN387]

This Article contends that the current analytical approach, as articulated in the recent Shrimp/Turtle decision, fails to provide the theoretical foundation necessary for nations to predict how their actions will be treated by future dispute settlement panels. Instead, it continues to fuel the perception that dispute settlement will be guided by the discretionary and value-laden interpretations of future ad hoc judicial bodies. By adopting a modified utilitarian approach based on fairness, GATT/WTO will be able to articulate a concrete set of moral principles that Member States, as well as the public, will understand. Balancing the effectiveness/public benefit values of a particular

trade-based conservation measure against its demoralization and settlement ***939** costs maintains the utilitarian values that most members are comfortable applying, yet tempers them with the notion that under some circumstances a particular conservation measure may be too demoralizing to the international community to be justified without compensation, while under other circumstances awarding compensation may be too costly to view the measure as unjustified.

Adjudicatory tribunals are capable of applying this modified utilitarian calculus independently. However, a comprehensive and consensual set of principles or guidelines developed under the auspices of the GATT/WTO CTE would improve the ability of nations to predict how their actions may be treated by future panels if challenged and would add legitimacy to the dispute settlement process.

GATT/WTO is at a crossroads. The violent protests that seri- ously disrupted the Seattle WTO Ministerial Meeting in November 1999 represents a new and difficult phase in the organization's development. [FN388] The protests successfully focused the world's attention on the perceived failure of the WTO to adequately address the interrelationship between free trade and non-trade social values. However, it is possible that future violent demonstrations similar to those that occurred in Seattle will cause many WTO Members from developing nations to harden their positions. This backlash may occur because of their fear that the coalition of environmentalists and labor unions that took to the streets in Seattle represents a threat by the developed nations to re-erect barriers to free trade in an effort to once again freeze them out of the global economic system. [FN389]

The WTO's recent Shrimp/Turtle decision provided some hope to those who support the use of trade restrictions for international environmental purposes by signaling that the organization is finally concerned about more than the continued progress and advancement of the international free trading system. In the future, should it hand down a dispute settlement ruling that is perceived as retreating from the progress established in Shrimp/Turtle, irreparable harm to its credibility and legitimacy may ensue. ***940** Similarly, should the next adjudicatory ruling be viewed by the developing world as advocating a further erosion of free trade protections, those nations may be reluctant to support even moderate institutional reform. Rather than risk this potentially damaging result, immediate steps should be taken to begin the process of developing a consensus-based set of principles and guidelines that will encourage future adjudicatory panels to apply a modified utilitarian approach as a primary decision-making tool.

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[FN1]. Friedrich Kratochwil, Sovereignty as Dominium: Is There a Right to Humanitarian Intervention?, in Beyond Westphalia? State Sovereignty And International Intervention 21, 23 (Gene M. Lyons & Michael Mastanduno eds., 1995) (quoting Jean Bodin, Six Lives De La Republique (1977)).

[FN2]. 2 William Blackstone, Commentaries on The Laws of England 2 (1979).

[FN3]. For a discussion of the historical development of this policy and a review of specific laws and regulations, see Ted L. McDorman, The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles, 24 Geo. Wash. J. Int'l L. & Econ. 477 (1991); Richard J. McLaughlin, UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources, 21 Ecology L.Q. 1 (1994).

[FN4]. This Article uses the term "extraterritorial" to describe those measures that are intended to effect behavior outside of the territory of the nation imposing the trade restriction. It is assumed that any "extraterritorial" measure will also be "extrajurisdictional" to the extent that international law permits a particular government to exercise jurisdiction over its nationals or citizens. In other words, although unilateral trade restrictions are intended to affect behavior outside of the territorial limits of the restricting nation, the actual trade restriction itself only concerns the entry and sale of products within the jurisdiction of the state. The term "extraterritorial" is not meant to describe behavior that would be viewed as beyond the jurisdiction of the restricting nation under international law such as a blockade or seizure of vessels on the high seas or within another nation's territorial sea. For further discussion of the distinction between "extraterritorial" and "extrajurisdictional" within the context of the General Agreement on

Tariffs and Trade (GATT) and the World Trade Organization (WTO), see Ilona Cheyne, Environmental Unilateralism and the WTO/GATT System, 24 Ga. J. Int'l & Comp. L. 433, 453-54 (1995).

[FN5]. See, e.g., Steve Charnovitz, Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices, 9 Am. U. J. Int'l L. & Pol'y 751, 759-61 (1994); Gene S. Martin, Jr. & James W. Brennan, Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments, 17 Denv. J. Int'l L. & Pol'y 293, 294-97 (1989).

[FN6]. See, e.g., Kevin C. Kennedy, Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach, 18 Harv. Envtl. L. Rev. 185, 185-86 (1994); Joseph J. Urges, Dolphin Protection and the Mammal Protection Act Have Met Their Match: The General Agreement on Tariffs and Trade, 31 Akron L. Rev. 457, 459-60 (1998); Nina M. Young et al., The Flipper Phenomenon: Perspectives on the Panama Declaration and the "Dolphin Safe" Label, 3 Ocean & Coastal L.J. 57 (1997).

[FN7]. John Alton Duff, Recent Applications of United States Laws to Conserve Marine Species Worldwide: Should Trade Sanctions be Mandatory?, 2 Ocean & Coastal L.J. 1, 21-31 (1996).

[FN8]. It has long been recognized that immense numbers of sea turtles are killed globally by being drowned in shrimp trawls. A 1990 National Academy of Sciences study concluded that shrimp trawling is the single greatest cause of mortality of sea turtles. See Committee on Sea Turtle Conservation et al., Decline of the Sea Turtles: Causes and Prevention 47-50 (1990).

[FN9]. GATT is the provisional predecessor organization to the WTO which was formally established on January 1, 1995. WTO is the institutional entity that administers and implements the renegotiated GATT trade agreements. The renegotiated trade agreements that accompanied the creation of the WTO are known as GATT 1994. GATT 1994 incorporated the original GATT 1947 agreement with subsequent modifications and understandings. Therefore, GATT 1994 and GATT 1947 contain identical texts. This Article will use the term "GATT/WTO" when referring generically to the GATT/WTO system of trade agreements and institutional arrangements resulting from the Uruguay Round of Multilateral Trade Negotiations. It will refer by name to the other trade agreements that were created as a result of the Uruguay Round of trade negotiations. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

[FN10]. Appellate Body Report, United States--Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118 (1999) [hereinafter Shrimp/Turtle Appellate Report].

[FN11]. Id. at para. 44. For a detailed discussion of article XX, see infra notes 63-67 and accompanying text.

[FN12]. For a full discussion of the evolution from a strict doctrinally- based interpretation to a balancing approach, see infra notes 68-177 and accompanying text.

[FN13]. Shrimp/Turtle Appellate Report, supra note 10, at para. 19.

[FN14]. Id. at para. 24.

[FN15]. Id. at paras. 31-34.

[FN16]. For a detailed explanation of the events leading to the Shrimp/Turtle decision and potential difficulties facing the United States in complying with the ruling, see Susan L. Sakmar, Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case, 10 Colo. J. Int'l Envtl. L. & Pol'y 345 (1999).

[FN17]. A recent ruling by the U.S. Court of International Trade struck down certain aspects of the State Department Regulations that would have made compliance with the AB ruling possible. See Earth Island Inst. v. Daley, 48 F. Supp.2d 1064, 1080-81 (Ct. Int'l Trade 1999). The State Department has indicated that it will appeal the decision.

[FN18]. See Shrimp/Turtle Appellate Report, supra note 10, at para. 134.

[FN19]. For a discussion of how the WTO dispute settlement panels have functioned to date, see Robert E. Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 8 Minn. J. Global Trade 1 (1999).

[FN20]. See Robert E. Hudec, GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, 32 Int'l Law. 619, 636-39 (1998). The difficulties associated with shifting methods of interpreting GATT/WTO law is discussed in Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 111-15 (1997).

[FN21]. For a discussion of the historical development of the GATT/WTO dispute settlement system from an informal diplomacy-based system to a more formal legally-based system, see Hudec, supra note 19, at 1-15.

[FN22]. See infra notes 87-93 and accompanying text.

[FN23]. See Daniel C. Esty, Greening the Gatt: Trade, Environment, and the Future 114-36 (1994); Charnovitz, supra note 5, at 752-63; Hudec, supra note 19, at 15-27; Thomas J. Shoenbaum, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 Am. J. Int'l L. 268, 284-313 (1997).

[FN24]. See generally Frank J. Garcia, Trade and Justice: Linking the Trade Linkage Debates, 19 U. Pa. J. Int'l Econ. L. 391 (1998). For a spirited debate on the advantages of utilitarian versus rights-based approaches to international environmental decision-making, see Robert F. Housman, A Kantian Approach to Trade and the Environment, 49 Wash. & Lee L. Rev. 1373 (1992); Richard B. Stewart, International Trade and Environment: Lessons From the Federal Experience, 49 Wash. & Lee L. Rev. 1329 (1992).

[FN25]. The most thorough collection of articles on the so-called "trade linkage" debate may be found in Symposium, Linkage as Phenomenon: An Interdisciplinary Approach, 19 U. Pa. J. Int'l Econ. L. 209 (1998). For a list of trade linkage literature during the past five years, see Garcia, supra note 24, at 391 n.2.

[FN26]. This issue is discussed more fully infra notes 184-232 and accompanying text. For an insightful comparison of utilitarian and non- utilitarian approaches to moral reasoning, see Frank J. Garcia, The Global Market and Human Rights: Trading Away the Human Rights Principle, 25 Brooklyn J. Int'l L. 51 (1999) (criticizing GATT/WTO utilitarian approach as being incapable of properly evaluating non-trade values); Leigh Raymond, Comment, The Ethics of Compensation: Takings, Utility, and Justice, 23 Ecology L.Q. 577 (1996) (comparing utilitarian versus contractarian approaches to U.S. takings jurisprudence).

[FN27]. The potential list of theories of justice is substantial and includes Marxist, liberal egalitarian, liberal individualism, utilitarian, contractarian, communitarian, libertarian, and skepticism, among others.

[FN28]. Garcia, supra note 24, at 401-24, discusses many of these theories. While taking no stand on which theory to apply, he eloquently argues that some form of linkage between justice theory and free trade decision-making is essential because "their resolution depends upon our making decisions as to the allocation of social goods and social burdens, and may involve an investigation into the propriety of certain gains and the correction of improper gain." Id. at 415; see also Philip M. Nichols, Trade Without Values, 90 Nw. U. L. Rev. 658, 669-72 (1996).

[FN29]. See infra notes 184-232 and accompanying text.

[FN30]. Garcia, supra note 26, at 67 (stating that dominant normative account of trade law and policy is utilitarian in nature); Housman, supra note 24, at 1375-76 (criticizing utilitarian balancing approach of GATT/WTO).

[FN31]. For further discussion, see infra notes 121-183 and accompanying text.

[FN32]. See infra notes 233-67 and accompanying text.

[FN33]. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214-24 (1967). Michelman's article is generally acknowledged as the most influential article ever written on the issue of takings. See Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev. 997, 998 (1999) (stating that "[Michelman's article]

remains, more than thirty years after its publication, the most significant piece of academic commentary on our subject"); William M. Treanor, Jam for Justice Holmes: Reassessing the Significance of Mahon, 86 Geo. L.J. 813, 872 n.345, (declaring that "[Michelman's] article is almost certainly the most influential piece ever written on the clause."). The title of this Article is, of course, an unsubtle allusion to Michelman's famous piece.

[FN34]. Michelman, supra note 33, at 1214-15.

[FN35]. See infra notes 233-38 and accompanying text.

[FN36]. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978); see also infra notes 223-27 and accompanying text.

[FN37]. Michelman, supra note 33, at 1235, defines fairness in the following fashion:
What fairness (or the utilitarian test) demands is assurance that society will not act deliberately so as to inflict painful burdens on some of its members unless such action is "unavoidable" in the interest of long-run, general well-being. Society violates that assurance if it pursues a doubtfully efficient course and, at the same time, refuses compensation for resulting painful losses.

[FN38]. See infra notes 290-316.

[FN39]. See infra Part V.

[FN40]. See infra notes 377-83 and accompanying text.

[FN41]. See infra Part II.

[FN42]. See infra Part II.

[FN43]. See infra Part III.

[FN44]. See infra Part IV.

[FN45]. See infra Part V.

[FN46]. For a thorough discussion of the various types of trade/environment disputes and the tensions between free trade and environmental regulation, see Daniel A. Farber & Robert E. Hudec, GATT Legal Restraints on Domestic Environmental Regulations, in Fair Trade and Harmonization: Prerequisites for Free Trade? 59-94 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) [hereinafter Fair Trade and Harmonization]; Robert E. Hudec, GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in Fair Trade and Harmonization, supra, at 95-174.

[FN47]. Final Act, supra note 9, at art. III.

[FN48]. United States-Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, 35 I.L.M. 274 (1996) [hereinafter Reformulated Gasoline Panel Report]; Appellate Body Report on United States-Standards for Reformulated Conventional Gasoline, May 20, 1996, 35 I.L.M. 603 (1996) [hereinafter Reformulated Gasoline Appellate Report].

[FN49]. Reformulated Gasoline Panel Report, supra note 48; Reformulated Gasoline Appellate Report, supra note 48.

[FN50]. Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), GATT Doc. WT/DS26/AB/R (Jan. 16, 1998) [hereinafter Beef Hormone Appellate Report].

[FN51]. See also Layla Hughes, Comment, Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision, 10 Geo. Int'l Envtl. L. Rev. 915, 915-16 (1998) (criticizing decision and arguing that WTO's jurisdiction over environmental and health-related disputes should be limited).

[FN52]. For instance, if the United States assessed a $100 per ton duty on shrimp imported from nations that failed to employ sea turtle conservation measures as strict as those imposed on domestic fishermen.

[FN53]. See supra notes 3-8 and accompanying text.

[FN54]. Addressing the U.S. embargo on tuna from nations that failed to adequately protect dolphins on the high seas, Robert Hudec points out the potential danger of such an approach by noting that:

The proponents are usually genuinely interested in stopping whatever foreign practice is under attack, and they have usually demonstrated the genuineness of their concern by imposing the same restrictions against domestic producers.... The main problem here is not pure protectionism, but an excess of zeal over what are essentially moral claims.

Hudec, supra note 46, at 149.

[FN55]. A report on trade and the environment published by the GATT Secretariat identified 19 international environmental agreements that provide for some type of trade restriction. GATT Doc. TRE/W/1/Rev.1 (Oct. 14, 1993).

[FN56]. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)]. The purpose of CITES is to control the import and export of certain species of plants and animals. CITES provides for the enforcement of punitive trade restrictions on noncomplying parties.

[FN57]. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, as amended, 30 I.L.M. 537 (1991). The policy of the Montreal Protocol is to phase out the consumption and production of ozone- depleting chemicals.

[FN58]. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, Mar. 22, 1989, 28 I.L.M. 649. The Basel Convention works to prevent the export and import of hazardous wastes by parties to the Convention to and from nonparty states.

[FN59]. Lex posterior dictates that when there is a conflict between two agreements signed by the same parties, the agreement later in time is presumed to be controlling. Lex specialis provides that when there are two or more applicable agreements the more specific agreement is meant to control even if the more general agreement is later in time. For a discussion of how these principles may apply during con- flicts between GATT/WTO and MEAs, see Hudec, supra note 46, at 121-22; Petersmann, supra note 20, at 127; Betsy Baker, Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT, 26 Vand. J. Transnat'l L. 437, 446-47 (1993).

[FN60]. See infra note 63.

[FN61]. Final Act, supra note 9, at art. I.

[FN62]. Final Act, supra note 9, at art. III.

[FN63]. Article XX of the GATT 1994 states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [GATT 1994] shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal, or plant life or health;
(c) relating to the importation or exportation of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement ...;
(e) relating to the products of prison labor;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement ...;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan ...;
(j) essential to the acquisition or distribution of products in general or local short supply ....
GATT, supra note 9, at art. XX.

[FN64]. Exceptions that may have peripheral relevance include article XX(a) dealing with "public morals" that may be invoked when a Member imposes a trade restriction as a result of an import ban or export ban based on environmentally-related moral purposes. For a discussion of morality-based trade restrictions and proposals for their governance, see Steve Charnovitz, The Moral Exception in Trade Policy, 38 Va. J. Int'l L. 689 (1998). Article XX(d), involving violations that are "necessary to secure compliance with laws or regulations that are not inconsistent with this [GATT] agreement," has been invoked in several environmental dispute settlement actions with limited success. For a summary of these instances, see Padideh Ala'i, Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization, 14 Am. U. Int'l Rev. 1129, 1150-55 (1999).

[FN65]. See supra note 63.

[FN66]. See Final Act, supra note 9, at art. XX.

[FN67]. For a summary of these holdings, see Petersmann, supra note 20, at 121-28; Ala'i, supra note 64, at 1150-55.

[FN68]. Nichols, supra note 28, at 660, writes that "[t]he WTO system, as currently envisioned, fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist." As a consequence, Nichols believes that the WTO's legitimacy will suffer as member nations find it increasingly difficult to support the organization.

[FN69]. These panelists, who were selected from the international trade regulation community, unquestioningly accepted the axiom that "international trade increases international wealth." For a thorough discussion of the empirical evidence supporting this axiom as well as a summary of other non- economic types of benefits promoted by the global free trading system, such as the facilitation of peaceful cooperation and exchange, and diffusion of knowledge and technological innovation, see Nichols, supra note 28, at 662-63. For a discussion of the implications of this belief on the organization's utilitarian-based decision-making, see infra notes 87-93 and accompanying text.

[FN70]. Steve Charnovitz, The Environment vs. Trade Rules: Defogging the Debate, 23 Envtl. L. 475, 476 (1993); see also Patrick Low, Trade and the Environment: What Worries the Developing Countries?, 23 Envtl. L. 705, 706 (1993) (stating that "if poor societies fail to improve the living standards of their people, persistent poverty may turn out to be the most aggravating and destructive of all environmental problems.").

[FN71]. See Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 4 (1975) ("The Postwar design for international trade policy was animated by single-minded concern to avoid repeating the disastrous errors of the 1920s and 1930s.").

[FN72]. This interpretation was put forward in the Thailand-Cigarettes decision, which involved a dispute between the United States and Thailand over Thailand's regulations restricting the importation of U.S. tobacco products. The panel ruled that Thailand's regulations did not fall within the article XX(b) exception because they were not "necessary" to protect public health. The panel noted that the "import restrictions imposed by Thailand could be considered as "necessary" in terms of article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives." Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. DS10/R-37S/200, at para. 75 (1990).

[FN73]. For a discussion, see Petersmann, supra note 20, at 114-17; Hudec, supra note 20, at 636-39.

[FN74]. This interpretation originated in the Herring & Salmon decision, which involved a complaint brought by the United States against Canada for restricting exports from Canada of unprocessed salmon and herring. The

United States argued that the Canadian regulations violated GATT article XI and did not fall within the article XX(g) exception. The GATT dispute settlement panel ruled that Canada failed to bring itself within the exception by concluding that the phrases "relating to" and "in conjunction with" mean that a measure must be "primarily aimed at the conservation of an exhaustible natural resource" and "primarily aimed at rendering effective the domestic production restrictions." Canada's trade measures did not meet this strict "primarily aimed at" standard. Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. L/6268-35S/98, at para. 4.6 (1998).

[FN75]. Hudec, supra note 20, at 637. For a thorough analysis critical of the traditional interpretation of articles XX(b) and (g), see generally Shoenbaum, supra note 23.

[FN76]. Shoenbaum, supra note 23, at 276.

[FN77]. See, e.g., United States--Section 337 of the Tariff Act of 1930, GATT Doc. L/6439-36S/345 (Nov. 7, 1989), at para. 5.27; Reformulated Gasoline Panel Report, supra note 48. The panel noted that it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefiting from as favorable sales conditions as were afforded by an individual baseline tied to the producer of the product.

[FN78]. Joel P. Trachtman, Trade and ... Problems, Cost-benefit Analysis and Subsidiarity, 9 Envtl. J. Int'l L. 32, 69 (1998); see also Shoenbaum, supra note 23, at 278.

[FN79]. United States-Restrictions on Imports of Tuna, Sept. 3, 1991, 30 I.L.M. 1594 [hereinafter Tuna/Dolphin I].

[FN80]. United States--Restrictions on Imports of Tuna, June 16, 1994, 33 I.L.M. 839 [hereinafter Tuna/Dolphin II].

[FN81]. See Ala'i, supra note 64, at 1145-54 (summarizing this analysis).

[FN82]. The panel held that:

The United States had not demonstrated to the panel--as required of the party invoking an article XX exception--that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.

Tuna/Dolphin I, supra note 79, at para. 5.28; see also Petersmann, supra note 20, at 125. Many commentators interpreted the decision to prohibit all trade restrictions directed against environmental harms outside the national territory of the regulating state. See, e.g., Hudec, supra note 46, at 118.

[FN83]. Tuna/Dolphin II, supra note 80, at para. 5.15.

[FN84]. Id. at para. 5.38.

[FN85]. Id. at para. 5.23.

[FN86]. Id. at para. 5.27.

[FN87]. This conviction is clearly enunciated in the GATT Report on trade and the environment. See supra note 55.

[FN88]. Charnovitz has pointed out that the doctrinaire pro-trade orientation of GATT/WTO makes it an especially unsuitable forum in which to bring marine-conservation related disputes because the complaining country has nothing to lose by filing a complaint. While a country like Mexico can prevent the United States from embargoing Mexican Tuna, GATT/WTO dispute settlement provisions prevent the United Statesfrom requesting the tribunal to force Mexico to improve its dolphin conservation measures. Steve Charnovitz, Dolphins and Tuna: An Analysis of the Second GATT Panel Report, 24 Envtl. L. Rep. 10567, 10584 (1994). For this and a number of other reasons, the author has suggested that the United Nations Law of the Sea Convention's Dispute Settlement System is a more

appropriate forum to adjudicate disputes over the protection of marine living resources. See generally Richard J. McLaughlin, Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or WTO?, 10 Geo. Int'l Envtl. L. Rev. 29 (1998); McLaughlin, supra note 3.

[FN89]. Requiring a least trade restrictive alternative eliminates options in the utilitarian calculation because, in some circumstances, the domestic regulatory cost may not warrant the least trade restrictive option. In other circumstances, even the least trade restrictive measure may not be worthwhile because the non-trade value it seeks to protect may be worth far less than the potential trade costs imposed. See Trachtman, supra note 78, at 72.

[FN90]. Daniel M. Hausman & Michael S. McPherson, Taking Ethics Seriously: Economics and Contemporary Moral Philosophy, 31 J. Econ. Literature 671, 704 (1993). For further discussion on utilitarianism, see infra notes 184-205 and accompanying text.

[FN91]. See supra note 69. "Doctrinalism" has been closely associated with the legal writings of William Blackstone and his Commentaries. It is synonymous with his treatises' elaborate body of seemingly immutable common law rules. Jeremy Bentham, a pupil and frequent critic of Blackstone and one of the founding theorists of utilitarianism, characterized Blackstone's doctrinalism as reflecting a view that "any law is good law, because the sovereign says so." Robin West, The Other Utilitarians, in Analyzing Law: New Essays in Legal Theory 197 (Brian Bix ed., 1998) (citation omitted).

[FN92]. Hudec, supra note 19, at 6, describes the historical development of the GATT dispute settlement system from what he calls "a small 'club' of like- minded trade policy officials" to a larger more contentious group in the early 1990s. Throughout this period, there seemed to be a consensus that a diplomatic approach to dispute settlement was preferable to a more rigorous legal approach. According to Hudec, weakness in legal reasoning and procedural flimsiness of the panel decisions did not have that much impact on the overall success of the dispute settlement system because of the strong consensus of general direction by the participating nations and because throughout most of its existence there were almost no requests for permission to impose trade sanctions. Id. at 9-10; see also Andreas F. Lowenfeld, Remedies Along with Rights: Institutional Reform in the New GATT, 88 Am. J. Int'l L. 477, 479- 81 (1994) (discussing the change from a diplomatic to adjudicatory model of dispute settlement in GATT).

[FN93]. See Hudec, supra note 19, at 27.

[FN94]. These changes are discussed in McLaughlin, supra note 88, at 41-42.

[FN95]. The preamble states the following: "[W]hile 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 in a manner consistent with their respective needs and concerns at different levels of economic development ...." See Final Act, supra note 9, at 1144.

[FN96]. Hudec, supra note 19, at 29.

[FN97]. The WTO Dispute Settlement Understanding provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994) [hereinafter Understanding on Rules and Procedures].

[FN98]. See supra note 48 and accompanying text.

[FN99]. Reformulated Gasoline Appellate Report, supra note 48, at 633.

[FN100]. See supra note 71 and accompanying text.

[FN101]. The AB noted that it would apply the "primarily aimed at" test because both of the disputants seemed to accept it in their briefs, but went on to explain: "[W]e see no need to examine this point further, save, perhaps to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from article XX(g)." Reformulated Gasoline Appellate Report, supra note 48, at 622-23.

Petersmann, supra note 20, at 114-15 n.24, sharply criticized the AB's acceptance of the shared legal views of the parties as inappropriate in a multilateral treaty system like the WTO where settlement reports may become multilateral treaty practice that will be referred to in future interpretations of WTO law.

[FN102]. Reformulated Gasoline Appellate Report, supra note 48, at 624-25.

[FN103]. Shoenbaum, supra note 23, at 275.

[FN104]. See supra note 63.

[FN105]. Reformulated Gasoline Appellate Report, supra note 48, at 629.

[FN106]. Id. at 633.

[FN107]. Id. at 632 (emphasis added).

[FN108]. For further discussion, see Hudec, supra note 20, at 638.

[FN109]. Petersmann, supra note 20, at 115-16.

[FN110]. Endangered Species Act Section 609, 16 U.S.C. § 1537 note (1998). In addition to requiring that the United States initiate negotiations with other nations to develop bilateral or multilateral sea turtle conservation agreements, section 609 also authorizes a certification system that exempts foreign nations from the shrimp ban if they are "certified" by the President as having sea turtle protection practices that are comparable to those in the United States. The certification process requires all foreign nations to show that its fishing environment does not pose a danger to sea turtles or that it has adopted protection strategies equivalent to those in place in the United States, including the installation of turtle excluder devices (TEDs) in all shrimp trawls.

[FN111]. For a summary of the threats to sea turtles and the legal history concerning the implementation of section 609, see Marlo Pfister Cadeddu, Comment, 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 (1998).

[FN112]. Shrimp/Turtle Appellate Report, supra note 10, at para. 1.

[FN113]. United States--Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832 [hereinafter Shrimp/Turtle Panel Report].

[FN114]. This term comes from the now infamous case of Lochner v. New York, 198 U.S. 45 (1905), in which the Court found that New York had impermissibly infringed the constitutional rights of employers and employees to contract with each other by enacting a law that limited the number of hours that bakers could work. It has come to symbolize the discredited view in the United States that courts are free to determine why types of legislation rationally promoted legitimate economic goals and to strike down those that fail to comport with their sense of the legitimate economic role of the government. See 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 15.3, at 585-603 (3d ed. 1999); see also Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation, 70 Va. L. Rev. 187 (1984).

[FN115]. Shrimp/Turtle Panel Report, supra note 113, at para. 7.60.

[FN116]. Id. at paras. 7.56-.60.

[FN117]. Id. at paras. 7.484-.489.

[FN118]. Id. at para 7.484.

[FN119]. Id.

[FN120]. The concluding statement of the Shrimp/Turtle Panel Report reads as follows:

As far as the WTO Agreement is concerned, we considered that certain unilateral measures, insofar as they could jeopardize the multilateral trading system, could not be covered by article XX.... [I]n the present case, even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied without any serious attempt to reach, beforehand, a negotiated solution.
Id. at para. 7.61.

[FN121]. Shrimp/Turtle Appellate Report, supra note 10, at para. 8.

[FN122]. The ruling was hailed by the U.S. government as a victory for the global environment but condemned by some environmentalists as hypocritical and an affront to the U.S.'s right to enforce its domestic law. For a discussion of opposing perspectives, see Jack Lucentini, Federal Court: U.S. Shrimp Import Limits Too Weak, J. Com., Apr. 13, 1999, at 3A. As one commentator observed about many of the recent GATT/WTO environmental dispute settlement decisions: "It can be seen as giving the decision to the traders and language to the environmentalists." Ronald A. Brand, Sustaining the Development of International Trade and Environmental Law, 21 Vt. L. Rev. 823, 856 (1997).

[FN123]. See, for example, paragraphs 119-21 criticizing the panel's article XX analysis and paragraph 110 supporting the U.S. position in favor of brief submission by non-governmental sources. Additionally, paragraph 145 accepts the U.S. argument that its sea turtle conservation measures fall within the article XX(g) exception. Shrimp/Turtle Appellate Report, supra note 10.

[FN124]. Shrimp/Turtle Appellate Report, supra note 10, at para. 186.

[FN125]. Id. For further discussion, see infra notes 119-67 and accompanying text.

[FN126]. See Ala'i, supra note 64 (claiming that the AB is now beginning to balance sustainable development and protection of environment with free trade objectives).

[FN127]. Shrimp/Turtle Appellate Report, supra note 10, at para. 187.

[FN128]. Id.

[FN129]. Id. at para. 117.

[FN130]. Id. at paras. 115-22, 125.

[FN131]. Id. at para. 147.

[FN132]. Id. at paras. 127-34.

[FN133]. Id. at para. 131.

[FN134]. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), supra note 56.

[FN135]. Shrimp/Turtle Appellate Report, supra note 10, at para. 133. The AB refused to explicitly determine whether there is an implied jurisdictional limitation in article XX(g). However, it ruled that regardless of the precise perimeters of extraterritorial jurisdiction, there was a sufficient nexus between the highly migratory and endangered sea turtles in question and the United States to satisfy the requirement. Id.

[FN136]. Id. at paras. 135-42.

[FN137]. Id. at para. 141. The AB found:
The means and ends relationship between [s]ection 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in United States-Gasoline between the EPA baseline establishment rules and the conservation of clean air in the United States.

Id.

[FN138]. Id.

[FN139]. Id. at para. 142.

[FN140]. Id. at para. 145.

[FN141]. Id.

[FN142]. Id. at para. 146.

[FN143]. Id. at para. 141.

[FN144]. This narrowly-tailored language reads as follows:
We do not pass upon the question of whether there is an implied jurisdictional limitation in [a]rticle XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of [[a]rticle XX(g).
Id. at para. 133.

[FN145]. For a discussion of the Pelly Amendment, see Charnovitz, supra note 5. Southern Atlantic minke whales are neither endangered nor migratory through waters under U.S. jurisdictional control. See also infra notes 341-60 (discussing hypothetical whaling scenario).

[FN146]. Shrimp/Turtle Appellate Report, supra note 10 at para. 151 (quoting Reformulated Gasoline Appellate Report, supra note 48, at 22).

[FN147]. Id. at para. 158 (quoting B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 125 (1953)).

[FN148]. Id. at paras. 156, 159.

[FN149]. Id. at para. 120.

[FN150]. Id. (quoting article XX).

[FN151]. Id. at para. 153.

[FN152]. Id.

[FN153]. Id. at para. 150 (quoting article XX). To make this determination, the AB indicated that three elements must exist. First, the application of the measure must result in discrimination. Second, the discrimination must be arbitrary or unjustified in character. Third, this discrimination must occur between countries where the same conditions prevail. Id.

[FN154]. Id. at para. 164.

[FN155]. Id. at para. 61.

[FN156]. Id. at para. 49.

[FN157]. Id. at para. 165.

[FN158]. See supra notes 107-09 and accompanying text.

[FN159]. Shrimp/Turtle Appellate Report, supra note 10, at para. 165.

[FN160]. This may or may not be governed by a widely noticed AB holding interpreting the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in the recent Beef Hormone decision. See Beef Hormone Appellate Report, supra note 50. In this decision, the tribunal cited with approval the international legal principle of in dubio mitius, which was defined in a footnote in the decision as follows:

The principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming the obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.

Id. at para. 165 n.154 (quoting 1 Oppenheim's International Law 1278 (R. Jennings & A. Watts eds., 9th ed. 1992)).

For further discussion of how the term was used in the Beef Hormone decision, see Hughes, supra note 51, at 921-22, and Hudec, supra note 19, at 30-31, which notes that, while being a well respected canon of international law, in dubio mitius is entirely dependent on how forcefully it is applied.

[FN161]. Farber & Hudec, supra note 46, at 82, acknowledge that no GATT/WTO tribunal has previously engaged in this variety of balancing and contend that the most difficult case for GATT/WTO tribunals is the question of whether a regulation does produce some possible regulatory benefit, but the benefit seems too small to justify the cost in terms of its impact on free trade. They suggest that this kind of balancing will likely be challenged as a usurpation of the government's political functions.

[FN162]. Shrimp/Turtle Appellate Report, supra note 10, at para. 165.

[FN163]. Id. at para. 167.

[FN164]. Id.

[FN165]. Id. at para. 168. The tribunal held open the possibility that good faith negotiations that fail to achieve a cooperative solution may be sufficient to entitle a party to adopt unilateral measures. However, it stated that it did not need to address that issue because the United States did not enter into negotiations prior to imposing its import ban. Id. at para. 165.

[FN166]. Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, at 3, 12, U.N. Doc. A/CONF. 151/5/Rev. 1, reprinted in 31 I.L.M. 874, 878 (1992), cited in the Shrimp/Turtle Appellate Report, supra note 10, at para. 168.

[FN167]. Shrimp/Turtle Appellate Report, supra note 10, at para. 169.

[FN168]. Id. at paras. 171-72.

[FN169]. Id. at para. 171.

[FN170]. This reference must be interpreted to mean that the United States should have at least attempted to engage in some form of third party mediation or adjudication effort. Because such efforts are consensual rather than compulsory, the United States could not force another Member to participate. However, the author has argued that it may be possible to have compulsory dispute settlement if the disputants are States Parties to the Third United Nations Convention on the Law of the Sea. See generally McLaughlin, supra note 88.

[FN171]. Shrimp/Turtle Appellate Report, supra note 10, at para. 173.

[FN172]. Id. at paras. 172-74.

[FN173]. Id. at para. 173.

[FN174]. Id. at para. 174.

[FN175]. Id. at para. 181.

[FN176]. Id. at para. 180. Interestingly, the tribunal held that article X:3 of GATT 1994 establishes certain

minimum standards for transparency and procedural fairness, and that those minimum standards have not been met by the United States. Id. at paras. 182-83.

[FN177]. Id. at para. 184.

[FN178]. Id. at para. 114 n.83. Articles 31 and 32 of the Vienna Convention provide as follows:
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.... Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning ... when the interpretation ... (a) [l]eaves the meaning ambiguous or obscure; or (b) [l] eads to a result which is manifestly absurd or unreasonable.
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[FN179]. The issue of extraterritoriality was addressed in both of the well known GATT dispute settlement decisions involving U.S. embargoes of tuna from nations whose fishing or processing practices failed to adequately protect dolphin. Tuna/Dolphin I, supra note 79, created a political firestorm in the United States by ruling that article XX (b) and (g) could only be applied to protect animals or exhaustible natural resources within a nation not outside. Tuna/Dolphin II, in dicta, implied that nothing in the GATT treaty prohibited article XX from being applied extraterritorially. However, it went on to rule that the U.S. embargo was intended to coerce other nations into changing their domestic policies and not to protect natural resources. Because the language concerning extraterritoriality was dicta, and the decision was not formally adopted by GATT, Tuna/Dolphin II's influence is questionable. Tuna/Dolphin II, supra note 80.

[FN180]. See supra notes 68-78 and accompanying text.

[FN181]. See generally supra notes 94-97 and accompanying text.

[FN182]. See supra notes 88-89 and accompanying text.

[FN183]. Professor Petersmann has summarized the changes brought about as a result of the Uruguay Round Agreements as follows: "Under the Uruguay Round Agreements, the national sovereignty over non-discriminatory measures protecting the national environment will thus be limited by increased recourse to principles of: [proportionality; acceptance of equivalent standards; harmonization on the basis of international standards; and the need to justify use of higher national standards.]" Ernst-Ulrich Petersmann, International Trade Law and International Environmental Law, 27 J. World Trade L. 43, 46, 67 (1993).

[FN184]. John Stuart Mill, who succeeded Jeremy Bentham as the most eloquent proponent of utilitarianism, defined the principle as that which "holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure." J.S. Mill, Utilitarianism, in Great Books of the Western World 445, 448 (Robert M. Huchins ed., 1952).

[FN185]. There is a distinction between act or classic utilitarianism, which focuses on the justification or morality of an act itself, and rule utilitarianism, which focuses on the morality of rules which in turn justify or constrain acts. For purposes of this article there is no need to distinguish between these two theoretical approaches and both will be termed utilitarianism. SeeAlan Donagan, The Theory of Morality 193, 196-99 (1977); Garcia, supra note 26, at 67-68.

[FN186]. Robin West, The Other Utilitarians, in Analyzing Law: New Essays in Legal Theory 197 (Brian Bix ed., 1998). Much of the following discussion is based on West.

[FN187]. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in The English Philosophers from Bacon to Mills 791, 792 (Edwin A. Burtt ed., 1967) (1939).

[FN188]. West, supra note 186, at 200-01.

[FN189]. Id. at 201-03.

[FN190]. This was the focus of George E. Moore's highly influential critique of utilitarianism in 1903, in which he argued that naturalist consequentialist theories are a logical fallacy because the good can never be defined in "natural" or non-ethical terms. G.E. Moore, Principia Ethica (Thomas Baldwin ed., rev. ed. 1993).

[FN191]. In economic terms, an action or policy is "Pareto-superior" if it makes one person better off and leaves no one else worse off. Jules L. Coleman stated that utilitarians "will no doubt embrace the Pareto standard, since they are committed to a conception of the right and the good from which Pareto superiority follows as a particular instance, that is, as one way of promoting utility." Jules L. Coleman, Markets, Morals and the Law 101 (1988). West refutes this notion by pointing out the differences between classic utilitarianism and preference satisfaction and noting that some utilitarians might very well reject the notion that Pareto superior preferences result in increased happiness, noting that "individuals often do not prefer what pleases them, and even more often do not take pleasure in what over the long run would be most conducive to their happiness." West, supra note 186, at 208.

[FN192]. But see West, supra note 186, at 201-03.

[FN193]. These difficulties have led to the emergence of new branches of applied moral philosophy and economics. Social choice theory attempts to provide a social evaluation based on profiles of individual welfare. Economic game theory creates formal models of rationality and theoretical studies of incentives. For a survey of these theories, see Hausman & McPherson, supra note 90, at 712-23.

[FN194]. By making choices based on maximum utility, utilitarians seem ambivalent toward personal rights and certain intuitive moral principles. For example, it may not be relevant to the utilitarian calculus whether a person was killed as a result of accidentally being run over by a car or as a result of being stabbed to death, except insofar as the causal consequences of these ways of dying differ. This seeming ambivalence is one of the primary criticisms of utilitarianism. Hausman and McPherson, supra note 90, at 706-07; see also R.G. Frey, Introduction: Utilitarianism and Persons, in Utility and Rights 3, 10 (R.G. Frey ed., 1984) (stating that classical utilitarianism is, without refinement, "inimical to some claim that there are incommensurable values (such as human life)").

[FN195]. Frey, supra note 194, at 5; Hausman & McPherson, supra note 90, at 705-06.

[FN196]. A virtual library of empirical studies exist that support this claim. See Nichols, supra note 28, at 661-67 .

[FN197]. Richard H. Steinberg, Antidotes to Regionalism: Responses to Trade Diversion Effects on the North American Free Trade Agreement, 29 Stan. J. Int'l L. 315, 318-19 (stating that "[n]o economic theory of trade has been more dominant in the last two centuries than David Ricardo's theory of comparative advantage").

[FN198]. See David Ricardo, The Principles of Political Economy and Taxation 77-93 (3d ed. 1960).

[FN199]. For a discussion of the literature supporting and opposing the notion that free trade increases global wealth, see Nichols, supra note 28.

[FN200]. Jeffrey L. Dunoff, Rethinking International Trade, 19 U. Pa. J. Int'l Econ. L. 347, 349-50 (1998); Nichols, supra note 28, at 700.

[FN201]. Earlier sections of this Article asserted that the analysis traditionally employed by GATT/WTO dispute settlement panels did not reflect a true utilitarian approach because it foreclosed certain options that may have produced consequences with greater utility. See supra notes 87-93 and accompanying text.

[FN202]. For the first forty years of GATT's existence, there was little concern about the utilitarian foundations of the organization. However, this was not because economic relationships did not have spillover effects, but because there was little knowledge of, or interest in, spillover issues such as the environment, human rights, or labor issues. Jeffrey L. Dunoff, Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes, 15 Mich. J. Int'l L. 1043, 1050 (1994) (indicating that "[t]here is likewise little evidence that any of the GATT's provisions were drafted to advance global environmental interests. This is not surprising, since at the time there was little governmental knowledge of, or interest in, domestic or international environmental issues").

[FN203]. Trachtman, supra note 78, at 34 (discussing these spillover effects and examining trade-off devices used to

address that conflict).

[FN204]. Id.

[FN205]. See Charnovitz, supra note 88, at 10584 (stating that trade pick up with bias of dispute panel members and inability of forum to impose additional environmental requirements makes GATT/WTO incapable of addressing environmental disputes); Jeffrey L. Dunoff, Resolving Trade-Environment Conflicts: The Case for Trading Institutions, 27 Cornell Int'l L.J. 607, 621 (1994) (arguing that institutional weaknesses in GATT/WTO call for creation of new international environmental organization); McLaughlin, supra note 88, at 70 (arguing United Nations Law of Sea Convention rather than GATT/WTO is most appropriate forum for trade-related disputes over conservation of marine living resources).

[FN206]. For purposes of this Article the terms contractarianism or contractualism are used to generically describe several theories of non- consequentialist or deontological moral reasoning which determine the rightness or wrongness of an act not by the nature of its consequences, but by whether or not it conforms to certain moral principles. For a concise and useful discussion of many of these contractualistic theories, see Hausman & McPherson, supra note 90, at 708-11.

[FN207]. Id. at 708.

[FN208]. John Rawls, A Theory of Justice 31 (1971).

[FN209]. Garcia, supra note 26, at 73 (arguing that human rights claims should take priority over counterclaims based in utility and other consequentialist appeals).

[FN210]. Although it is somewhat problematic to create contractualistic moral obligations toward non-human entities, there are certain relationships between human beings and the natural world that are susceptible to non-consequentialist moral rules. See infra notes 213-14.

[FN211]. Housman, supra note 24, at 1374-75; see also Holly Doremus, Patching the Ark: Improving Legal Protection of Biological Diversity, 18 Ecology L.Q. 265, 273-81 (1991) (contrasting utilitarian, esthetic, and ethical theories for species preservation).

[FN212]. Cited and discussed in Roger J. Sullivan, Immanuel Kant's Moral Theory 49-54 (1989). See also Fernando R. Teson, The Kantian Theory of International Law, 92 Colum. L. Rev. 53, 71 (1992) (discussing Kant's view of "the state" as "a civil society created by a social contract[ ]").

[FN213]. Housman, supra note 24, at 1375.

[FN214]. Id. The scope and dimensions of this obligation are clear within certain nations; they are much less clear internationally. For further discussion, see infra note 209-21 and accompanying text.

[FN215]. As of 1996, there have been eight GATT/WTO dispute settlement decisions rendered on environmental issues. Steve Charnovitz, The WTO Panel Decision on U.S. Clean Air Act Regulations, 19 Int'l Env't Rep. (BNA) 191, 195 (Mar. 6, 1996).

[FN216]. See supra notes 65-90 and accompanying text.

[FN217]. See generally Charnovitz, supra note 88.

[FN218]. See supra notes 94-97 and accompanying text.

[FN219]. Thomas M. Scanlon, Contractualism and Utilitarianism, in Utilitarianism and Beyond 103, 116 (Amarthya Sen & Bernard Williams eds., 1982).

[FN220]. See Rawls, supra note 208, at 92.

[FN221]. Id. at 118. The "original position" is intended to make any decision as impartial as possible. It consists

of a hypothetical meeting of representatives of a future society who have been given the task of agreeing on basic principles of justice for their society. It is made up of mutually disinterested individuals under moderate conditions of resource scarcity. Id. In addition, no one in the original position knows "his place in society, his class position or social status" nor his "natural assets and abilities [such as] his intelligence and strength." Id. at 137.

[FN222]. Id. at 83.

[FN223]. Rawls points out that these values have been supported for centuries by both utilitarians and contractarians. Id. at 92.

[FN224]. These principles also fall within that category of international law known as jus cogens in which derogation is not possible. In the environmental arena, some have argued that certain human rights abuses caused by serious pollution and other forms of environmental degradation may also rise to such a level. See, e.g., Caroline Dommen, Claiming Environmental Rights: Some Possibilities Offered by The United Nations' Human Rights Mechanisms, 11 Geo. Int'l Envtl L. Rev. 1 (1998).

[FN225]. One of the most important customary principles in international environmental law, first enunciated as the famous Principle 21 of the Stockholm Declaration, provides that each nation has "the sovereign right to exploit their own resources pursuant to their own environmental policies," as long as they do not "cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." Declaration of the U.N. Conference on the Human Environment, U.N. GAOR, U.N. Doc. A/CONF.48/14/Rev.1 (1972); see also Dunoff, supra note 202, at 1094 (noting that while there is an international legal obligation to protect the environment, its content is not established).

[FN226]. Cultural imperialism is a derogatory term used to describe the forced imposition of one culture's values onto another culture. It is the antithesis of the doctrine of cultural relativism which believes that "all principles for evaluating and judging behavior are relative to the culture in which a person is raised." Christopher C. Joyner & John C. Dettling, Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law, 20 Cal. W. Int'l L.J. 275, 277 (1990).

[FN227]. Interestingly, in their list of long-term international goals regardless of cultural foundation, Joyner and Dettling do not mention the environment. Included in their list are: a desire to maintain independence, economic prosperity, international reputation, national prestige, ideological aspirations, and stable, peaceful international conditions. Id. at 312-13.

[FN228]. Several widely accepted multi-lateral treaties contain language that recognizes the importance of preserving endangered species. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), supra note 56 (regulating international trade in endangered species); Third United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 194(5), 21 I.L.M. 1245, 1261 (1982) (entered into force Nov. 16, 1994) (requiring that Member States take measures to protect and preserve habitat for threatened or endangered species from pollution of marine environment). While clearly recognizing the importance of preserving endangered species, none of these multi-lateral treaties are capable of preventing Member States from exercising their sovereign rights to choose their own policies in regard to the conservation of endangered species within their own territory.

[FN229]. Given the lack of consensus on endangered species protection within the domestic confines of the United States and other industrial nations, it is difficult to imagine how hard the task may be to achieve sufficient consensus internationally to override national sovereignty concerns.

[FN230]. Patricia W. Birnie & Alan E. Boyle, International Law and the Environment 8 (1992) (noting that despite urgent global economic and developmental problems, remarkable progress has been made in developing a body of international environmental law).

[FN231]. Id. at 9-31.

[FN232]. Nichols, supra note 28, at 707-09. For example, if the United States either refuses, or is incapable of fully complying with the decision handed down by AB in the Shrimp/Turtle decision, it could cause severe harm to the ability of the WTO to perform its functions. See supra note 16.

[FN233]. For an interesting and thought provoking comparison of utilitarian versus contractarian ethical approaches to U.S. takings law, see generally Raymond, supra note 26.

[FN234]. The Fifth Amendment states, in pertinent part, that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

[FN235]. Scholarship that evaluates domestic legal principles as a model for GATT/WTO decision-making has a robust history. The U.S. Constitution's Commerce Clause has received significant attention. See Esty, supra note 23, at 112 (noting that Commerce Clause jurisprudence "offer[s] a valuable starting point for analyzing how environmental considerations might be woven into the fabric of the GATT"); Farber & Hudec, supra note 46, at 64-67 (agreeing with Esty that U.S. Commerce Clause jurisprudence provides a good starting point for analyzing trade and environment issues in GATT, but critical of Esty's analysis of that jurisprudence); see also Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 Vand. L. Rev. 1401 (1994). There has also been significant scholarship analogizing the law of the European Union with GATT/WTO. See Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy, 39 Harv. Int'l L.J. 357 (1998).

[FN236]. See supra notes 61-67 and accompanying text.

[FN237]. How U.S. courts make this determination is discussed infra notes 239-67 and accompanying text.

[FN238]. See supra notes 61-183 and accompanying text.

[FN239]. A good general summary of these rules may be found in 2 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law: Substance and Procedure 479-522 (2d ed. 1992).

[FN240]. For citations to a number of articles critical of the Supreme Courts' takings jurisprudence, see David A. Westbrook, Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases, 74 Notre Dame L. Rev. 717, 718 n.3 (1999).

[FN241]. See id. (suggesting that because takings cases require fact- specific review of particular agency actions, they lend themselves to pragmatic decision-making rather than grand principles); see also Daniel R. Mandelker, Investment-Backed Expectations in Taking Law, 27 Urb. Law. 215, 249 (1995) (arguing that takings law "reflects a pragmatic judgment about the property interests that courts decide are worth protecting under the Taking Clause."); Jeanne L. Schroeder, Never Jam To-day: On the Impossibility of Takings Jurisprudence, 84 Geo. L.J. 1531, 1531-33 (1996) (maintaining that philosophically satisfying takings theory is impossible).

[FN242]. The complexity and depth of this debate may be sampled in The Jurisprudence of Takings, 88 Colum. L. Rev. 1581 (1988) (consisting of symposium on takings with articles by William A. Fischel, Frank Michelman, Douglas W. Kmiec, Margaret Jane Radin, Susan Rose-Ackerman, T. Nicolaus Tideman, Stewart E. Sterk, Gregory S. Alexander, and William W. Fisher III).

[FN243]. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434- 35 (1982) (holding that per se taking occurs whenever government engages in a permanent physical occupation of property "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner").

[FN244]. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018, 1030 (1992) (stating that whenever an owner of real property has been called upon to sacrifice all economically beneficial uses in name of common good he suffers a taking unless proscribed use was not part of his title to begin with).

[FN245]. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (quoting Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978)).

[FN246]. Id.

[FN247]. The Court has long asserted that the touchstone of the Fifth Amendment is "fairness and justice." Armstrong v. United States, 364 U.S. 40, 49 (1960).

[FN248]. See Michelman, supra note 33.

[FN249]. Michelman was the first to use the term "investment-backed expectations." Id. at 1213.

[FN250]. See id. Most commentators would also include two other path- breaking articles to any list of the most influential scholarship in the field of takings. See Allison Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63; Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Westbrook, supra note 240, at 718 n.2.

[FN251]. Michelman, supra note 33, at 1211.

[FN252]. Id. at 1210.

[FN253]. Id. at 1212.

[FN254]. Id. But see Raymond, supra note 26, at 602-03 (arguing that Michelman has misinterpreted Bentham's idea of security through expectations and has over-estimated tendency of utilitarian theory of takings to require compensation).

[FN255]. Michelman, supra note 33, at 1212.

[FN256]. Id. at 1213.

[FN257]. Id.

[FN258]. Id.

[FN259]. Id. (emphasis added).

[FN260]. Id. at 1214.

[FN261]. Id. at 1214-15. Michelman discusses the practical difficulties of distinguishing and quantifying demoralization costs. He acknowledges that any attempt to interview potential compensation claimants is an unacceptable approach because the interviewee will likely not know the answer to a question asking about the dollar value of their outrage, as well as because it would be in their strategic interest to not reveal the true answer even if they knew it. Id. at 1215. Instead, he suggests that deductions based on social scientific behavioral assumptions are the best approach. He predicts that high levels of demoralization are likely under the following scenarios. First, when there is a deliberate collective redistributive decision, as opposed to simple uncertainty about future events. Id. at 1216. Second, when capricious redistributive decisions are taken even though settlement costs are relatively low. Id. at 1217. Third, when it is clear that a claimant has sustained an injury distinct from the generality of persons in the society. Id. Fourth, when the level of efficiency of a regulatory measure is arguable or unclear. Id. at 1218. Fifth, if there is no discernable reciprocal burdens coupled with the benefits (an example of reciprocal burdens would be a zoning decision that restricts a large area of the city to single family residential development). Id.

[FN262]. Id. at 1214.

[FN263]. Id. at 1215.

[FN264]. See supra notes 243-44.

[FN265]. Michelman, supra note 33, at 1228. For a critical response to Michelman's view of per se takings, see John J. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. Rev. 465 (1983), which proposes a sliding decisional model rather than per se test.

[FN266]. Once again, Michelman introduces several so-called "debatable" social scientific assumptions to assist in the utilitarian analysis of when diminution of value should be compensable. These assumptions are:
(1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several

discrete "things" whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is anevent attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.
Michelman, supra note 33, at 1234. To illustrate, Michelman distinguishes between the losses of the zoned-out apartment building owner who no longer has the apartment investment he depended on, and the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land and still has some viable investment possibilities, though lessened in value. Id.

[FN267]. Id. at 1235.

[FN268]. See generally supra note 224.

[FN269]. John E. Cribbet et al., Property Cases and Materials 6 (7th ed. 1996).

[FN270]. Pacta sunt servanda is defined to mean that "agreements ... contained in treaties, must be observed." Blacks Law Dictionary 1133 (7th ed. 1999).

[FN271]. The international right of sovereign nations to exploit their natural resources has been approved in numerous United Nations Resolutions. See, e.g., Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973); Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); see also Restatement of Foreign Relations Law § 206(a).

[FN272]. Royal C. Gardner, Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection, 65 U. Cin. L. Rev. 539, 563-64 (1997) (discussing historical foundation of analogy between private property and national sovereignty and arguing that the United States should incorporate constitutional takings principles when it imposes environmental regulations internationally).

[FN273]. Kratochwil, supra note 1, at 21-22.

[FN274]. Kurt Burch, "Property" and the Making of the International System 145-48 (1998). Hans Morgenthau declared: "Today, no less than when it was first developed in the sixteenth century, sovereignty points to a political fact ... the existence of ... the supreme authority to enact and enforce legal rules within that territory." Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace 306 (1967).

[FN275]. Differences of opinion regarding the character, historical development, normative content, and future prospects of both national sovereignty and private property are the grist of hundreds of scholarly studies. A discussion of these opinions and theories would be of little relevance for purposes of this Article. For a bibliography, see Burch, supra note 274, at 163-77.

[FN276]. Howard F. Chang, An Economic Analysis of Trade Measures to Protect the Global Environment, 83 Geo. L.J. 2131, 2193-94 (1995) (arguing that environmental trade measures cannot force other nations to take any action and are therefore not an intrusion on national sovereignty); see also McLaughlin, supra note 3, at 62-66 (arguing that although there may be no authority under customary international law to prohibit coercive trade measures, they may violate certain conventional obligations such as those in United Nations Convention on Law of Sea). However, an examination of whether coercive trade measures do or do not violate national sovereignty under international law is irrelevant to our discussion, which is concerned with the political, economic, and psychological perceptions of the affected states when trade restrictions are imposed in a certain manner.

[FN277]. See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, Economic Analysis of International Law, 24 Yale J. Int'l L. 1, 12-13 (1999) (finding similar self-interested behavior in domestic and international societies). Just as individual persons and firms "seek to further their self-defined interests through the most efficacious means available[,]" so do states in the international system. Id. at 13. These "utilitarian states interact to 'overcome the deficiencies that make them unable to consummate ... mutually beneficial agreements." ' Id. "Both the international and the domestic systems, then, are individualist in origin, spontaneously-generated and unintended products of self-interested behavior." Id.

[FN278]. See supra notes 252-55 and accompanying text.

[FN279]. Gardner, supra note 272, at 570-71 (analogizing the right to use one's private property in economically beneficial manner with right of sovereign nations to exploit their natural resources so long as activity does not harm territories of neighboring states); see also Andrew L. Strauss, From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization, 19 U. Pa. J. Int'l Econ. L. 769, 783-88 (explaining the case for environmental sovereignty). Despite changes brought about by international economic and cultural integration and high technologies, the nation-state continues to form the principal focus of political power and decision-making in the world today. According to Professor Harry Gelber:

[F]or the time being it seems entirely premature to speak of the disappearance or even the weakening of the nation or the nation-state, let alone of their replacement or absorption by something else.... It is surely of great significance that, for all the claims about the decline of the nation and of national authority in recent times, no seriously alternative organizing and mobilizing principles to those of the nation-state have so far become effective.

Harry G. Gelber, Sovereignty Through Interdependence 116 (1997); see also Michael R. Fowler & Julie M. Bunck, Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty 163-64 (1995) (arguing that sovereignty seems to be prospering, not declining).

[FN280]. See supra notes 265-67 and accompanying text.

[FN281]. Chang, supra note 276, at 2194, recognizes this intensity of feeling when he wrote:

I mean to suggest here that a measure may be particularly offensive to sovereignty interests insofar as it challenges the judgment made by a national government regarding the policies that best serve its own people. If we recognize a national government as the legitimate representative of its citizens, then we should generally respect the choices it makes on their behalf.

See also Gardner, supra note 272, at 570-71.

[FN282]. See supra notes 248-50 and accompanying text.

[FN283]. See supra note 94-109 and accompanying text.

[FN284]. See supra notes 10, 48.

[FN285]. The AB's holding in Shrimp/Turtle specifically addresses the problem of improper balancing by noting that the requirements of the chapeau should not be applied uniformly to all trade restrictive measures. Instead, it provides that:

When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies.... The standard of "arbitrary discrimination," for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

Shrimp/Turtle Appellate Report, supra note 10, at para. 120; see also supra notes 65-90 and accompanying text (discussing generally the traditional doctrinal approach).

[FN286]. See supra notes 143-45 and accompanying text.

[FN287]. See supra notes 146-83 and accompanying text.

[FN288]. See supra notes 146-83 and accompanying text. The AB did not address the second clause in the article XX chapeau which prohibits "disguised restrictions on international trade" in its Shrimp/Turtle decision, and seemed to imply in its Reformulated Gasoline decision that the terms "arbitrary discrimination," "unjustified discrimination," and "disguised restriction" were coincident. See Steve Charnovitz, Environment and Health Under WTO Dispute Settlement, 32 Int'l Law. 901, 911 (1998). For purposes of this Article, the second clause will not be discussed separately but will be viewed as generically coincident with "arbitrary or unjustifiable discrimination."

[FN289]. For a flavor of this public perception, see the collection of essays in The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power (Earth Island Press ed., 1993).

[FN290]. Shrimp/Turtle Appellate Report, supra note 10, at para. 158.

[FN291]. Id. (quoting B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 125 (1953)).

[FN292]. The tribunal elaborates on this definition of reasonableness as follows:

A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed.... But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.

Id. at para. 158 n.156 (quoting B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 125 (1953)).

[FN293]. See supra notes 153-57 and accompanying text.

[FN294]. See supra notes 163-68 and accompanying text.

[FN295]. See infra notes 296-316 and accompanying text.

[FN296]. The importance of protecting sea turtles and the legitimacy of U.S. concern over their protection is repeated throughout the decision. In its concluding remarks, the AB states "We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should." Shrimp/Turtle Appellate Report, supra note 10, at para. 185.

[FN297]. Id. at para. 164.

[FN298]. Id. at para. 163.

[FN299]. Id. at para. 172 (emphasis added).

[FN300]. A strong argument can be made equating the GATT/WTO per se rule against unilateral trade measures that are intended to coerce other members into changing their domestic policies that bring them into accordance with the trade restricting Member's with the per se rule against physical invasions by government under U.S. takings law. Both seem to reflect a reasonable belief that such actions are especially unsettling to expectations and therefore extremely demoralizing.

[FN301]. Shrimp/Turtle Appellate Report, supra note 10, at para. 166.

[FN302]. Id. at para. 168.

[FN303]. Id.

[FN304]. Id. at para. 171.

[FN305]. These concerns are forcefully and explicitly made in the original panel decision summarized in the AB's ruling. Id. at para. 112.

[FN306]. The phrase "threat to [the multilateral trading] system" was used in the briefs of several appellees and the original panel decision to express this concern. Id.

[FN307]. Dunoff & Trachtman, supra note 277, at 10-12 (discussing different meanings of "positivism" for international lawyers and economists and its role in governance of international society).

[FN308]. Shrimp/Turtle Appellate Report, supra note 10, at paras. 173-84.

[FN309]. The tribunal ruled that the United States violated the spirit of article X(3) of the 1994 GATT/WTO Agreement, which establishes certain minimal standards for transparency and procedural fairness. Id. at para. 183.

[FN310]. Id. at para. 169.

[FN311]. Id. at para. 167.

[FN312]. Id.

[FN313]. The procedural defects noted by the AB in its Shrimp/Turtle decision do not lend themselves to a modified utilitarian balancing analysis and instead depend on independent standards necessary to meet minimal procedural due-process requirements. However, the lack of minimal due-process protections may be viewed as creating demoralization costs. See id. at paras. 175-84; see also supra note 114 and accompanying text.

[FN314]. Understanding on Rules and Procedures, supra note 97, at 1226.

[FN315]. Shrimp/Turtle Appellate Report, supra note 10, at paras. 161-69.

[FN316]. See infra notes 337-73 and accompanying text.

[FN317]. This principle has remained unchanged since the Roman era and is reflected by the well-known Latin phrase sic utere tuo ut alienum non laedas ("[S]o use your own as not to injure another's property."). Black's Law Dictionary 1690 (7th ed. 1999).

[FN318]. The Supreme Court first adopted a test which identified all "noxious uses" of private property and not just common law nuisances as non- compensable in 1887. Mugler v. Kansas, 123 U.S. 623, 669 (1887). While the so-called nuisance exception had been applied previously, the modern vocabulary used by the Supreme Court in applying the exception in its takings cases was developed by Justice Rehnquist in his dissent in Penn Central Transportation Co. v. New York, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting). See Lynda J. Oswald, The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis, 50 Vand. L. Rev. 1449, 1466-67 (1997).

[FN319]. This customary norm was codified for the first time in Principle 21 of the Declaration of the United Nations Conference on the Human Environment, United Nations Conference on the Human Environment: Final Documents, adopted June 16, 1972, U.N. Doc. A/CONF.48/14/Rev. 1 at 3 (1973), reprinted in 11 I.L.M. 1416 (1986). The United States Restatement on Foreign Relations Law confirms this view of customary law. 2 Restatement (Third) of the Foreign Relations Law of the United States § 601 (1987).

[FN320]. This was the holding in the famous Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1938 (1941), where the tribunal found Canada liable for allowing toxic sulfur dioxide fumes to seriously damage fruit orchards across the border in the United States.

[FN321]. Oswald, supra note 318, at 1455-57 (discussing traditional distinction between police powers and eminent domain and arguing that both have unfortunately converged during recent years).

[FN322]. Id. at 1478-81 (examining views of many of these commentators and asserting that harm prevention/benefit extraction dichotomy remains valid and useful).

[FN323]. 505 U.S. 1003, 1025 (1992) (citing Sax, supra note 250, at 49).

[FN324]. Oswald, supra note 318, at 1481 (stating that some variety of normal behavior or community's sense of value provides rough and ready analytical tool for resolving most takings questions); Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 418-24 (1977) (advocating normal behavior model that imposed higher standard than nuisance law); see also William A. Fischel, Regulatory Takings: Law, Economics, and Politics 355 (1995) (arguing for a standard which ordinary citizens regard as normal behavior within their communities).

[FN325]. Article 3(2) of the Understanding on Rules and Procedures, supra note 97, at 1226, seems to encourage tribunals to apply customary rules of treaty interpretation, but not to apply customary rules that "add to or diminish the rights and obligations provided in the covered agreements." But see Lakshman D. Guruswamy, Should

UNCLOS or GATT/WTO Decide Trade and Environment Disputes?, 7 Minn. J. Global Trade 287, 319 (1998) (harshly criticizing the inability of GATT/WTO tribunals to apply customary international law and arguing for United Nations Law of Sea Convention to assume jurisdiction over disputes where environmental and trade policies collide).

[FN326]. The kind of scientific evidence that is necessary to support a claim under article XX was addressed in the AB's Beef Hormone Appellate Report, supra note 50.

[FN327]. See Craig S. Harrison, Costs to the United States in Environmental Protection and Marine Scientific Research by not Joining the Law of the Sea Convention, in Consensus and Confrontation: The United States and the Law of the Sea Convention 425, 426 (Jon M. Van Dyke ed., 1985); see also Lakshman Guruswamy, The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes, 25 Ecology L.Q. 189, 214 n.111 (1998) (rejecting author's contention that article 194(5) is limited to "marine pollution" and does not prohibit unacceptable fishing technologies).

[FN328]. See 2 Restatement (Third) of Foreign Relations Law of the United States pt. V, introductory note at 5 (1987). But see W.T. Burke, Customary Law of the Sea: Advocacy or Disinterested Scholarship?, 14 Yale J. Int'l L. 508, 510 (1989) (criticizing the Restatement for making no attempt to provide details of state practices to support its assertions).

[FN329]. Guruswamy, supra note 327, at 214 (stating that "[c]ommentators have rightly observed that these articles may establish a broad affirmative duty for all states to protect and preserve threatened and endangered species, their ecosystems and their habitats").

[FN330]. McLaughlin, supra note 3, at 39-40. Article 194 specifically deals with "pollution of the marine environment," which is defined in the Convention as:

[T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, 1271 (1982).

There is no authority in either the text or negotiating history to interpret this definition of pollution as including unacceptable fishing practices. Use of the term "substances or energy" is intended to refer to toxic, harmful and noxious substances, which are referred to in other parts of the text, as well as thermal energy. Moreover, the inclusion of "fishing" as a legitimate use in need of protection from pollution contradicts any assertion that fishing itself falls within the definition of pollution.

[FN331]. There is not a single reference to anything relating to fishing techniques in the negotiating history of article 194. See 4 United Nations Convention on the Law of the Sea 1982: A Commentary 50-68 (Myron H. Nordquist et al. eds., 1991).

[FN332]. See Hudec, supra note 46, at 112 (explaining that trans-boundary pollution cases are so obviously illegal that they do not take up space in the trade/environment debate and instead, "[m]ost proposals advocating the use of externally-directed trade measures are targeted upon environmental practices whose outward effects are less direct, less immediate, or less damaging").

[FN333]. See supra notes 290-315 and accompanying text.

[FN334]. The "average reciprocity of advantage" rule has been applied in the United States in some form since the early part of the twentieth century. The rule can be generally defined to provide that land use regulations that result in benefits to regulated landowners roughly equal to the burdens imposed on them do not violate the U.S. Constitution. See Oswald, supra note 318, at 1489. In the international context, it is intended to describe the situation in which a nation that is required to adopt certain conservation techniques receives environmental benefits as a result of its actions and the actions of other nations that are roughly equal to the burdens imposed.

[FN335]. An example of cooperative trade restrictions may be found in the U.N. sponsored Straddling and Highly Migratory Fish Stock Agreement which provides that States Parties may take action including the collective imposition of trade restrictions against nations whose vessels have engaged in activities that undermine the

effectiveness of the fisheries conservation or management measures established by the organization for that part of the high seas. See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF 164/37 (1995), reprinted in 34 I.L.M. 1542, 1571 (1995).

[FN336]. The AB, in the Shrimp/Turtle Appellate Report, supra note 10, at para. 171, implied that the United States should have attempted to find redress in some other international forum prior to imposing its trade restrictions, but did not identify what "international mechanism" may be appropriate under such conditions.

[FN337]. Tuna/Dolphin I, supra note 79.

[FN338]. In announcing its final rule enacting its trade restrictions, the United States conceded that there was no substantial evidence that dolphin populations in the Eastern Tropical Pacific were threatened with extinction. In fact, the Inter-American Tropical Tuna Association, United States National Marine Fisheries Service, and the National Research Council asserted that dolphin stocks in the region were healthy and sustaining current mortality rates. Jeffrey L. Dunoff, Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?, 49 Wash. & Lee L. Rev. 1407, 1451 n.271 (1992).

[FN339]. This assertion is strongly supported by the fact that written and oral presentations to the GATT dispute settlement panel in support of Mexico's position were submitted by Australia, Canada, the European Community, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela. No nation submitted comments in favor of the United States' position. See Tuna/Dolphin I, supra note 79, at paras. 4.4-.30.

[FN340]. This disagreement was the focus of a series of lawsuits brought by environmental organizations to force the Bush Administration to implement the embargo of tuna products. The Administration argued that the National Marine Fisheries Service did not possess sufficient data necessary to make an accurate comparability finding. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 976 (N.D. Cal. 1990), aff'd, 929 F.2d 1449 (9th Cir. 1991).

[FN341]. See Sen. Kerry Calls for Moratorium on Encircling Dolphins to Catch Tuna, Int'l Trade Rep. (BNA), July 24, 1992, at 2.

[FN342]. In contrast, although it was suggested in the Shrimp/Turtle decision that conservation methods other that TEDs may also be effective, the tribunal did not question that the use of TEDs is a widely accepted and effective method of protecting and conserving sea turtles. See supra notes 136-39 and accompanying text.

[FN343]. It was estimated that nearly one million dolphin were killed as a result of U.S. tuna fishing operations in the Eastern Tropical Pacific between 1971-75. See Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141, 1143-44 (D.C. Cir. 1976).

[FN344]. These included the International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 (1992) which authorized the State Department to enter into bilateral agreements to implement a five-year moratorium on dolphin-encircling purse seine operations, beginning in 1994, in return for an immediate lifting of all tuna embargoes; and the on-going negotiations within the Inter-American Tropical Tuna Commission, which eventually led to a negotiated settlement known as the Declaration of Panama and formed the basis of the 1997 International Dolphin Conservation Program Act, Pub. L. No. 105-42, 111 Stat. 1122 (1997), lifting all embargoes on tuna. See Nina M. Young et al., The Flipper Phenomenon: Perspectives on the Panama Declaration and the "Dolphin Safe" Label, 3 Ocean & Coastal L.J. 57, 83- 100 (1997).

[FN345]. See generally Joshua R. Floum, Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic, 10 Geo. Int'l Envtl. L. Rev. 943 (1998).

[FN346]. Id. at 954.

[FN347]. Tuna/Dolphin II, supra note 80.

[FN348]. The secondary ban was originally imposed against twenty nations, which prompted strong protests from affected states. See Lee J. Weddig, Battling Over Tuna and Trade, J. Com., Feb. 19, 1992, at 10A. For a list of these nations, see Tuna/Dolphin II, supra note 80, at paras. 2.13-14.

[FN349]. Charnovitz, supra note 88, at 10576.

[FN350]. Tuna/Dolphin II, supra note 80, at para. 5.23.

[FN351]. The secondary embargo would apply even if all of the targeted nation's fishermen were in full compliance with the United States mandated dolphin conservation measures. See id.

[FN352]. After these definitional changes, only Costa Rica, Italy, Japan, and Spain were subject to the secondary embargo. Id. at para. 2.15.

[FN353]. Norway resumed commercial whaling operations in 1993 and increased its harvest from 383 in 1992, to 1043 in 1997. Japan has not resumed commercial whaling, but increased its scientific research quota of minke whales in the Southern Atlantic Ocean to 440 in recent years. See William C. Burns, The International Whaling Commission and the Future of Cetaceans: Problems and Prospects, 8 Colo. J. Int'l Envtl. L. & Pol'y 31, 51-53 (1997).

[FN354]. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. V, para. 3, 161 U.N.T.S. 72, 80 (1953) (authorizing any signatory nation to exempt itself from the Convention's conservation regulations). The Convention creates the International Whaling Commission (IWC), made up of 32 voting Member States, which determines policy on international whaling matters.

[FN355]. 22 U.S.C. § 1978 (1994).

[FN356]. Id. § 1978(a)(1)-(2).

[FN357]. Id. § 1978(a)(4). The Pelly Amendment is the only U.S. environmental statute with trade restriction provisions that specifically require that any import restriction be consistent with GATT. Id.

[FN358]. On only one of these occasions was a trade embargo actually imposed. Joseph Robert Berger, Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the GATT in the WTO Sea Turtle Case, 24 Colum. J. Envtl L. 355, 394 (1999).

[FN359]. In 1993 Norway was certified for resuming commercial whaling of minke whales in defiance of the international whaling moratorium established by the International Whaling Commission. In 1995, Japan was certified for taking minke whales in the North Pacific and the Antarctic. Id. at 395.

[FN360]. For a summary of these views, see Masayuke Komatsu, Whaling Management: Lessons for Fisheries, in Japanese Position on Whaling and Anti- Whaling Campaign 5 (Institute of Cetacean Research ed., 1998). The Southern Ocean Sanctuary was created by the International Whaling Commission in 1994 to indefinitely protect all species of whales in an area covering about thirty million square kilometers of water around the Antarctic Continent. See generally Judith Berger-Eforo, Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy For the Twenty-First Century?, 8 Pace Int'l L. Rev. 439 (1996).

[FN361]. For the background and practice of the International Whaling Convention, see Patricia W. Birnie, International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale- Watching (1985); Cynthia Taliaferro Bright, The Future of the International Whaling Commission: Can We Save the Whales?, 5 Geo. Int'l Envtl. L. Rev. 815 (1993).

[FN362]. If the whole species being targeted is not endangered, it is unclear whether a panel would rule that it qualifies for an article XX exception. See supra note 135 and accompanying text.

[FN363]. Even for purposes of our hypothetical example, this would be an unlikely prospect because even before the International Whaling Commission imposed a moratorium on commercial whaling in 1982, the only species targeted by Japanese whalers that was listed as endangered or threatened was the sperm whale. Arne Kalland, The Anti-Whaling Campaigns and Japanese Responses, in Japanese Position on Whaling and Anti-Whaling Campaign 11 (Institute of Cetacean Research ed., 1998). Sperm whales are not currently listed as endangered or threatened under appendix I or II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

(CITES), supra note 56.

[FN364]. Antarctic stocks of minke whales have been estimated at 760,000 animals, which is assumed to be well above the historic level of abundance. Kalland, supra note 363, at 12.

[FN365]. For example, at the Puerto Vallarta meeting of the International Whaling Commission in 1994, the proposal to create the Southern Ocean Sanctuary passed by a margin of twenty-three votes to one. Japan cast the lone dissenting vote. Berger-Eforo, supra note 360, at 475.

[FN366]. Jennifer Angelini & Andrew Mansfield, A Call for U.S. Ratification of the Protocol on Antarctic Environmental Protection, 21 Ecology L.Q. 163, 167-81 (1994) (arguing for a quick ratification of the protocol on Antarctic environmental protection because of the fragile nature of the Antarctic environment and its susceptibility to further degradation).

[FN367]. Recall that under Michelman's modified utilitarian analysis the demoralization costs represent production costs incurred by uncompensated losers and their sympathizers who are disturbed that, under similar circumstances, they themselves may not receive compensation. See supra note 261 and accompanying text.

[FN368]. Angelini & Mansfield, supra note 366, at 181-217 (describing the Antarctic Treaty System and the Protocol on Antarctic Environmental Protection).

[FN369]. Komatsu, supra note 360, at 9.

[FN370]. For an interesting collection of observations relating the traditional importance of whale meat in Japan, see Mutsuko Ohnishi, Mrs. Ohnishi's Whale Cuisine 100-04 (Bruce Darling trans., 1995).

[FN371]. Osamu Sato, The Japanese Fisheries System, Oceanus, Spring 1997, at 9 (noting that 50% of the animal protein consumed in Japan is from fish).

[FN372]. Berger-Eforo, supra note 360, at 468. Japan's concern about the illegality of the International Whaling Commission action to create the Southern Whale Sanctuary is well founded. See William Aron et al., Flouting the Convention, Atlantic Monthly, May 1, 1999, at 22 (noting that anti-whaling nations are using the International Whaling Commission to ban all commercial whaling in violation of the clear terms of the applicable treaty and that this effort could jeopardize future environmental agreements).

[FN373]. This finding does not imply that Japan has no viable legal claims under other sources of international law when other nations use trade restrictions to coerce changes of behavior for environmental purposes. See generally McLaughlin, supra note 3 (arguing that under certain circumstances, restrictive trade measures for environmental purposes may violate provisions of the United Nations Convention on the Law of the Sea and may be challenged under that treaty's dispute settlement provisions).

[FN374]. See supra Part V.C.

[FN375]. For example, it is highly likely that the outcomes summarized in Figure I would be interpreted differently by another author. This subjectivity could be greatly reduced if the WTO develops a consensus-based set of criteria to assist in the balancing process. See infra notes 376-79 and accompanying text.

[FN376]. The guidance currently given to GATT/WTO adjudicatory panels which have been delegated the task of solving trade/environment disputes is limited to the vague preambular language contained in the 1994 Final Agreement creating the WTO requiring optimal use of the world's resources in accordance with the objective of sustainable development. See supra note 92 and accompanying text.

[FN377]. This judicial balancing approach would be similar to the current approaches used in determining the validity of trade restrictive effects of state environmental product standards under the Interstate Commerce Clause of the United States Constitution and article 30 of the E.C. Treaty. In both situations, the courts balance the value of the environmental benefits versus the burden on trade. Judicial balancing in the absence of legislative guidance has been criticized by several commentators as well as some judges who have been entrusted with the task. See Damien Geradin, Trade and the Environment: A Comparative Study of EC and US Law 63-65 (1997).

[FN378]. The Committee was created at the meeting for the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh between April 12 and 15, 1994. Trade and Environment, Ministerial Decision, Apr. 14, 1994, 33 I.L.M. 1267 (1994).

[FN379]. More specifically, the Ministerial Declaration set out the following terms of reference for the CTE:
(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
(b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
- the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
- the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
- surveillance of trade measures used for environmental purposes, of trade- related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.
Id. at 1268.

[FN380]. McLaughlin, supra note 88, at 31.

[FN381]. Strauss, supra note 279, at 812-18 (describing the advantages of using the WTO as a forum to negotiate international environmental agreements. These advantages include neutralizing the likely opposition of business interests and developing countries).

[FN382]. In a recent report from the CTE, Members reaffirmed the Committee's non-interventionist policies by stating that they are committed "not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competiveness effects of applying environmental policies." Report of the WTO Committee on Trade and Environment, PRESS/TE 014, para. 169 (Nov. 18, 1996).

[FN383]. In this regard, see Cass R. Sunstein, Protectionism, the American Supreme Court, and Integrated Markets, in 1992: One European Market 127, 141 (Bieber et al. eds., 1988) ("Courts are passive; they do not initiate the lawsuits they decide. By contrast, legislatures can stem a problem before it starts. If interferences with free trade ... are widespread, this distinction may assume great importance.").

[FN384]. Esty, supra note 23, at 222-23 (advocating the establishment of a scale of trade measures and an illustrative list of environmental injuries that would justify various trade restrictions).

[FN385]. In the absence of detailed legislative guidance, the European Court of Justice has created its own sliding scale of values in order to scrutinize the trade impact of domestic measures taken by Member States under articles 30 and 36 of the European Economic Community Treaty. According to Professor Ari Afilalo, the Court has traditionally given a high level of scrutiny to measures grounded in health and consumer protection concerns, a low level of scrutiny to measures based on public morality, and an intermediate level to measures involving worker safety and cultural values (unpublished manuscript on file with author).

[FN386]. Id.

[FN387]. See supra note 63.

[FN388]. The popular media reported heavily on the so-called "battle in Seattle." For a description of these events, see The Siege of Seattle, Newsweek, Dec. 13, 1999, at 30.

[FN389]. Evelyn Iritani & Edwin Chen, WTO Summit: Protest in Seattle, LA Times, Dec. 2, 1999, at A1.