A MATTER OF NECESSITY: A ONE-STEP COMPROMISE BETWEEN LIBERALIZED TRADE AND THE ENVIRONMENT

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I. INTRODUCTION

The World Trade Organization (WTO) came into existence in 1995 after being created during the Uruguay Rounds, a multilateral trade negotiation between 123 countries.[1] The WTO functionally and nominally replaced the international trade framework set forth in the General Agreement on Tariffs and Trade (GATT), a multilateral trade agreement in effect from 1948 through 1994;[2] the WTO now carries the mantle of liberalizing international trade. While free, fair, and open international trade is a utopian ideal, the WTO's current implementation is far from a system without complications. For example, the most recent multilateral trade negotiations, the Doha Development Round, began in 2001, but talks have been paralyzed and any progress to further liberalize international trade looks bleak.[3]

An ongoing issue for the WTO and its members is the interplay between a country's duties as a WTO member and its rights as a sovereign state. This interplay is particularly relevant in the context of environmental regulation.[4] Part II of this Comment examines the intersection of international trade and environmental protection. This section shows why the WTO, a trade organization, needs to address environmental issues and lays the foundation for this Comment's argument that the WTO is failing to adequately value the environment. This intersection is put into context in Part III through a presentation and analysis of two WTO disputes. Part III highlights how the WTO has handled the responsibility

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

2. General Agreement on Tariffs and Trade, Oct. 30 1947, 55 U.N.T.S. 194 [hereinafter GATT].

3. *See Goodbye Doha, hello Bali*, THE ECONOMIST, Sept. 8, 2012, http://www.economist.com/node/21562196 (discussing the initial priorities of the Doha Development Round and the obstacles that have derailed the talks).

4. ANUPAM GOYAL, THE WTO AND INTERNATIONAL ENVIRONMENTAL LAW: TOWARDS CONCILIATION 1 (2006) (explaining that this debate has gained momentum due to a globalized economy, deterioration of the ecosystem, and rising environmental concerns).

of distinguishing between legitimate environmental protection efforts and mere economic protectionism masked as a concern for the environment and health.

Part IV of this Comment features a critique of the WTO's approach to settling trade disputes arising out of a member country's actions to address an environmental or health concern under Article XX(b) of the GATT. The critique identifies a flaw in the WTO's logic even though its logic arose from a legitimate canon of statutory interpretation. This Comment argues that the WTO's flawed logic and the resulting use of a two-step test to handle these disputes ultimately undermines the WTO's concession under GATT Article XX that, in certain circumstances, member countries retain the right to dictate domestic policies that contravene their WTO obligations.

Part V proposes an alteration to the WTO's evaluation of Article XX(b) measures; it attempts to reconcile the WTO's role as a trade organization and the importance of free and open international trade with the existence of important competing societal interests and the sovereign authority of WTO member countries. The solution is most easily expressed through the lens of the previously settled cases discussed in Part III; however, the Comment promotes the adoption of the new test as a means to push the WTO to become an international organization that is able to see beyond its mission and fairly evaluate competing social concerns like environmental protection.

II. INTERSECTION OF INTERNATIONAL TRADE AND ENVIRONMENTAL PROTECTION

Signatory countries to the GATT established the WTO in light of the widespread international acknowledgement that all countries have similar fundamental goals: improving standards of living, ensuring full employment, expanding production of goods and services, not wasting the world's resources, and protecting the environment.[5] The WTO was created in order to facilitate the achievement of these goals by preserving a fair and open system of international trade: "The Parties to this Agreement, . . . [b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[6]

The creation of the WTO reaffirmed the 1947 General Agreement on Trades and Tariffs as binding and now supplemented by the 1994 General Agreement on Trades and Tariffs (GATT 1994).[7] Furthermore, the Uruguay Rounds led to expanded application of provisions of GATT and GATT 1994 to sectors of trade that had previously been left unregulated on the international level. The most prominent expansion of regulation was into the agricultural sector,[8] but measures

5. Marrakesh Agreement pmbl.

6. *Id.*

7. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 190 [hereinafter GATT 1994].

8. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World

were also taken to regulate textiles and clothing[9] (this regulation has since expired) and trade-related investment measures.[10] The Uruguay Rounds served as an aggressive extension of international trade agreements and showed a growing commitment to international cooperation in achieving fair trade.

Although the establishment of the WTO and its necessary implications on the future of international trade surely grabbed the headlines in the spring of 1994, the WTO, even while expanding the coverage of the GATT, never abandoned the longstanding international acknowledgement that sometimes interests exist that supersede the desire for free trade.

A. The GATT's Protection of Competing Social Values

Article XX of the GATT provides the interests that constitute general exceptions to the terms of the GATT. These interests range from as broad as the protection of public morals[11] to as narrow as the products of prison labor.[12] Additionally, Article XXI of the GATT provides the interests that constitute national security exceptions to the terms of the GATT.[13] All of the Article XX exceptions come with the stringent caveat that they are "[s]ubject 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."[14] This requirement has come to be known as the chapeau and is the WTO's crucial tool for assessing whether a country's averred interest has been tailored and implemented in a fashion that does not undermine the organization's broad goals.[15]

Unsurprisingly, Article XX of the GATT is where the intersection of international trade and environmental protection occurs. Article XX includes two exceptions for environmental protection.[16] Article XX(b) allows for a country to

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Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 410; *see also* Andrew Green & Tracey Epps, *The WTO, Science, and the Environment: Moving Towards Consistency*, 10 (2) J. INT'L ECON. L. 285, 309 (2007).

9. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 3, 14.

10. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 3, 186.

11. GATT art. XX(a).

12. GATT art. XX(e).

13. GATT art. XXI.

14. GATT art. XX.

15. *See generally* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002) (demonstrating how the WTO applied its chapeau analysis to an actual international trade dispute).

16. BRADLY J. CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW 78–81 (2006) (explaining that while GATT Article XX does not have a provision that expressly includes environmental protection as a legitimate justification, Articles XX(b) and (g) have been interpreted to include environmental protection).

take measures "necessary to protect human, animal or plant life or health."[17] Article XX(g) allows for a country to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[18] Although these exceptions are still subject to the chapeau, the individual provisions are fairly broad exceptions that give countries considerable leeway to develop and implement their own domestic environmental policies. An example of such leeway is the WTO's willingness to allow countries justifying their actions under Article XX to dictate the level of protection desired.[19] This leeway indicates the WTO's recognition that member countries prioritize and respond to societal values in different ways; however, the combination of leeway and heterogeneous WTO members gives rise to the need for WTO dispute settlement bodies.

B. Make No Mistake, the WTO's Main Priority Remains Liberalized Trade

Use of the GATT Article XX exceptions is a natural source of tension among member countries. As of August 2012, the WTO has 157 member countries,[20] each with unique priorities, climates, levels of development, and populations that affect how and why a country may need to invoke Article XX(b) and Article XX(g) environmental exceptions. If all countries joined the WTO because they thought liberalized international trade was a smart policy decision, then countries' differing attitudes toward taking advantage of Article XX exceptions to respond to domestic issues are bound to lead to disputes.

A disparity in economic power among member countries compounds these tensions.[21] This disparity leads to conflicts in a variety of areas; two of these related areas help illustrate the problem: relative importance of environmental protection and unequal access. The former has two important premises. First, some countries (usually countries with stronger economies) have more environmental protection measures with more rigorous enforcement mechanisms than other countries (usually countries with weaker economies).[22] Second, even when

17. GATT art. XX(b).

18. GATT art. XX(g).

19. *See* Hannes Schloemann, *Brazil Tyres: Policy Space Confirmed under GATT Article XX*, 12 INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV. (Feb. 2008), *available at* http://ictsd.org/i/news/bridges/3141/ (explaining that by giving member countries the freedom to choose their desired level of protection, the WTO created a policy space where the goal could be as idealistic as perfect public health).

20. *Members and Observers*, WORLD TRADE ORG., http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Mar. 2, 2013) (there are 159 members as of Apr. 21, 2014).

21. CIA, *Country Comparison: GDP (Purchasing Power Parity)*, THE WORLD FACT BOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Jan. 31, 2014) (illustrating that cross references between WTO members list and the CIA GDP Rankings show WTO members range from United States (1), European Union (2), and China (3), to Samoa (203) and Tonga (208)).

22. *See* Mark Edward Foster, Note, *Trade and Environment: Making Room for Environmental Trade Measures within the GATT*, 71 S. CAL. L. REV. 393, 408–10 (1998) (classifying countries as either "high-level states" or "low-level states" regarding the level of environmental protection sought through their policy decisions).

countries agree that an environmental problem exists, not all countries agree on how the problem should be addressed and to what extent.[23]

Given these realities, a WTO ruling on the validity of an environmental measure has economic consequences. If countries are able to move forward with strict environmental measures, then this ability could put a strain on countries with limited financial and technical resources to meet the new standards.[24] Conversely, if a country's environmental protection measures are unenforceable internationally, then choosing to protect the environment will result in that country suffering a competitive disadvantage[25] when it comes to production costs or attracting investments. Building on the problem of disparity of resources is that countries will inevitably have different opinions about how to address an environmental problem. For example, a country whose main export is lumber probably wants to address greenhouse gas emissions in a manner unrelated to deforestation.[26] Conversely, a country without a meaningful lumber economic sector would view regulating deforestation as an appealing way to limit green house gas emissions. Hypothetically, under GATT Article XX, both countries would be preliminarily justified in pursuing their environmental goals; however, it is more than likely that any action taken would result in a trade dispute between the countries that would need to be settled by a WTO dispute settlement body.

The latter conflict area arising from economic disparity is unequal access. Bradly Condon, Founding Director of the Centre for International Economic Law, argued: "The effectiveness of unilateral trade measures depends on the relative market power of the importing and exporting countries. Thus, in practice, [unilateral trade measures are] only available to WTO members with substantial markets."[27] Condon supports this assertion by analyzing the free rider problem.[28] The free rider problem is that if an objective can be completed with less than 100% participation, then countries can avoid the cost of participation while still benefitting from the fulfillment of the objective.[29]

To remedy the free rider problem, the WTO has allowed countries to penalize free riders through the imposition of trade barriers.[30] The problem with permitting

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23. *See id.* at 409–10 (citing the protection of marine mammals as a common goal between Mexico and the United States but identifying differences in how the problem should be addressed).

24. *See id.* at 408–09.

25. *See id.*

26. *See id*. at 409 (mentioning the lumber industry as example of how a country's policy decisions are influenced).

27. CONDON, *supra* note 16, at 213.

28. *See id*. at 213–18.

29. *See id*. at 214 (using Malaysia's refusal to participate in sea turtle protection as an example of free riding—gaining the benefit of the resource without participating in the cost of maintenance).

30. *See id*. at 214–15 (relying on the ruling in Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001)).

such penalties is that the penalty needs to be large enough to outweigh the economic gain from noncompliance. Thus, a larger WTO member can easily coerce a relatively small WTO member into compliance, while the inverse is not true. As a means of illustration, Condon identifies the United States's as a free rider in its refusal to sign onto the Kyoto Protocol.[31] The United States' role as the free rider subjects it to penalties in the form of trade barriers; however, the United States is only concerned about these penalties if they exceed the cost of compliance. The problem is that the cost of Kyoto Protocol compliance is so great[32] that it is impossible for any one country to unilaterally take action that would push the United States to sign onto the Kyoto Protocol.[33] Moreover, the United States has such a large market share of world imports that unilateral action against the United States could result in countermeasures that cripple the penalizing country.[34]

The relevance of these problems—relative importance of environmental protection and unequal access—is that while environmental protection as an ideal is widely supported, it is not a subject area that is free from controversy. Thus, as this Comment goes on to argue that the WTO's analysis of GATT Article XX(b) measures fail to adequately respect the importance of environmental protection, the Comment does not mean to indicate that the intersection of environment and trade is simple. Rather, the complexity of this intersection should prompt the WTO to think critically about how it settles disputes regarding environmental measures. Complex problems do not justify inconsistent logic and unfair tests—two features of the WTO's analysis of Article XX(b) measures.

In 2004, the WTO Secretariat emphasized and supported the pro-free trade sentiment driving Article XX environmental disputes: "WTO members recognize, however, that the WTO is not an environmental protection agency and that it does not aspire to become one. Its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade."[35] Although the environmental protection agency language is certainly hyperbolic, the assertion, as a whole, calls into question the true extent of the broad power allegedly retained by members under Article XX. It is with this quote in mind that this Comment begins its examination

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31. CONDON, *supra* note 16, at 215.

32. Condon admits that the exact cost of Kyoto Protocol compliance for the United States is uncertain; however, the facts still serve as a useful illustration of the importance of market share in the free rider problem. *See* CONDON, *supra* note 16, at 216 n.2 (citing two sources with vastly different compliance cost estimates).

33. *See id*. at 215–17 (arguing that no single country imports such a large percentage of US products that a total import ban would rise to the cost of Kyoto Protocol compliance).

34. *See id*. at 216–18 (using Canada as an example to show that the damage Canada's penalties could do to the United States is far less severe than a countermeasure imposed by the United States since 87.2% of Canada's exports go to the United States).

35. STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENT 185 (2010) (quoting WTO Secretariat, *Trade and Environment at the WTO* 6 (Apr. 2004), http://www.wto.org/english/res_e/booksp_e/trade_env_e.pdf).

of two WTO environmental disputes that illustrate how the WTO handles its analysis of environmental measures.

III. WTO DISPUTES: DISCRIMINATION OR JUSTIFIED EXCEPTION

The WTO has adjudicated numerous disputes where the alleged violating country has argued that their restriction on trade is a justified exception under GATT Article XX. An analysis of these two cases has a broad dual purpose. First, the facts and circumstances of each case highlight the nature of these disputes both in scale and scope. It is helpful to understand what a country is trying to achieve when it enacts measures. These goals become the crux of this Comment's argument in Parts IV and V. Second, the legal analysis and decisions of the WTO dispute settlement bodies, particularly the Appellate Body, in each case provides the foundation for this Comment's critique and proposal of a new framework for how future trade restrictions justified on Article XX(b) grounds should be handled by the WTO. More particularly, *United States – Standards for Reformulated and Conventional Gasoline* (*US–Gasoline*)[36] provides important background information for how the WTO ended up adopting a two-step test for Article XX disputes. It is with this case that the Comment demonstrates how the WTO empowered the Article XX chapeau. This Comment uses *Brazil – Measures Affecting Imports of Retreaded Tyres* (*Brazil–Tyres*)[37] to flesh out the Article XX(b) necessity test. The disputes also serve as examples of the power instilled in the chapeau relative to an individual provision like Article XX(b).

A. United States – Standards for Reformulated and Conventional Gasoline

US–Gasoline was the first case settled by the WTO dispute settlement bodies[38] and as such is a good starting point for an examination of the WTO analysis of an Article XX dispute. In 1995, Venezuela and Brazil challenged the gasoline regulations set forth by the U. S. Environmental Protection Agency (EPA) pursuant to their authority and responsibility under the Clean Air Act.[39] Particularly, Venezuela and Brazil took issue with laws and corresponding regulations dictating gasoline quality, commonly referred to as the Gasoline Rule.[40] The Clean Air Act and its regulations attempt to control pollution created by U.S. gasoline usage regardless of whether the gas was manufactured domestically or abroad.[41] As a means to achieve this goal, the Clean Air Act

36. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), WT/DS2/AB/R (Apr. 29, 1996).

37. Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), WT/DS332/R (June 12, 2007).

38. NATHALIE BERNASCONI-OSTERWALDER, DANIEL MAGRAW, MARIA JULIA OLIVA, MARCOS ORELLANA & ELISABETH TUERK, ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 100 (2006).

39. 42 U.S.C. § 7545(k) (2011).

40. Appellate Body Report, *US–Gasoline*, ¶ (I), WT/DS2/AB/R.

41. *See* Henrik Horn & Petros C. Mavroidis, *Environment, Trade, and the WTO Constraint:*

created two gasoline programs aimed at the composition[42] and performance of gasoline,[43] one for reformulated gasoline[44] and another for conventional gasoline.[45] The Clean Air Act tasked the EPA with the responsibility of implementing these programs and developing methods for proving compliance.[46]

The issue in *US–Gasoline* was the regulation of certain components of reformulated gasoline and all of the components of conventional gasoline. The EPA regulation subjected refiners, blenders, and importers to "non-degradation requirements."[47] In effect, the regulation required refiners, blenders, and importers of gasoline to keep their gasoline *at least* as clean as the gas they refined, blended, or imported in 1990, i.e. 1990 gasoline served as the baseline for these gasoline entities going forward.[48] Alternatively, if the 1990 baseline could not be ascertained, then the refiner, blender, or importer would be subject to the statutory baseline. The purpose of the baselines were to serve as an anti-dumping provision; the EPA did not want their regulation of reformulated gasoline to have the effect of gasoline refiners, blenders, and importers "dumping" the pollutants extracted from the reformulated gasoline into their conventional gasoline.[49] Therefore, if these gasoline entities met their 1990 baseline levels, then it follows that the regulation of reformulated gasoline did not have a deleterious effect on the quality of conventional gasoline.

Venezuela and Brazil's main problem with the EPA's regulations was that domestic refiners and blenders had more ways to determine their 1990 baseline levels and prove compliance with this level than foreign refiners, blenders, and importers.[50] Domestic refiners could establish their 1990 baseline levels using

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BOP Till You Drop?, 62 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL [HELLENIC REVIEW OF INTERNATIONAL LAW] 1, 28 (2009) (Greece).

42. Composition of gasoline is the actual chemical content of the gasoline. *See* 42 U.S.C. § 7545(k)(2)(C) (barring the use of heavy metals in gasoline unless the EPA expressly determines a particular heavy metal will not increase toxic air pollution).

43. Performance of gasoline is how the gasoline affects the environment after it has been emitted by a motor vehicle. *See, e.g.*, 42 U.S.C. § 7545(k)(3)(B)(ii) (limiting the amount of toxic air pollutants that can be emitted from vehicles using reformulated gasoline relative to a baseline gasoline).

44. 42 U.S.C. § 7545(k)(1)–(3) (stating that reformulated gasoline is intended to be sold and used in vehicles in nonattainment areas of the United States, i.e. areas failing to meet the national ambient air quality standards set forth in the Clean Air Act. 42 U.S.C. § 7501(2)); *see also* Appellate Body Report, *US–Gasoline*, ¶ (I)(B), WT/DS2/AB/R (identifying nonattainment areas as the nine largest metropolitan areas with the worst summertime ozone pollution in addition to areas specifically identified by state governors).

45. 42 U.S.C. § 7545(k) (conventional gasoline is gasoline that has not been certified as reformulated gasoline and therefore is sold and used in vehicles in areas of the United States that have not been designated as nonattainment areas. *See* 42 U.S.C.A. § 7545(k)(10)(F)).

46. 42 U.S.C. § 7545(k)(1).

47. Appellate Body Report, *US–Gasoline*, ¶¶ (I)(B)(1)–(2), WT/DS2/AB/R.

48. *Id.* ¶ (I)(B)(2).

49. *Id.*

50. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasolin*e"), ¶¶ 6.3–6.4, WT/DS2/R (Jan. 29, 1996).

three methods.[51] Meanwhile, foreign refiners, blenders, and importers only had one method available to establish their 1990 baseline;[52] this made it more likely that these entities would be subject to the statutory levels dictated by the EPA. Venezuela's national oil company, Petróleos de Venezuela Sur America (PDVSA), estimated that adherence to the statutory baseline would decrease its exports by $150 million between 1995 and 1997.[53]

Venezuela and Brazil's strongest argument was that by promulgating these regulations, the United States held foreign refiners, blenders, and importers to a more stringent standard than domestic refiners and blenders[54] and thus was favoring domestic gasoline over foreign gasoline (a violation of GATT Article III(4)).[55] Although the United States put forth several arguments to rebut the Article III(4) violation, their important argument for this discussion was that even if they did violate Article III(4), their regulations were protected by GATT Article XX(b) and Article XX(g). The United States asserted that air pollution presents a health risk to humans, animals, and plants; moreover, since vehicle emissions causes approximately half of all air pollution, the United States was justified under Article XX(b) to regulate gasoline.[56] The United States also claimed that clean air is an exhaustible resource and the best way to preserve that resource is to limit air pollution in accordance with its authority under Article XX(g).[57]

1. GATT Article XX(b) analysis: a focus on "necessity"

The WTO Panel (the Panel) handling the dispute dispatched the United States' Article XX(b) argument with a three pronged analysis. First, the Panel looked at whether the policy in question fell within the range of policies designed to protect human, animal, and plant life.[58] Second, the Panel examined whether the inconsistent measures that required using the Article XX(b) exception were necessary to fulfill the policy objective.[59] Third, the Panel assessed whether the regulations promulgated by the United States complied with the chapeau of Article XX.[60] This approach is standard in assessing GATT Article XX(b) arguments. The first prong of this analysis is considered relatively easy to satisfy while the second

51. 40 C.F.R. § 80.91(b)(1) (2013).

52. 40 C.F.R. § 80.91(b)(2)–(3).

53. TRISH KELLY, THE IMPACT OF THE WTO: THE ENVIRONMENT, PUBLIC HEALTH AND SOVEREIGNTY 19 (2007).

54. *See id.* at 16 (juxtaposing Brazil and Venezuela's complaints with the US political climate that pitted domestic refiners against environmentalists).

55. GATT art. III(4) (establishing that a country cannot treat imported products less favorably than the like products of domestic origin).

56. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasolin*e"), ¶ 6.21, WT/DS2/R (Jan. 29, 1996).

57. *Id.* ¶ 6.36.

58. *Id.* ¶ 6.20.

59. *Id.*

60. *Id.*

and third prongs present more complex problems.[61] Discerning whether a measure is necessary (prong two) or was implemented in good faith (prong three) requires a more thorough analysis than merely evaluating whether a stated policy fits within the language of Article XX(b).

Doyle's assertion regarding the first prong proved true as the Panel, Venezuela, and Brazil agreed with the United States that their gasoline regulations constituted a policy designed to protect human, animal, and plant life.[62] The Panel then turned to the necessity prong of its analysis and explained that this analysis turned on the necessity of the violation, not the necessity of the policy objective.[63] As applied to this case, the Panel was looking at the necessity of the GATT Article III(4) violation, not the necessity of reducing air pollution to protect human, plant, and animal life.

The Panel applied a definition of "necessary" that had been developed and set forth by GATT Panels in prior cases: "Import restrictions . . . could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which [the country] could reasonably be expected to employ to achieve its health policy objectives."[64] While the United States maintained that EPA gasoline regulations and the use of individual or statutory baseline levels satisfied the "necessary" requirement, the Panel remained unconvinced. The Panel put forth several alternative measures that would have satisfied the GATT: applying a statutory baseline to all refiners, blenders, and importers; giving foreign refiners the option to determine individual 1990 baselines using methods available to domestic refiners; and treating importers differently as a means to maintain competitive and no less favorable conditions for imported products relative to like domestic products.[65] The United States ultimately conceded the "necessary" prong and its Article XX(b) argument;[66] instead, the United States attempted to win this dispute on appeal using its Article XX(g) argument.

2. GATT Article XX(g) analysis: a lesson in principles of interpretation

The WTO Panel had ruled against the United States's Article XX(g) argument because they concluded that the violating measures were not "primarily aimed at" the conservation of clean air, although they agreed that clean air was an exhaustible natural resource.[67] Similar to the Panel's analysis of the Article XX(b) necessity prong, the Panel narrowly construed "measures" to be limited to only

61. Christopher Doyle, Note, *Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the China-Audiovisual Products Case*, 29 B.U. INT'L L.J. 143, 153 (2011).

62. Panel Report, *US–Gasoline*, ¶ 6.21, WT/DS2/R.

63. *Id.* ¶ 6.22.

64. *Id.* ¶ 6.24 (citing Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R-37S/200 (Oct. 5, 1990)) (alteration in original).

65. *Id.* ¶ 6.25.

66. ZLEPTNIG, *supra* note 35, at 232 (indicating that the United State's failure under the Article XX(b) necessity test was not appealed to the Appellate Body).

67. Panel Report, *US–Gasoline*, ¶¶ 6.37, 6.40, WT/DS2/R.

those measures that violated the GATT and not the regulation scheme as a whole; moreover, the Panel characterized these measures as the "less [favorable] baseline establishment methods,"[68] a characterization that would prove problematic for the WTO Appellate Body.

The Appellate Body, hearing the United States' appeal of the Panel's Article XX(g) ruling, overruled the determination that the EPA regulations were not "primarily aimed" at the conservation of clean air. The Appellate Body criticized the Panel for allowing prior legal conclusions to guide their analysis: "The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less [favourable] treatment.'"[69] Additionally, the Appellate Body distinguished the "relating to" language of Article XX(g) as less restrictive than the "necessary" language of Article XX(b).[70] Working from this framework, the Appellate Body undertook an Article XX(g) analysis of its own.

After re-asserting that clean air is an exhaustible natural resource, the Appellate Body examined whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.[71] The Appellate Body explained that it was necessary to analyze the baseline establishment rules in the context of their value to the overall scheme of the Gasoline Rule, specifically the need to scrutinize compliance with the non-degradation requirement: "Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated."[72] The Appellate Body concluded that the symbiotic relationship of the baseline values and the non-degradation requirement was enough to show that the measure was primarily aimed at conserving clean air.[73]

The third prong of the Appellate Body's analysis focused on the following clause of Article XX(g): "if such measures are made effective in conjunction with restrictions on domestic production or consumption."[74] The Appellate Body, again

68. *Id.* ¶ 6.40.

69. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), ¶ (III)(B), WT/DS2/AB/R (Apr. 29, 1996).

70. *Id.* (explaining that as a matter of basic principles of interpretation, it is unreasonable to think that WTO members used a variety of terms if they intended each exception to require the same level of connectedness between measure and policy); *see also* GOYAL, *supra* note 4, at 157–58 (discussing the Appellate Body's statutory interpretation of "relating to" in light of other word choices made in provisions of Article XX).

71. The "primarily aimed at" language is not part of Article XX(g); however, both the Panel and the Appellate Body identified this language first established in Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.6, L/6268-35S/98 (Nov. 20, 1987) as the appropriate test for determining whether a measure was related to the policy objective.

72. Appellate Body Report, *US–Gasoline*, ¶ (III)(B), WT/DS2/AB/R.

73. *Id.*

74. *Id.* ¶ (III)(C).

using basic principles of interpretation, asserted that these words should be afforded their plain meaning in the context of achieving the treaty's purpose.[75] This interpretive technique led the Appellate Body to conclude that this prong of the analysis is essentially an even-handedness requirement,[76] i.e. if the measure is primarily aimed at conserving an exhaustible natural resource, then there ought to be similar domestic restrictions primarily aimed at conserving that resource. The Appellate Body's conclusion is a departure from prior GATT Panel decisions that required an empirical test showing the effectiveness of the measures.[77] In this dispute, the baseline establishment rules were imposed on all refiners, blenders, and importers, it was only the differing treatments under these rules that were called into question—a question that the Appellate Body would not fully address until its chapeau analysis. It was this across-the-board requirement affecting foreign and domestic parties that led the Appellate Body to conclude that the Gasoline Rule satisfied this prong of the analysis.

3. GATT Article XX chapeau analysis

The final hurdle for the United States's Gasoline Rule was satisfying the Article XX chapeau, the last prong for all Article XX analyses. The Appellate Body reaffirmed the purpose of the chapeau—to prevent the abuse of these exceptions in light of the legal obligations that WTO members owe under the GATT.[78] In light of this purpose, the Appellate Body articulated that the chapeau requirements are more difficult to satisfy than any particular Article XX provision; however, a failure to satisfy the chapeau cannot merely be a restatement of the GATT violation that led to the invocation of an Article XX exception.[79] This reasoning is justified not only by logic, but also by the basic principle of interpretation that bars interpretations that diminish the value of treaty provisions.[80] This principle is known as the "principle of effectiveness" and is successful in ensuring that provisions of a treaty are read in their full context and not in isolation.[81]

If the chapeau only required a re-showing of a GATT violation, then either the exception would be a false option or the GATT obligation would be redundant because the chapeau already provided the protection. Conversely, if a successful showing of satisfying a particular GATT Article XX provision were enough to satisfy the chapeau, then the chapeau language would be superfluous. To avoid such a conflict, the Appellate Body adopted a chapeau analysis that assessed the environmental measure from a unique angle.

The Appellate Body acknowledged that the chapeau contains two

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75. *Id.*

76. *Id.*

77. GOYAL, *supra* note 4, at 158–60 (explaining the change in the WTO's interpretation of the "made effective" clause of Article XX(g)).

78. Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R.

79. *Id.*

80. *Id.*

81. ZLEPTNIG, *supra* note 35, at 79.

components: the scope of application[82] and the violating actions.[83] The Appellate Body declined to issue any ruling on the former because none of the parties to the dispute had questioned the scope of the chapeau's application.[84] Instead, the Appellate Body examined the United States's baseline establishment rules to see whether the regulations constituted a violation under the chapeau. The Appellate Body construed the impermissible actions of the chapeau to work in conjunction with one another, rather than be mutually exclusive.[85]

The Appellate Body engaged in an analysis that for the most part seemingly mirrored the WTO Panel's Article XX(b) "necessary" prong analysis; however, the Appellate Body managed to push the analysis further just enough to stay true to their interpretation of the chapeau relative to other GATT provisions. While the Panel's "necessary" analysis focused on the availability of alternatives,[86] the Appellate Body distilled the United States's real concerns by focusing on its response to why none of the WTO alternatives were reasonable courses of action, distilled the United States' real concerns.[87] The first identified concern was administrative problems.[88] The second identified concern was the financial burden of compliance with the statutory baseline.[89]

The United States indicated several administrative problems with allowing foreign refineries to establish their own baselines;[90] mainly, the EPA would have a difficult time verifying and enforcing the baseline requirements on importers if every foreign refinery was determining their own 1990 baseline levels.[91] Rather than delve into the legitimacy of this argument, the Appellate Body looked to see if the United States had taken any identifiable actions to remedy these administrative concerns.[92] The Appellate Body could find any evidence of the United States reaching out to Venezuela or Brazil to not see what could be done to alleviate the

82. One clause of the chapeau applies to actions "between countries where the same conditions prevail." Another clause applies to "international trade." GATT art. XX. The Appellate Body seems to indicate that certain actions may be justified in one context but not the other, but does not commit to this view.

83. The Chapeau includes three violating actions: arbitrary discrimination, unjustifiable discrimination, and disguised restrictions. GATT art. XX.

84. *See* Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R (stating that it was unnecessary to decide the scope or application of the Chapeau's standards).

85. *See id*. ¶ (III)(C) (defining and applying the word conjunction as used in the given context).

86. *See generally* Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), ¶¶ 3.39–3.46, WT/DS2/R (Jan. 29,1996) (analyzing the alternatives and what was necessary).

87. *See* Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R (discussing alternate options such as applying the statutory baseline to all gasoline producers, and why the United States is saying that is not a viable alternative).

88. *Id*.

89. *Id*.

90. *Id.*

91. *Id.*

92. *See id*. (discussing how the Appellate Body assessed the situation).

United States's verification and enforcement concerns.[93]

The United States had also argued before the WTO Panel that domestic refineries had not been subjected to the statutory baseline value (except in limited circumstances) because of the physical and financial burden associated with compliance.[94] The Appellate Body conceded the soundness of the domestic policy decision; however, that concession did little to change the reality that the EPA had failed to factor in appropriately the financial burden placed on foreign refineries when requiring importers to meet the statutory baseline levels.[95]

The Appellate Body's identification of these two failures on the part of the United States served as the basis for its conclusion that the United States's had applied these regulations in violation of the chapeau although the United States and the EPA had properly identified clean air as an exhaustible natural resource and developed justifiable regulations to respond to that environmental problem.[96] Specifically, the Appellate Body ruled that the regulations "constitute[d] 'unjustifiable discrimination' and a 'disguised restriction on international trade'"[97] and, therefore, the United States could not implement its Clean Air Act regulations as drafted.[98]

B. Brazil – Measures Affecting Imports of Retreaded Tyres

In 2005, the European Communities (EC)[99] filed a complaint with the WTO regarding Brazil's import ban on retreaded tyres.[100] The ban was set forth in Article 40 of Portaria 14 of 17 November 2004 (Portaria SECEX 14/2004) of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX).[101] Notably, Portaria SECEX 14/2004

93. Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R (citing the United States's assertion that the EPA was unable to conduct on-site audits of foreign refineries as evidence that the U.S. had failed to conduct any meaningful discussions with foreign governments to aid in the administration of its new Gasoline Rule).

94. *Id.* (citing Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), ¶ 6.26, WT/DS2/R (Jan. 29, 1996)).

95. *See* Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R (reporting that Venezuela's national oil company estimated compliance costs to be $150 million in exports between 1995 and 1997).

96. *Id.*; Panel Report, *US–Gasoline*, ¶¶ 6.23–6.26, WT/DS2/R.

97. Appellate Body Report, *US–Gasoline*, ¶ (IV), WT/DS2/AB/R.

98. *See* KELLY, *supra* note 53, at 29 (explaining that the United States had to treat foreign refiners, blenders, and importers in the same manner as domestic refiners and blenders).

99. The official name of the European Union countries in the WTO until November 30, 2009. *Member Information: The European Union and the WTO*, WORLD TRADE ORG. http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Feb. 21, 2013).

100. *See generally* Request for Consultations by the European Communities, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), WT/DS332/1 (June 23, 2005).

101. Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), ¶ 2.7, WT/DS332/R (June 12, 2007); *see also id.* ¶¶ 7.13–7.15 (explaining that the actual language of Portaria SECEX 14/2004 only bans the issuance of import licenses; however that admittedly has the effect of banning imports because of Brazil's license requirement).

included a clause that exempted MERCOSUR countries[102] from the import ban.[103] This exemption—a root of controversy—ultimately played a critical role in the WTO analysis of Portaria SECEX 14/2004 in both the Panel and Appellate Body reviews of this case.[104]

The EC alleged that Brazil's import ban on retreaded tyres violated several provisions of the GATT[105]—most obviously, GATT Article XI(1), which addresses "prohibitions or restrictions other than duties, taxes or other charges."[106] Rather than challenge the violation of GATT Article XI(1), Brazil conceded the violation[107] but argued that GATT Article XX(b) protected the import ban.[108] Of course, such an argument should trigger a WTO analysis that mirrors the one described in Part III(A)(1) of this Comment, which will serve as a useful comparison going forward.

Unlike the more obvious deleterious health effects resulting from gasoline consumption in *US–Gasoline*, Brazil's Article XX(b) argument is less readily apparent. It requires some context to understand why Brazil implemented the import ban and what it stood to gain from the ban. Retreaded tyres are produced by replacing the worn down tread and sometimes the sidewalls of used tyres from a variety of vehicles: passenger cars, commercial vehicles, and aircrafts.[109] The international regulations from the U.N. Economic Commission for Europe (UNECE) restrict passenger vehicles to only one retreading, while other tyres can be retreaded more than that.[110] Though it is not a party bound by the UNECE regulations of retreaded tyres, Brazil has relied on them in developing its own tyre regulations.[111] For example, in Brazil, passenger vehicle tyres cannot be retreaded more than once.[112] The effect of such regulation is that retreaded tyres have a shorter lifespan than new ones. When taken one step further, this logical progression is where Brazil identified its true concern—tyres with a shorter lifespan lead to a faster accumulation of waste tyres, which have hazardous effects.[113]

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102. Joanna Klonsky, Stephanie Hanson & Brianna Lee, *MERCOSUR: South America's Fractious Trade Bloc*, COUNCIL ON FOREIGN REL. (July 31, 2012), http://www.cfr.org/trade/mercosur-south-americas-fractious-trade-bloc/p12762 (listing Argentina, Brazil, Paraguay, Uruguay, and Venezuela as MERCOSUR members).

103. Panel Report, *Brazil–Tyres*, ¶ 2.7, WT/DS332/R.

104. *See generally id.*; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US–Gasoline*"), WT/DS2/AB/R (Apr. 29, 1996).

105. Panel Report, *Brazil–Tyres*, ¶ 3.1 (a)–(e), WT/DS332/R.

106. GATT art. XI(1).

107. Panel Report, *Brazil–Tyres*, ¶ 4.2, WT/DS332/R.

108. *Id.* ¶¶ 4.3–4.4.

109. *Id.* ¶¶ 2.1–2.3.

110. *Id.* ¶ 2.3 (citing United Nations Economic Commission for Europe Regulations 108 and 109).

111. *Id.* ¶ 3.1–3.4.

112. *Id.* ¶ 3.3(a).

113. Panel Report, *Brazil–Tyres*, ¶ 4.11, WT/DS332/R (identifying Brazil's policy objective

Brazil identified two main hazardous problems caused by the accumulation of waste tyres: spread of mosquito-borne disease[114] and release of toxic chemicals into the environment.[115] The most pressing concern was the spread of dengue virus, which is a problem that has plagued Brazil for centuries.[116] This problem persisted even after the WTO Appellate Body issued its ruling in 2007; in the first quarter of 2008, there were 120,570 reported cases of dengue and 48 reported deaths, and both numbers are presumed to be underreported.[117] The mosquitoes that spread the dengue virus breed in stagnant water, a breeding ground that can be found in any number of the 100 million waste tyres found throughout Brazil.[118] In an attempt to address this dire problem, Brazil passed legislation aimed at reducing the rate at which these "breeding grounds" accumulated;[119] moreover, its attempt needed to account for certain disposal methods that cause serious damage to the environment.

Brazil further asserted that the root of this health hazard—accumulation of waste tyres—cannot be eliminated because as long as tyres exist, they will eventually become waste tyres; thus, Brazil argued that reducing the amount of waste tyres generated was an appropriate response to reduce the impact of the health hazards.[120] Brazil relied on several WTO Panel and Appellate Body reports that defended a country's autonomy to enact measures that reduce health risks within the scope of Article XX(b), even if those measures do not entirely eliminate the problem.[121] Ultimately, the WTO Panel determined that Brazil satisfied its initial Article XX(b) burden by showing that the retreaded tyre import ban was an attempt to address risks to human, plant, and animal life.[122] Of course, this initial Article XX(b) showing was only the first hurdle for Brazil; the Panel's ensuing analyses regarding the necessity of the import ban and its legitimacy under the chapeau are far more stringent tests.

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in implementing the import ban).

114. Specifically, Brazil was concerned with the dengue epidemic. *See id.* ¶ 4.28 (indicating that dengue was identified by the World Health Organization as a major problem).

115. *Id.* ¶¶ 4.11−4.12.

116. Nikolaos Lavranos & Nicolas Vielliard, *The Brazilian Tyres Case: Competing Trade and Non-Trade Interests and Competing Jurisdictions between MERCOSUR and WTO*, 17 EUR. ENERGY & ENVTL. L. REV. 306, 307 (2008) (chronicling the first case of dengue in 19th century Brazil and continuing up through the national outbreaks in 1986, 1991, and 2001 during which times there were two million reported cases).

117. *Id.*

118. *Id.* at 207–08.

119. *Id.* at 208.

120. *See* Panel Report, *Brazil–Tyres*, ¶¶ 4.13–4.15, WT/DS332/R (explaining Brazil's thought process in ascertaining how to fulfill its policy objectives).

121. *See id.* ¶ 4.16 & nn. 61, 63 (relying on Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 172, WT/DS135/AB/R (Mar. 3, 2001), Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 6.224, WT/DS276/R (Apr. 6, 2004)).

122. *See id.* ¶ 7.93 (summarizing the Panel's finding that the health risks posed by mosquito-borne diseases and the release of toxic chemicals from waste tyre fires fall within the scope of GATT Article XX(b); *see also supra* notes 55, 58, and accompanying text explaining that falling within the scope of an Article XX(b) exception is the easiest requirement of the three).

1. GATT Article XX(b): necessity hangs in the balance

Relying on prior WTO Appellate Body reports, the Panel explained how the necessity of a violation is determined:

> [T]he necessity of a measure should be determined through "a process of weighing and balancing a series of factors," which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[123]

The Panel echoed the standard set forth in *US–Gasoline* in its explanation that the test would be evaluating the necessity of Brazil's import ban, not the necessity of responding to the health risks posed by toxic emissions and mosquito-borne diseases.[124] The Panel methodically proceeded to analyze each factor of the balancing test. The Panel articulated—as the WTO had done in the past—that protecting human life from health risks is a vital interest of the highest importance.[125] In reaching its conclusion that the import ban was furthering the values of protecting human life and the environment, the Panel cited the spread of mosquito-borne diseases[126] and the side effects of exposure to the toxic emissions from tyre fires.[127] It is relevant to note that although Article XX(b) does not include the term "environment," the Panel determined that Brazil's goal of protecting the environment was its informal way of referring to animal and plant life.[128] While the Panel's analysis of the health risks to plant and environmental life was brief, it was satisfied with Brazil's showing of the risks posed by the accumulation of waste tyres.[129]

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123. *Id.* ¶ 7.104 (relying on Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 172, WT/DS135/AB/R (Mar. 3, 2001); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 305, WT/DS285/AB/R (Apr. 7, 2005); Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 70, WT/DS302/AB/R (Apr. 25, 2005)).

124. *Id.* ¶ 7.106.

125. *See id.* ¶ 7.108 (relying on language used by Brazil in framing the objective in its arguments to the WTO).

126. Panel Report, *Brazil–Tyres*, ¶¶ 7.109–7.110, WT/DS332/R (expressing particular concern in regards to dengue which the World Health Organization recognized as the "most important emerging tropical viral disease" and a "major international public health concern.").

127. *See id.* ¶ 7.109 ("[T]he exposure of human beings to toxic emissions caused by tyre fires . . . may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.").

128. *See id.* ¶¶ 7.44–7.46 (indicating its willingness to allow Brazil to use the term environment, so long as Brazil made a connection to plant and animal life and did not attempt to argue for general environmental protection).

129. *See id.* ¶ 7.112 (listing the alleged risks and concluding that such risks fell within the WTO members commitment to protecting the environment).

The Panel addressed the trade restrictiveness of the import ban, but spent relatively few words on the issue because the EC argued and the Panel agreed that an import ban is "as trade-restrictive as can be"[130] and has the "highest negative impact on international trade."[131] It is important to emphasize that this factor could not be working against Brazil anymore; Portaria SECEX 14/2004—subject to a balancing test—had a major strike to overcome.

The final piece of the Panel's analysis assessed whether the import ban contributed to Brazil's goal of decreasing waste tyre accumulation[132] and, if so, whether such a decrease reduced the identified health risks cited by Brazil.[133] This analysis seemingly turned on the contentious issue of whether contribution could be shown qualitatively, as argued by Brazil, or must be proved quantitatively, as argued by the EC.[134] The Panel's determination, that quantification was acceptable but not required to show a satisfactory contribution,[135] was a critical blow to the EC's argument against the necessity of the import ban.

The Panel proceeded to focus on whether the import ban *could* reduce waste tyre accumulation, rather than consider whether there was any statistical evidence that showed an actual reduction. This theoretical approach guided the Panel's evaluation of the tyre market in Brazil and how it would likely be affected by the retreaded tyre import ban. Ultimately, the Panel accepted Brazil's arguments that use of new tyres with a longer life span[136] and the domestic retreading of used tyres[137] were likely to reduce the accumulation of waste tyres in Brazil because imported retreaded tyres had a shorter life span, could not be retreaded again, and therefore accumulated at a faster rate.[138] Because the risks associated with the accumulation of waste tyres had already been established, the Panel could easily conclude that a measure that contributed to the reduction of waste tyres would necessarily lead to diminished health risks.[139]

The EC appealed the Panel's ruling and re-asserted that the proper legal standard to determine contribution was actual contribution, not potential contribution.[140] The Appellate Body affirmed the Panel's ruling and legal analysis.[141]

Curiously, as noted by the EC in its appeal, the Panel instantly moved from its

130. *Id.* ¶ 7.114.
131. *Id.* ¶ 7.113.
132. Panel Report, *Brazil–Tyres*, ¶¶ 7.123–7.142, WT/DS332/R.
133. *Id.* ¶¶ 7.143–7.147.
134. *Id*. ¶¶ 7.116–7.117.
135. *Id.* ¶ 7.118.
136. *Id.* ¶ 7.127.
137. *Id.* ¶ 7.131.
138. Panel Report, *Brazil–Tyres*, ¶ 7.130, WT/DS332/R.
139. *Id.* ¶¶ 7.146–7.148.
140. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), ¶ 137, WT/DS332/AB/R (Dec. 3, 2007).
141. *Id.* ¶ 155.

conclusion that the import ban contributed "to the objective pursued"[142] to an evaluation of the proposed alternatives.[143] The immediate shift is curious given the balancing that is supposed to be taking place—it is unclear how the WTO can determine whether an alternative is the "less WTO-inconsistent measure" if it has not established in any terms exactly how the import ban rates among the three factor necessity test.[144] It was only after evaluating the availability of alternatives that the Panel returned to its "weighing and balancing" process.[145] Nonetheless, the Panel pushed its analysis forward and began its evaluation of potential alternatives to the import ban.

The EC cited two broad categories of measures for waste tyres that could be taken by Brazil in lieu of its import ban: reduction and management.[146] The problem facing the EC's proposed alternative measures was the understanding that Brazil had the power to seek protection from risks covered by Article XX(b) at whichever level it chose—Brazil decided to seek protection by reducing the risks to the maximum extent possible.[147] The ability to dictate a country's desired level of protection is a power that some argue puts complainants on the defensive in identifying sufficient alternatives.[148] This was the problem for the EC because well-reasoned proposals, like reducing the number of imported used tyres[149] or promoting domestic retreading,[150] do not actually address the problem of imported retreaded tyres.[151] The Panel acknowledged that the EC's proposals were less trade restrictive but ultimately agreed with Brazil that the proposals were not substitutable, even if they would contribute to Brazil's goal of waste tyre reduction.[152] On appeal, the Appellate Body referenced its determination in *US–Gambling* that "a measure or practice will not be viewed as an alternative unless it 'preserve[s] for the responding Member its right to achieve its desired level of

142. Panel Report, *Brazil–Tyres*, ¶ 7.148, WT/DS332/R.

143. *See* Appellate Body Report, *Brazil–Tyres*, ¶ 176, WT/DS332/AB/R (describing the EC's argument regarding the superficial balancing test used by the WTO).

144. *See* Panel Report, *Brazil–Tyres*, ¶ 7.151, WT/DS332/R (summarizing the Panel's conclusion regarding the three relevant factors but not weighing them against one another).

145. *See id.* ¶ 7.209 (declaring that the following paragraphs will include the Panel's determinations under the weighing and balancing test).

146. *Id.* ¶ 7.163.

147. *See id.* ¶ 7.108 (asserting Brazil's right to determine its desired level of protection and explaining that Brazil had chosen to seek the maximum protection possible).

148. Schloemann, *supra* note 19.

149. *See* Panel Report, *Brazil–Tyres*, ¶ 7.170, WT/DS332/R (describing the EC's assertions that Brazil has not taken measures to prevent the importation of used tyres due to court injunctions).

150. *See id.* ¶ 7.164 (describing the EC's assertions that Brazil has not taken measures to encourage domestic retreading).

151. *See id.* ¶ 7.166 ("Non-generation solutions proposed by the [EC] could be alternatives only if Brazil sought to reduce waste tyre volumes by a particular amount and that these suggested measures are . . . additional measures, because without the import ban, some tyre waste that could have been prevented would not, in fact, be prevented.").

152. *Id.* ¶ 7.169.

protection with respect to the objective pursued.'"[153]

The Panel also assessed the EC's waste management proposals—landfilling and stockpiling, incineration, and material recycling.[154] The Panel deemed each proposal flawed in one way or another: land filling and stockpiling did not address the problem of having too many tyres;[155] incineration still releases toxic emissions and poses health risks;[156] and material recycling, while ideal, was likely cost prohibitive, especially given the increasing number of tyres that would need to be recycled without the import ban.[157]

In concluding its necessity analysis, the Panel asserted its method—"[i]n 'weighing and balancing' these elements"[158]—however, the ensuing analysis did not appear to expressly balance anything. The WTO Panel, by contextualizing the measure and defining it narrowly, really limited any possible balancing effort. The Panel concluded that the health risks posed by the accumulation of waste tyres were likely to be best tackled by a comprehensive scheme with different measures addressing specific aspects of the problem.[159] By characterizing the problem so broadly, the Panel was able to conclude that the import ban was a narrow measure aimed at the influx of short-life-span tyres coming into Brazil.[160] Such a narrow view of the import ban, while not incorrect or inappropriate, played a major part in upending the possibility of a true balancing test. The EC's proposed alternatives were not even eligible to be weighed and balanced because they failed to fit the narrow scope of Brazil's import ban and were more suitable as complements, not substitutes.[161] On appeal, the Appellate Body affirmed the Panel's assessments of the proposed alternatives and disagreed with the EC's claim that the Panel's balancing test was superficial.[162]

Strictly looking at the amorphous weighing and balancing process and the stringent available alternatives approach used by the Panel and affirmed by the Appellate Body as an appropriate way to determine necessity, the logical conclusion would be that the WTO has recognized the importance of environmental protection and has taken analytical steps to ensure that countries are free to respond to environmental concerns as they see fit. This conclusion would be wrong because the WTO's trump card waits in the GATT Article XX chapeau.

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153. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), ¶ 170, WT/DS332/AB/R (Dec. 3, 2007) (quoting Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R (Apr. 7, 2005)).

154. Panel Report, *Brazil–Tyres*, ¶ 7.179, WT/DS332/R.

155. *Id.* ¶ 7.189.

156. *Id.* ¶ 7.194.

157. *Id.* ¶ 7.208.

158. *Id.* ¶ 7.213.

159. *Id.* ¶¶ 7.213–7.214.

160. Panel Report, *Brazil–Tyres*, ¶ 7.214, WT/DS332/R.

161. *See id.* ¶¶ 7.214–7.215 (concluding that the proposed alternatives were not sufficient alternatives and therefore the import ban was necessary under Article XX(b)).

162. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), ¶¶ 174–83, WT/DS332/AB/R (Dec. 3, 2007).

2. GATT Article XX Chapeau: liberalized trade trumps health risks

Satisfying the "necessary" clause of Article XX(b) only satisfies step one of the two-step test that the WTO applies to Article XX protected measures.[163] The Article XX chapeau is a test designed to root out measures that, in practice, include unjustifiable or arbitrary distinctions between countries and disguised restrictions on trade.[164] Two previously unexamined details of the import ban rose to the forefront in the Panel's chapeau analysis: the MERCOSUR exemption and the continued imports of used tyres through injunctions issued by Brazilian courts.[165]

The Panel first established that, as applied, the retreaded tyre import ban was clearly discriminatory, as suggested by the EC.[166] The discrimination in this case was fairly obvious given that under Portaria SECEX 14/2004, some countries were still allowed to import retreaded tyres and as a result of injunctions, some countries were permitted to import used tyres, which counteracts the goal of the non-generation measure. Of course, the chapeau only restricts unjustifiable or arbitrary discrimination,[167] which meant that being deemed discriminatory under the chapeau was not a fatal blow to Portaria SECEX 14/2004.

The Panel gave considerable weight to the origin of the MERCOSUR exemption. Brazil did not voluntarily decide that MERCOSUR countries should be able to receive import licenses for retreaded tyres; rather, the exemption was a response to a MERCOSUR dispute filed by Uruguay where the judicial body ruled against Brazil's import ban.[168] The Panel reasoned that Brazil's decision to include a MERCOSUR exemption could not be arbitrary or unjustified when it acted pursuant to a judicial ruling from a regional multilateral agreement aimed at liberalizing trade.[169] The Panel explained that regional trade agreements necessarily distinguish between parties to the agreement and non-parties; moreover, the WTO allows participation in these regional agreements.[170] In terms of whether the exemption was justifiable, the Panel examined the number of imports into Brazil from MERCOSUR countries—two thousand tons per year—relative to imports from the EC—fourteen thousand tons per year.[171] This disparity alleviated concerns that the EC would simply use MERCOSUR countries as middlemen—EC exports to a MERCOSUR country, then the MERCOSUR country exports to Brazil under the exemption. The Panel completed this logical progression and concluded that even with the exemption, Brazil was reducing

163. *See* ZLEPTNIG, *supra* note 35, at 112 (describing the steps of analysis in the two-tier test).

164. GATT art. XX.

165. Panel Report, *Brazil–Tyres*, ¶ 7.231, WT/DS332/R.

166. *Id.* ¶ 7.251.

167. GATT art. XX; *see also* Panel Report, *Brazil–Tyres*, ¶ 7.226(b), WT/DS332/R (stating that a measure must be arbitrary or unjustifiable in character to be restricted discrimination).

168. Panel Report, *Brazil–Tyres*, ¶¶ 7.271–7.273, WT/DS332/R.

169. *Id.* ¶ 7.273.

170. *Id.*

171. *Id.* ¶ 7.288.

retreaded tyre imports by 86%, a result in line with its goal of reducing the accumulation of waste tyres.[172]

As far as the court injunctions allowing Brazilian retreaders to import used tyres, the Panel cited Brazil's continuing efforts to fight these injunctions in court (to varying degrees of success).[173] Unfortunately for Brazil, the statistical evidence showing the effect of these court injunctions undermined its case. The EC presented undisputed evidence that the number of used tyres imported into Brazil from the EC increased from about 1.5 million in 2000 to about 10.5 million in 2005.[174] The problem with courts allowing imported used tyres was that it failed to reduce the use of short lifespan tyres and thus did not achieve its non-generation objective. The Panel rounded out this point by explaining that the discrimination was occurring between countries with similar conditions because a used tyre from the EC retreaded in Brazil is no safer, better, or more goal-oriented than a retreaded tyre imported directly from the EC; therefore, Brazil's retreading industry was receiving an unjustifiable boost from the import ban.[175]

Even though the used tyre import injunctions had already violated the unjustifiable clause of the chapeau, the Panel completed its chapeau analysis by examining whether either the MERCOSUR exemption or the import injunctions were disguised restrictions on trade. In trying to discern whether Portaria SECEX 14/2004 was a disguised restriction on trade, the Panel attempted to ascertain the intent of Brazil in enacting the law.[176] The EC encouraged this examination, arguing that Brazil passed the law as a means to protect Brazil's tyre industry at the expense of WTO members and with no real concern for the apparent health risks.[177] The Panel ultimately concluded, despite statements made by Brazilian government officials, the evidence was not persuasive to indicate that Brazil intended for Portaria SECEX 14/2004 to be a restriction on trade disguised as reducing health risks.[178]

The EC's last argument was that the import ban was merely a way to channel the behavior of exporting countries as evidenced by the increase of used tyres exported to Brazil.[179] The Panel agreed with the EC and concluded that the ban was a disguised restriction on trade given the court-issued injunctions that led to a steady increase of used tyre imports.[180] The logic was that Brazil could not claim to maintain this import ban on legitimate Article XX(b) grounds, when its objective had been undermined by the imports of used tyres that benefitted the domestic retreading industry.[181]

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172. *Id.*
173. *Id.* ¶¶ 7.292–7.294.
174. Panel Report, *Brazil–Tyres*, ¶¶ 7.299–7.300, WT/DS332/R.
175. *Id.* ¶¶ 7.308–7.309.
176. *Id.* ¶ 7.330.
177. *Id.* ¶ 7.328.
178. *Id.* ¶ 7.341.
179. *Id.* ¶ 7.347.
180. Panel Report, *Brazil–Tyres*, ¶¶ 7.348–7.349, WT/DS332/R.
181. *Id.* ¶ 7.348.

Even though Brazil ultimately lost, the EC appealed to the WTO Appellate Body seeking a more definitive victory, especially under its Article XX(b) necessity test arguments. While the EC failed to succeed on its Article XX(b) arguments, the Appellate Body reversed the Panel's determination that the MERCOSUR exemption was not arbitrary or unjustifiable discrimination.[182] The Appellate Body discarded—at least for this case—the relatively minimal effect the exemption had on Brazil's goals[183] and reaffirmed the standard that arbitrary and unjustifiable discrimination is determined by examining the cause or rationale of decision to discriminate.[184] This reversal was a striking blow to the logical conclusion reached at the end of Part III(B)(1) of this Comment. The Appellate Body demonstrated a reluctance to permit any arbitrary or unjustifiable discrimination, regardless of the actual effect or the deliberation that led to the decision.[185] The lack of a relationship between adhering to the MERCOSUR judicial ruling and fulfilling its stated objectives sealed the import ban's fate according to the Appellate Body.[186]

The juxtaposition of the necessity analysis and the chapeau analysis in *Brazil–Tyres* is eye opening. Not eye opening because of the result, but because the WTO dispute settlement bodies were so tediously thorough in determining that Brazil's actions were necessary, that it is shocking to see them move on to a second test that is so ruthless in its unwillingness to consider a world in which liberalized trade is of lesser importance.

IV. CRITIQUE: WTO'S FLAWED LOGIC

The WTO's foremost concern—the concern that defines its existence—is the protection of liberalized international trade.[187] It is natural and expected that the WTO would seek to prioritize liberalized trade above all else. The WTO however, does not exist in a vacuum; it exists in a world full of competing concerns, rising pressures, and dangerous risks that may affect one, some, most, or all of its member countries. The WTO is aware that its member countries have legitimate concerns that exist outside and perhaps in conflict with free and open trade, which is why the GATT Article XX exceptions exist. The problem is that the WTO's awareness is undermined by its entrenched assumption that free and open international trade is of supreme importance and, while other concerns can be

182. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil–Tyres*"), ¶ 233, WT/DS332/AB/R (Dec. 3, 2007).

183. *Id.* ¶ 229 (describing the Panel's effects-based approach to determining discrimination in violation of the chapeau).

184. *See* ZLEPTNIG, *supra* note 35, at 284 (discussing the Appellate Body's decision to focus on rationale instead of the actual effect of the discrimination).

185. *See* Appellate Body Report, *Brazil–Tyres*, ¶ 232, WT/DS332/AB/R (claiming that even rational decisions, like following a judicial order, can result in chapeau violating discrimination).

186. *Id.* ¶ 226.

187. Marrakesh Agreement pmbl.

addressed, they must be addressed on the WTO's terms.

The in-depth breakdown and summary of *US–Gasoline* and *Brazil–Tyres* has set the stage for showing how the WTO's reliance on a two-step Article XX exception test resulted in the entrenchment of flawed logic in WTO dispute analysis. Furthermore, both cases show the actual impact of allowing this flawed logic to dictate WTO analysis of measures falling within the scope of an Article XX exception.[188] The balancing test, used to determine Article XX(b) necessity in *Brazil–Tyres*, provides the clearest depiction of why the two-step WTO analysis is problematic but also serves as a useful starting point in illustrating how the WTO should address the problem moving forward.

A. The Two-Step Entrenchment

The WTO dispute bodies in *US–Gasoline* engaged in a two-step analysis. First the violating measure was examined under specific Article XX provisions. Once satisfied that the United States had instituted a scheme primarily aimed at the conservation of an exhaustible resource,[189] the WTO moved to step two: the chapeau. The shift to step two became problematic because of the WTO's reliance on a canon of statutory interpretation demanding that interpretations not diminish any provision of a treaty.[190] The effect of such an approach is that the WTO re-examined the legitimacy of violating measures from an application perspective.[191]

To see the flaw in the WTO's logic requires a step back. GATT Article XX is a concession on the part of the WTO that as a matter of state sovereignty, its member countries have a right to violate their responsibilities to the WTO for express reasons identified under Article XX. The GATT's interpretation of the Article XX chapeau undermines this concession to state sovereignty by dictating the terms by which member countries can exercise their sovereign powers. This idea is succinctly expressed by Sanford Gaines: "Although *Shrimp-Turtle* shows a refreshing appreciation of global environmental policy and opens the door to unilateral national environmental measures Article XX . . . that open door only leads to a second and more tightly guarded gateway, the Article XX chapeau."[192]

Essentially, the WTO in *US–Gasoline* ruled that the United States can enact measures that conserve clean air because clean air is a resource worth protecting

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188. *US–Gasoline* was ultimately an Article XX(g) exception; *Brazil–Tyres* was an Article XX(b) exception. While this Comment ultimately focuses on Article XX(b) because of its necessity test, it remains relevant to show that the problem identified in *Brazil–Tyres* is not limited to Article XX(b) cases.

189. *See* GATT art. XX(g) (including natural resources as a GATT exception).

190. *See supra* notes 77–80 and accompanying text (explaining the principle of effectiveness).

191. *See* CONDON, *supra* note 16, at 112 (highlighting the WTO's chapeau analysis and categorizing it as an application analysis).

192. Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 743 (2001) (using *Shrimp–Turtle*, an Article XX(b) and (g) dispute that violated the chapeau but was seen as a victory for environmental protection, to criticize the Article XX chapeau's failure to justify legitimate environmental measures).

(hence why Article XX exists), but that clean air can only be conserved if it is done in a way that does not offend the WTO's commitment to free and open international trade. At first glance, this may seem logical—conservation of clean air that fits within the liberalized trade framework is better than conservation of clean air that runs counter to liberalized trade; however, this preference is irrelevant to the Article XX analysis. In fact, such a comparison ignores the purpose of Article XX's existence. Remember, GATT Article XX allows free trade to be violated in certain instances. The chapeau analysis, as conducted by WTO dispute settlement bodies, effectively sets forth the following hierarchy: no clean air is preferable to conserving clean air in a manner that arbitrarily or unjustifiably discriminates or is a disguised restriction on international trade. If individual Article XX provisions identify concerns worthy of violating the GATT, then it is flawed logic to require those concerns worthy of GATT violation to be done in a particular manner or not at all. The WTO's interpretation of—and expectations under—the chapeau are rooted in an allegiance to liberalized trade above all else; a prioritization that is undermined by the analysis that the WTO conducts under subsections of Article XX.

This flawed logic has been entrenched in WTO Article XX disputes. Today, in practice, all Article XX concerns are assumed to be only as important and legitimate as their application. Both *US–Gasoline* and *Brazil–Tyres* satisfied an Article XX subsection but lost their disputes under the chapeau. This is a common theme in Article XX disputes.[193]

B. The Two-Step Test Undermines GATT Article XX(b)'s Necessity Analysis

Article XX(b) disputes provide great illustrations of the problem with the two-step test because of the fairly rigorous burdens that parties carry when trying to justify their violating measures. Satisfying the necessity requirement, as seen in *Brazil–Tyres*, requires surviving essentially two balancing tests. The first test weighs the value/importance of the objective and the level at which the violation contributes to that objective against the trade restrictiveness of the measure in question.[194] The second balancing test weighs the results of the first test against all the possible alternatives identified by the complaining party.[195] If a measure were to fail either test, then it would be unnecessary to reach a chapeau analysis.[196]

193. KELLY, *supra* note 53, at 84–85 (explaining that in the WTO dispute bodies exhibited a pattern in three cases: *US–Gasoline*, *US–Shrimp/Turtle*, and *EC–Hormones*. The pattern saw the Panels infringe on the right of a country to set its domestic policies. Then the Appellate Bodies would then reverse the Panels and support the WTO members' rights to set environmental and health policies; only then to declare that the measures enacted violated the chapeau). Trish Kelly's identification of this pattern was published before a similar result was seen in *Brazil–Tyres*.

194. *See* Schloemann, *supra* note 19 (reciting the checklist of concerns in the necessity analysis).

195. *See id.* (explaining the dispute bodies narrow approach to available alternatives in *Brazil–Tyres*).

196. Arjun Ponnambalam, *U.S. Climate Change Legislation and the Use of GATT Article*

Thus, the Article XX(b) necessity test requires a country to use the relatively least restrictive, narrowly tailored measures to achieve important objectives. In theory, a measure that seeks to reduce a minor health risk with an extreme trade restriction is just as likely to fail as a measure that seeks to reduce a major health risk but fails to account for less restrictive available alternatives.

This double-balancing interpretation of the Article XX(b) necessity test is not a consensus opinion on how WTO dispute settlement bodies actually handle their "weighing and balancing" duties. This disparity in interpretation is to be expected when reports are released that indicate that weighing and balancing were conducted, but provide no explanation or formula that rises to the level of predictability.[197] This uncertainty extends to WTO members[198] and legal scholars[199] and appears to provide the WTO an opportunity to reevaluate its current Article XX(b) analysis.

The existence of the second step of the Article XX analysis poses two complications. First, the dispute settlement bodies fail to fully assess a measure because it reserves important facts for their chapeau analysis.[200] Second, the chapeau analysis is not subject to any sort of balancing. For example, although environmental and health risks under Article XX(b) are only as valuable as the balancing test deems, the trade concerns protected by the chapeau are given the utmost priority. Thus, the WTO not only unfairly weighs the chapeau trade concerns above Article XX(b) environmental and health risks, but also reserves the analysis of how a measure is applied until such facts are no longer subject to a balancing relative to the importance of the objective pursued.

Brazil–Tyres provides one example of this method of reserving factors for later analysis: the Panel left unanalyzed the MERCOSUR exemption and the court-issued used tyre injunctions until its chapeau analysis.[201] Leaving the MERCOSUR exemption unanalyzed was especially glaring given that the exemption was included on the face of the law. The Panel reached its determination that the import ban was necessary to respond to the problem of waste tyre accumulation that posed severe risks to human health and the environment using neither a full nor true balancing test because it failed to account for two known circumstances that

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XX to Justify a "Competitiveness Provision" in the Wake of Brazil–Tyres, 40 GEO. J. INT'L L. 261, 269–70 (2009).

197. *See supra* notes 138–41, 147–52 and accompanying text for a showing the non-transparent balancing test allegedly conducted by the Panel in *Brazil–Tyres*.

198. *See supra* notes 133–34 and accompanying text for a discussion of the European Communities appeal of the necessity test determination because it thought the Panel failed to conduct a proper balancing test.

199. *See* Doyle, *supra* note 61, at 159–60 (arguing that the necessity test is increasingly convoluted with "vague, interrelated, and overlapping elements"); Lavranos, *supra* note 116, at 314 (commenting on the *Brazil–Tyres* Appellate Body's description of material contribution running counter to the "theoretical musings of the Panel).

200. *See* CONDON, *supra* note 16, at 78–81 (stating that "economic considerations should be reserved for the chapeau analysis"); *see also supra* note 160 and accompanying text (showing the reservation of issues until the chapeau analysis in *Brazil–Tyres*).

201. *See supra* note 160 and accompanying text (showing the reservation of issues until the chapeau analysis in *Brazil–Tyres*).

affected the contribution of the measure toward the objective.

These apparent complications call into question the sincerity of the WTO's understanding that the environment and public health need to be protected and that such action is and should be taken at the national level.[202] The existence of the formidable chapeau undermines the increasingly broad discretion that members can exercise when establishing policies within the protections of an Article XX justification.[203] If the WTO asserts that its members have the power to set their own domestic health and environmental measures, then the formal mechanism that evaluates such measures should not be working so heavily against them.

C. The Strict Chapeau Exacerbates the Two-Step Problem

The disagreement between the Panel and the Appellate Body over whether the MERCOSUR exemption violated the chapeau is especially informative to show the destructive force that the chapeau can levy on measures justified by an Article XX subsection.[204] The Panel and Appellate Body agreed that the exemption was discriminatory but disagreed over whether the effect of the exemption should be considered when assessing the measure itself. Specifically, the Panel thought the impact of a discriminatory measure should be evaluated relative to its impact on trade flow.[205] Using this framework, the Panel concluded that the MERCOSUR exemption, which had very little impact on trade flow, did not violate the chapeau, whereas the court-issued injunctions did violate the chapeau because of the influx of used tyres that streamed into Brazil.[206]

In expressing its willingness to apply a flexible standard, the Panel implicitly acknowledged that the valuable conclusions reached through a necessity analysis could be more important than a minor or irrelevant discriminatory application of a measure. Although this approach provided a glimmer of hope that the WTO was moving away from the flawed logic that was entrenched in *US–Gasoline*, the Appellate Body reversed the Panel's decision and asserted that discriminatory application of a measure was not excusable merely because its effects were

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202. *See* ZLEPTNIG, *supra* note 35, at 149 (providing WTO statements of support of the notion that countries are most competent to handle and most responsible for the safety, health, and protection of people, animals, and plants).

203. *Compare* Gaines, *supra* note 192, at 743 (focusing his attention on the potentially false gains of the environmental protection movement because of the strong chapeau), *with* Jonathan Skinner, Note, *A Green Road to Development: Environmental Regulations and Developing Countries in the WTO*, 20 DUKE ENVTL. L. & POL'Y F. 245, 267–68 (highlighting the WTO's recognition that developing countries should not necessarily be held to developed countries' standards when setting domestic policies, even though Brazil lost the dispute).

204. *See* Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil–Tyres*, 43 J. WORLD TRADE 507, 508–09 (2009) (indicating that the Panel's effects-based approach forced the Appellate Body to shed new light on the chapeau analysis which has traditionally been nontransparent).

205. *Id.* at 515 (explaining the importance consequence of the effects-based approach taken by the Panel in *Brazil–Tyres*).

206. *See supra* Part III.B.2 for a summary of the Panel's chapeau analysis in *Brazil–Tyres*.

minor.[207]

The Appellate Body snuffed out the glimmer by relying on a more traditional and stringent approach that examined whether a rational connection existed between the discriminatory application and the objective cited by the violating country.[208] This approach was also seen in *US–Gasoline* where the reason for discrimination—administrative and enforcement problems—was unrelated to the U.S. goal of conserving clean air.[209] The problem with relying on such a standard is that it improperly values nondiscriminatory application above all other possible concerns in a majority of circumstances.

V. THE ONE-STEP SOLUTION

The WTO would be wise to reevaluate its analysis of environmental measures justified under GATT Article XX(b) because its current analytical methodology fails to sufficiently acknowledge the importance of environmental protection and has misguided logical roots. These issues could be resolved by transforming the independent chapeau analysis into a prominent factor of the Article XX(b)'s balancing test used to determine necessity. This proposal deviates from the treaty interpretation set forth in *US–Gasoline*,[210] but is consistent with the rules of interpretation that govern the GATT. First, to remain consistent with the principle of effectiveness, this proposal does not strip the chapeau of its meaning and teeth; instead, its restrictions, and the values such restrictions protect, are placed on the same scale as the other Article XX(b) considerations—importance of the objective, contribution to the objective, restrictiveness of measures, and availability of alternatives. Additionally, a one-step test would actually better fulfill Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), which asserts that terms of a treaty should be read in the context of its object and purpose.[211] The purpose of Article XX(b) is to provide WTO members with a reprieve from their WTO obligations in order to adequately protect human, animal or plant life or health. Given this purpose, a one-step test that increases the likelihood that an environmental measure is protected by Article XX(b) fulfills the purpose of Article XX's existence. For example, if the Article XX(b) test was so strict that measures could never succeed, it would undermine the purpose of the treaty term.

The most glaring flaw in the current two-step system can be seen in an

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207. *See supra* Part III.C for a discussion of the Appellate Body's reversal of the Panel's ruling that the MERCOSUR exemption was not an arbitrary and unjustifiable discriminatory measure; *see also* Davies, *supra* note 204, at 515–18 (discussing the Appellate Body's chapeau analysis in *Brazil–Tyres*).

208. Davies, *supra* note 204, at 518–19 (comparing critical language in the Appellate Body's interpretation of the chapeau in *Brazil–Tyres* to critical language from the Appellate Body's chapeau analysis in *US–Shrimp*).

209. *See* KELLY, *supra* note 53, at 28–29 (explaining the Appellate Body's rationale for finding a chapeau violation in *US–Gasoline*).

210. *See supra* notes 75–77 and accompanying text for a discussion of the principle of effectiveness that guides the dispute bodies' GATT interpretation.

211. *See* ZLEPTNIG, *supra* note 35, at 193–94 (establishing that the VCLT governs interpretation of the GATT and reciting the relevant portions of the VCLT).

alteration of the facts in *Brazil–Tyres*. Assume that Brazil enacted a retreaded tyre import ban with a MERCOSUR exemption to respond to the dengue virus that was ravaging the Brazilian population. Under the analysis set forth by the Appellate Body in *Brazil–Tyres*, the ban would have satisfied the Article XX(b) necessity requirement but then would have been struck down under the chapeau for arbitrary and unjustifiable discrimination. Given the hypothetical facts, such an outcome is untenable. In the scenario, Brazil should be able to enact necessary responsive measures without the WTO striking them down due to minor discriminatory trade violations. There is not really a sound argument that can be made—in this extreme example—that the liberalized trade offended by the discriminatory MERCOSUR exemption is more important than Brazil's attempt to control a virus spreading through its country; yet, that is seemingly the current reality.

By isolating the chapeau analysis from the Article XX(b) necessity test, the WTO dispute settlement bodies are free to operate in a vacuum where there is no need to prioritize liberalized international trade because it is the only priority; there are no other competing values to consider. By making the chapeau analysis part of the balancing test, it would give the WTO flexibility in analyzing measures that violate trade concerns and the freedom to craft decisions that are responsive to real world problems. If the WTO dispute settlement bodies can, in the course of an ordinary necessity test, acknowledge that an import ban is the most trade restrictive type of measure while still reaching reasonable conclusions about the necessity of a measure because of non-trade concerns,[212] then they can surely find a way to factor discriminatory application into their balancing tests.

A potential criticism of such an approach is that the shift from a two-step test to a one-step test is truly a distinction without a difference, i.e. if the new test yields the same results as the two-step test, then nothing is really accomplished. The counter to such a criticism is that it gives the WTO a flexibility that it is currently unwilling or unable to exercise. The Appellate Body in *Brazil–Tyres* may have been more likely to agree with the Panel's use of an effects-based analysis if impact was merely one of several factors that influenced the weight of the chapeau concerns in the overall balancing test; instead, the Appellate Body was obviously more comfortable relying on well-established case law that viewed the chapeau as a tool to root out all levels of unjustified discrimination at all costs.

The shift to a one-step test also allows the WTO to tighten up its necessity balancing. The EC in *Brazil–Tyres* argued from several different angles that the Panel failed to truly weigh anything in its supposed balancing test. While the Appellate Body disagreed, the EC's arguments appeared legitimate.[213] The WTO has less incentive to institute and enforce a well-defined necessity test with the powerful chapeau analysis looming. The one-step test would encourage the WTO

212. *See supra* Part III.B.1–2 for an analysis of the dispute bodies' ability to properly balance competing concerns.

213. *See supra* notes 197–99 and accompanying text for a discussion of the confusion among WTO members and scholars in regards to how the balancing test is actually conducted by dispute settlement bodies.

to further define and refine the necessity test that accounts for the WTO's mission to protect liberalized international trade and root out disguised restrictions of it, while remaining cognizant that sometimes trade concerns may need to be sacrificed for a greater cause.

VI. CONCLUSION

The World Trade Organization is seemingly aware that liberalized trade is far from the only global concern; however, it is hard to detect that awareness when examining the rulings of WTO dispute settlement bodies. This is particularly problematic in the area of environmental protection. The current two-step test that gives WTO members the freedom to act under GATT Article XX(b) and then subjects that freedom to the stringent pro-liberalized trade requirements of the Article XX chapeau is an ineffective way for the WTO to fulfill its mission of carrying the mantle of free and open international trade while simultaneously existing in a world full of important and competing social values. The WTO has every right to expect and encourage its members to respect their WTO obligations. It is also realistic for members to expect the WTO to develop dispute settlement mechanisms that can fairly and adequately weigh the societal value of liberalized international trade against competing social values like environmental protection. Going forward, it is in the WTO and its members' best interest to see where their liberalized trade concerns fit in an always-changing global marketplace of ideas. To presuppose that liberalized trade is of paramount importance is a dangerous policy ground for the WTO to rest its laurels on as its members constantly deal with competing social values that they have no choice but to address.