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Clearing the Air: The Clean Air Act, GATT and the WTO's Reformulated Gasoline Decision

*Martin A. McCrory and Eric L. Richards**

I.

INTRODUCTION

Over the last four decades, the growth in the amount and complexity of air pollution in the United States resulting from the increasing use of automobiles¹ (along with other sources) has resulted in mounting dangers to the public health.² The American Lung Association has estimated that people in the United States spend \$40 billion per year in additional health care cost associated with air pollution.³ The Clean Air Act was created to combat this; its goal has been to protect and enhance the United States' air resources.⁴ In furtherance of this goal, the United States Environmental Protection Agency ("EPA") promulgated regulations governing gasoline formulation to ensure that polluting compounds in gasoline do not exceed 1990 levels.⁵ However, Venezuela complained that the EPA regulations discriminated against foreign gasoline refiners who wished to sell their products in the United States. Accordingly, it filed a complaint with the World Trade Organization ("WTO"), claiming that the U.S. reg-

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1. JAMES S. CANNON, *DRIVE FOR CLEAN AIR: NATURAL GAS AND METHANOL VEHICLES* 2 (1989).

2. See Clean Air Act Amendments of 1990 §101, 42 U.S.C. § 7401.

3. SENATE COMM. ON ENERGY AND PUBLIC WORKS, S. REP. NO. 101-228, at 8 (1989) [hereinafter S. REP. NO. 101-228].

4. *Id.* at 5.

5. See Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716, 7716 (1994). The final rules for reformulated gas were published on February 16, 1994 and became effective on March 18, 1994.

ulations subjected foreign gasoline to stricter standards than were imposed on domestic gasoline.⁶

The Venezuelan complaint suggested the possibility of a fundamental conflict between domestic environmental policy and U.S. obligations under international trade rules. Most importantly, it provided a stern first test for the World Trade Organization, the infant organization heralded as the world's most important economic body.⁷ Created in 1995, after four years of preparations and seven more years of negotiations, the WTO has been described as the "most ambitious, comprehensive and geographically wide trade agreement ever attempted or reached."⁸ It was the culmination of a series of multilateral trade negotiations, known as the Uruguay Round, that were part of the General Agreement on Tariffs and Trade ("GATT").⁹ GATT itself was viewed as a rather unwieldy process for reducing tariffs and resolving trade conflicts among its member nations.¹⁰ "The Uruguay Round . . . transform[ed] the GATT into a permanent international institution, the World Trade Organization, responsible for governing the conduct of trade relations among its members."¹¹ The Uruguay Round, through its creation of the WTO,

6. Heather M. Walters, *Impact of Sovereign Immunity on EPA's New, but not Necessarily Improved, Gasoline Rule*, 50 ADMIN. L. REV. 861, 862 (1998).

7. Keith M. Rockwell, *Baptism of Fire for the WTO*, J. COM., June 16, 1995, at 6A.

8. JOHN KRAUS, INT'L CHAMBER OF COMMERCE, *THE GATT NEGOTIATIONS: A BUSINESS GUIDE TO THE RESULTS OF THE URUGUAY ROUND* 6 (1994).

9. JEFFREY SCHOTT, *THE URUGUAY ROUND: AN ASSESSMENT* 3 (1994).

10. The original GATT agreement was signed in 1947 as a part of a larger international treaty for economic matters, the Charter of the International Trade Organization (ITO). Under the auspices of GATT, the original signatories immediately began reducing tariffs among themselves. However, the larger ITO structure was never ratified. ROBERT E. HUDEC, *ENFORCING INT'L TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 4-5 (1993). "GATT gradually began to assume more and more of the ITO's functions in the field of international trade policy. . . though [it] has never received a formal organizational constitution nor become an official United Nations organization *Id.* at 7.

The expansion of the GATT over the years has created a terminology problem when it comes to giving names to all the parts of the modern GATT enterprise. The answer has been to call everything "GATT." When one speaks of a "GATT decision," the term GATT is being used to denote some part of the GATT organization. When one speaks of government measures that "violate GATT," on the other hand, the term GATT refers to some part of the accumulation of rules and rule interpretations that bind member governments.

Id. at 9.

11. See SCHOTT, *supra* note 9, at 15. The WTO ties together in an integrated legal framework the various trade pacts that have been negotiated under GATT auspices In essence, the WTO Agreement is a "mini-charter," it merely consolidates the various trade pacts that have accumulated in the series of postwar negotiations. *Id.*

produced one other notable institutional reform: "it strengthened the multilateral dispute settlement mechanism so that countries [would] be more likely to comply with [international trade] rulings. . . ."12

Without a doubt, an open global market is as much to be desired as a clean global environment. Yet, as environmental regulations increasingly impact products with greater trade flows (and vice versa), the conflict between environmental protection and trade liberalization is destined to grow in intensity.¹³ The Venezuelan challenge highlights the effect of the WTO's liberal trade rules on domestic environmental policy, while simultaneously providing an opportunity to scrutinize the WTO's new dispute settlement mechanism in action. Specifically, this article uses the reformulated gasoline dispute as the centerpiece for an examination of the conflict between a strict, domestic environmental law, the Clean Air Act, and the liberal trade rules embodied in the WTO agreement.

Section I of this article provides a brief history of the Clean Air Act. Section II describes the 1990 Clean Air Act Amendments and the reformulated Gasoline Rules, including a discussion of the standards and baseline limitations which were at the center of the controversy in Venezuela's complaint to the WTO. Section III offers a brief history of the GATT, the WTO, and the new dispute settlement mechanism. Section IV describes the compromise regulations the EPA devised to bring the U.S. environmental rules into compliance with this country's obligations under international trade law. Finally, Section V provides an analysis of the rulings of the WTO dispute settlement panel. The article concludes that in the wake of the panel rulings, the international trade framework must be modified to better recognize the importance of environmental issues.

II.

HISTORY AND OVERVIEW OF THE CLEAN AIR ACT

In order to understand the interplay between the Clean Air Act and the GATT, one must first have a basic understanding of

12. *Id.* at 14. It is estimated that by the end of the first year of the WTO's existence, world trade in goods grew by 8 percent. For the United States, the gains were more impressive; exports rose 14.4 percent. Ambassador Jeffery Lang, *The WTO: Is It Working?*, 90 ASIL PROC. 224, 419 (1996).

13. GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 127 (1992).

the two. Clean air enforcement has a long history in the United States.¹⁴ It is thought that the first air pollution control laws were adopted in Chicago and Cincinnati in 1881.¹⁵ During the early years of air regulation, air pollution control was typically left to state and local governments. By 1912, twenty-three out of the twenty-eight U.S. cities with populations over two hundred thousand had air pollution laws.¹⁶ Yet, by 1950 the unprecedented growth of industry, especially in the eastern and midwestern United States, triggered a public outcry against air pollution.¹⁷

It seems that the one common pattern that existed between these antediluvian laws and their more modern federal counterparts was the virtual lack of compliance by industry and enforcement by government agencies. A pivotal event illuminating the noncompliance occurred in 1948 in Donora, Pennsylvania.¹⁸ Twenty people died as a direct result of air pollution caused by an inversion.¹⁹ Moreover, almost half of the town's 14,000 inhabitants were stricken ill.²⁰ As a result of this tragedy, the next year the United States Department of Health, Education and Welfare ("HEW") initiated research into the causes and effects of air pollution.²¹ In 1955, Congress realized that air pollution was a growing national concern and authorized the United States Surgeon General to investigate the problem and gather information.²² Nonetheless, Congress made it clear that the United States' role was purely investigatory and informational.²³ Primary enforcement responsibility remained squarely with the state and local governments.²⁴

14. See generally DAVID P. CURRIE, *AIR POLLUTION: FEDERAL LAW AND ANALYSIS* (1987) (for a detailed discussion of the history of the Clean Air Act).

15. FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* 2-11(1994). These laws were smoke control laws passed to control emissions from local industry.

16. Arnold R. Rietze, *A Century of Air Pollution Control Law: What's Worked: What's Failed; What Might Work*, 21 ENVTL. L. 1576, 1585 (1991).

17. *Id.* at 1585. Part of this industrial growth was due to the wars fought prior to 1950 and the resulting need for mass production to support the war efforts.

18. *Id.*

19. *Id.* An inversion is a state in which air temperature increases with increasing altitude thereby holding air and pollutants closer to the surface.

20. GRAD, *supra* note 15, at 2-11.

21. Rietze, *supra* note 16, at 1585.

22. See generally, Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322 (1955) (current version at 42 U.S.C. 7401 to 7642).

23. Air Pollution Control Act of 1955 § 2(b)(2).

24. Air Pollution Control Act of 1955 § 1.

Eight years later, Congress attempted to add teeth to the air pollution law, albeit very weak teeth, by passing the Clean Air Act of 1963.²⁵ This was the federal government's first attempt to actually regulate air pollution. Congress granted the federal government enforcement authority to abate air pollution "which endangers the health or welfare of any person."²⁶ Despite this language, the statute still allowed state and local governments to retain primary enforcement authority.²⁷ The federal government was relegated to the role of advisor and could only act with the express concurrence of the state and local governments.²⁸ Nevertheless, with this statute, the federal government began in earnest its movement toward centralizing air pollution control at the national level.

In 1965, Congress began its foray into the area of motor vehicle emission control.²⁹ Congress passed the 1965 Clean Air Act Amendments which allowed the Secretary of HEW to prescribe standards governing vehicle emissions.³⁰ The law required the standards to be based upon the economic and technical feasibility of compliance.³¹ The Secretary was authorized to prescribe standards for new domestic and imported motor vehicles and engines, and to certify the vehicles and engines based upon prototype testing.³² The vague language of this statute and the resulting lack of emission control standards led to Congress passing the 1970 Clean Air Act.³³

If properly applied, the 1970 Act would have been one of the strongest steps toward curbing mobile source pollution in the history of the United States. The Act specifically required a ninety percent reduction in emissions of hydrocarbons, carbon monox-

25. Pub. L. No. 88-206 § 1, 77 Stat. 392 (1963).

26. Pub. L. No. 88-206 § 5(a), 77 Stat. 366 (1963).

27. *Id.*

28. *Id.* The law basically required the Secretary of Health, Education and Welfare to conference with state and local officials prior to making a "recommendation of abatement." Therefore, the Secretary could only act with the consent of both the affected state and local governments. Even then, the Secretary's primary enforcement authority was limited to recommendations and a public hearing (upon prior state and local approval).

29. Motor Vehicle Air Pollution Control Act, Title I, Pub.L. 89-272, § 101, 79 Stat. 992 (1965).

30. *Id.* § 101 (8).

31. *Id.* at § 202(a).

32. Kenneth C. Keener, *A Current Survey of Federal Air Quality Control Legislation And Regulations*, 5 NAT. RESOURCES LAW. 42, 43 (1972).

33. CURRIE, *supra* note 14, at 2-6.

ide ("CO"), and nitrogen oxide ("NO_x") by 1975.³⁴ Unlike the 1965 Act, the amended law's standards were not technology based.³⁵ On the contrary, the standards were specifically based upon emission reduction.³⁶ Thus, instead of allowing technology to drive the law, the statute's mandatory emission reductions would force the development of new pollution control technology.³⁷ The 1970 Clean Air Act also authorized EPA (newly founded in 1970) to test vehicles for compliance or require the manufacturer to test the vehicles.³⁸ For the first time, the law also set standards for the chemical composition of gasoline, specifically lead. Despite its laudable goals, the law specified requirements that EPA was unwilling to enforce.³⁹

The 1970 Act was a watershed, prodding industry (and the entire country) into thinking seriously about air pollution reduction.⁴⁰ However, just as its antecedents, the 1970 Act was doomed to fail because of the utter lack of serious enforcement.⁴¹ Twenty years after the passage of the 1970 Act, mobile sources were still the leading cause of air pollution in the United States.⁴² By 1989, mobile sources accounted for fifty percent of the nation's volatile organic compounds ("VOCs"), forty-three percent of the NO_x, and over ninety percent of the CO (in urban areas).⁴³ In response, in 1990 President Bush signed into law arguably the strongest environmental statute in history, the 1990 Clean Air Act Amendments.

In the forty years the federal government has been involved in clean air regulation, mobile sources (primarily automobiles) have

34. See Clean Air Act of 1970, Pub.L.No. 91-604, § 202(b)(1)(A), 84 Stat. 1676, 1690 (1970).

35. See *Id.*

36. See *Id.*

37. CURRIE, *supra* note 14, at 2-4. In *International Harvester v. Ruckelshaus*, 478 F.2d 615, 640 (D.C. Cir. 1973), the Circuit Court upheld EPA's denial of a waiver of the reduction standards, even though the Court acknowledged the fact that the technology to meet the standards did not exist.

38. *Id.*

39. See Paul G. Rogers, *The Clean Air Act of 1970*, EPA J., JAN./FEB. 1990, at 21, 23. See also CURRIE, *supra* note 14 at 5-1. (Since the requirements were set without regard to feasibility or cost, strict enforcement by EPA would have caused severe hardship on industry).

40. See Rogers, *supra* note 39, at 22.

41. *Id.* at 23.

42. S. REP. NO. 101-228, at 13 (1989).

43. S. REP. NO. 101-228, at 89 (1989). The Senate found that problems caused by motor vehicle emissions required tighter vehicle controls to achieve and maintain air quality standards.

become the largest single source of air pollution in the United States.⁴⁴ In response to this threat, Title II of the 1990 Clean Air Act Amendments (“1990 Act”) was enacted to ensure strict regulation of vehicle emissions.⁴⁵ Toward that end, the 1990 Act included, *inter alia*, a new section that regulated the composition of gasoline.⁴⁶ Specifically, Section 211(k) of the 1990 Act required the EPA Administrator to promulgate regulations governing gasoline characteristics (i.e., its reformulation) necessary to assure vehicle emission reductions.⁴⁷ On February 16, 1994, EPA published its Final Rule governing this subject matter, entitled, “Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline.”⁴⁸

III.

THE CLEAN AIR ACT AMENDMENTS OF 1990: REFORMULATED GASOLINE

The 1990 Act not only governed air emissions from mobile sources in general; it specifically governed air emissions from mobile sources by controlling gasoline and gasoline additives.⁴⁹ Prior to 1990, motor vehicle fuels had largely been ignored. Instead, the federal government concentrated on emissions by regulating the vehicles themselves.⁵⁰ In 1970 and 1977, EPA regulated the use of lead and phosphorous in gasoline.⁵¹ However, by primarily emphasizing vehicle regulations and ignoring gasoline regulations EPA actually caused fuels to become dirtier,

44. The Honorable Henry Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1768 (1991). See also, S. REP. No. 101-228, at 13 (1989).

45. See The Clean Air Act of 1990, § 211, 42 U.S.C. § 7545 (1995).

46. 42 U.S.C. § 7545(k).

47. *Id.*

48. 59 C.F.R. § 7716 (1994).

49. See generally, The Clean Air Act of 1990, 42 U.S.C. § 7401 *et seq.*

50. Section 211 of the Clean Air Act Amendments of 1977 granted the Administrator of EPA the authority to control or even prohibit the manufacture, sale or introduction into commerce of any fuel or additive for use in motor vehicles that would cause or contribute to air pollution that could reasonably be anticipated to endanger the public health. David T. Deal, *Motor Fuel Regulations in the 1990's*, NAT. RESOURCES & ENV'T, Fall 1992, at 17.

51. Before 1990, the law concentrated on regulating mobile source emissions (motor vehicle emissions) at the “tailpipe” rather than at the pump. Previous law was not really concerned with the correlation between what went into the gas tank and what came out of the tailpipe.

effectively undermining a significant portion of any gains achieved through the tighter control of vehicles.⁵²

The 1990 Act contained numerous provisions that were intended to rectify this unfortunate result.⁵³ The statute was designed to assist states in attaining national ambient air quality standards ("NAAQS").⁵⁴ As part of this effort, the statute created a scheme for establishing regulations governing the reformulation of gasoline to obtain the greatest possible reduction in the emissions of ozone-forming volatile organic compounds ("VOCs") and toxic air pollutants.⁵⁵ Basically, the 1990 Act's reformulated gasoline provisions were intended to speed progress toward the attainment of NAAQS's for ozone and the reduction of toxic air pollutants associated with gasoline.⁵⁶

The essence of gasoline reformulation under the 1990 Act was that all gasoline, in certain covered areas of the country,⁵⁷ must, at a minimum, be twenty-five percent cleaner by the year 2000 and fifteen percent cleaner immediately.⁵⁸ The 1990 Act also required a reformulation of gasoline so that it reduces or limits Nox, benzene, aromatic hydrocarbons, VOCs and toxic air pollutants.⁵⁹ The statute prohibited the use of lead, manganese and other heavy metals in gasoline.⁶⁰ Section 211(k) of the 1990 Act made it a violation for any person to sell or dispense "conventional gasoline" (i.e., gasoline that was not certified as reformu-

52. Honorable Henry A. Waxman, *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 1972 (1991).

53. See generally, The Clean Air Act of 1990, 42 U.S.C. § 7545(k) (1990).

54. Committee on Energy and Commerce, Report of the Clean Air Act Amendments of 1990, H.R. Rep. No. 101-490, at 195-98 (1990). (The EPA administrator sets primary and secondary ambient air quality standards for a variety of pollutants emanating from mobile and stationary sources. Primary standards are ones EPA believes are necessary to protect human health. Secondary standards are ones EPA sets to protect the public welfare, including plant life and animal life).

55. 42 U.S.C. § 7545(k)(4).

56. See Deal, *supra* note 50, at 18.

57. This portion of the Act applies to the nine worst areas in the country that did not attain ozone NAAQS; (i.e., the nine worst nonattainment areas), during the time period from 1987 through 1989. 42 U.S.C. § 7545(k)(10)(D). The 9 covered areas are Los Angeles, New York, Chicago, Houston, Milwaukee, Baltimore, Philadelphia, San Diego, and Muskegon. See, H.R. REP. NO. 490, *supra* note 54, at 230 (1990). Additionally, Section 211(k)(6) of the Act allows the Governor of any State to "opt-in" on the reformulated gasoline provisions. 42 U.S.C. § 7545(k)(6).

58. 42 U.S.C. § 7545(k)(3).

59. See generally, 42 U.S.C. § 7545(k).

60. *Id.* EPA has the authority to waive the prohibition against certain heavy metals if it is determined that they will not increase toxic emissions.

lated) in any of the nine covered areas.⁶¹ More importantly, the Act provided that any violation of the reformulated gas provisions was punishable by a fine of \$25,000 for every day of violation.⁶²

A. *Fuel Formula vs. Performance Standards*

Section 211(k) of the 1990 Act imposes two alternative requirements relating to reformulated gasoline: 1) the gasoline must meet certain fuel formula specifications; or 2) all reformulated gasoline must meet certain performance standards, whichever is more strict.⁶³ The fuel formula method requires oil companies to produce gasoline that meets specific requirements. The fuel formula requirements prescribed in the 1990 Act limit the percentage of benzene and aromatic hydrocarbons to one percent and twenty-five percent, respectively.⁶⁴ Lead is completely prohibited.⁶⁵ Pursuant to this statutory section, in order to meet the fuel formula requirements, the gasoline must also contain additives to prevent the accumulation of deposits.⁶⁶ Additionally, the gasoline must contain at least two percent oxygen to increase combustion efficiency.⁶⁷

The performance standards prescribed by the 1990 Act require a fifteen percent reduction in VOCs and toxic air pollutants.⁶⁸ Additionally, the 1990 Act requires a twenty-five percent reduction in VOCs and toxics by the year 2000, adjustable by the EPA Administrator, subject to technological feasibility.⁶⁹ The performance standards allow oil companies the greatest flexibility because the standards set emission targets while granting the oil companies the prerogative to decide the best method of achieving the targets.⁷⁰ Basically, the performance standards allow oil

61. 42 U.S.C. § 7545(k)(4-5).

62. 42 U.S.C. § 7545(d)(1). This section also allows the government to obtain injunctive relief and to recover any economic benefits or savings received by violators through their noncompliance.

63. 42 U.S.C. § 7545(k)(3). In determining which standard is more stringent, the statute required EPA to determine which standard would result in the greatest reduction in emission of ozone forming VOCs and toxic air pollutants. Ultimately, EPA decided the performance standards were more stringent.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Waxman, *supra* note 52, at 1976.

companies to devise a way to meet the pollution reduction requirements using the most economic means possible.

B. *Meeting Reformulation Regulations: the Complex and Simple Models*

Under the reformulated gasoline regulations, retail sale of reformulated gasoline and its certification began on January 1, 1995.⁷¹ The regulations established two methods to certify fuel as meeting the reformulated gas requirements. Companies could certify their gasoline by using one of two models; they were aptly called the "simple model" and the "complex model." The "simple model" was based upon the idea that there are certain parameters that are clearly known to affect emissions (and were known at the time the Act was passed).⁷² These parameters were utilized by EPA to develop a model that is relatively easy to understand and relatively simple to implement.⁷³ A person could input these known parameters into the model and determine the effect on emissions. The "simple model" was not as elaborate or as effective as the "complex model," but it allowed EPA to establish a "quick and dirty" method of certifying reformulated gasoline within the timetable established by Congress. The "simple model" was only intended to be an interim model to be utilized until sufficient data was available to create a more detailed model.

Of the two, the "complex model" was actually the one that was best suited to meet the purposes of the 1990 Act. The "complex model" was EPA's computer generated model. EPA's model was based upon data and testing relative to the relationship between fuel parameters (example: a given level of VOCs, NO_x, CO) and

71. This particular gasoline certification is pursuant to EPA's "simple model." Gasoline certification pursuant to EPA's "complex model" began January 1, 1998.

72. EPA and industry generally agreed that Reid vapor pressure, fuel oxygen, benzene, and aromatics affected emissions and there was sufficient data to quantify the effect of these parameters for use in a model. It was also well-known that sulfur, T90 (the temperature at which 90% of gasoline evaporates, also known as E300; i.e. 300 degree Fahrenheit), and olefines adversely affected emissions. However, the effect of these three parameters was not yet quantified. So, for purposes of the "simple model," EPA set the limit on these three parameters at the individual refiner's 1990 average levels.

73. Despite the clarity of the "simple model," EPA received criticism from the oil industry that the model was inflexible, discouraged innovation, and penalized refiners who produced cleaner than average gasoline. Therefore, EPA granted the companies the option of utilizing the "complex model" instead of the "simple model." See 59 Fed. Reg. 7721.

emissions.⁷⁴ In essence, EPA created the “complex model” based upon the data generated from years of testing utilizing the “complex model”, a person could input any given gasoline parameter into the model and be able to reliably determine the characteristics of the resulting emissions. The problem with the “complex model” was that it took several years to develop, and by statute, Congress required EPA to develop regulations governing reformulated gasoline certification by 1991.⁷⁵ So, in order to comply with its statutory mandate, EPA developed its “simple model.” Companies had the option of choosing between the two models.

C. *Baselines: Foreign and Domestic*

1. Domestic Baseline

Once EPA determined that the 1990 Act’s performance standard was more stringent than its fuel formula specifications (i.e. more likely to result in the greatest reduction of polluting emissions), the 1990 Act required EPA to promulgate standards governing the reduction of VOC and toxic emission levels.⁷⁶ The Act required companies to reduce their VOC and toxic emissions by a certain percentage.⁷⁷

Given this statutory imperative, the question becomes what baseline should be used to measure the emission reductions. In other words, in order to determine if the reformulated gasoline performance standards have been met, EPA must first establish a baseline from which to measure a refinery’s compliance (or lack thereof). This baseline would establish standardized properties of gasoline from which reduction goals could be measured. EPA determined that there should be three baselines based upon a refinery’s 1990 gasoline data, and a statutory baseline if no 1990 data exists.⁷⁸

Under the baseline Method 1, the parties were allowed to establish their own individual baseline utilizing data that defined the actual properties of the gasoline produced by the refiner in

74. The model is based upon thousands of tests on various gasoline characteristics as they relate to emissions. The tests were run by EPA, the auto industry, and the oil industry.

75. 42 U.S.C. § 7645(k)(1) requires the Administrator of EPA to promulgate regulations within 1 year after the enactment of the Act.

76. *See* 42 U.S.C. § 7645(k)(3)(B).

77. *Id.*

78. 40 C.F.R. § 80.91-80.93, 80.101-80.106 (1997).

1990.⁷⁹ This baseline is based upon the actual quality, quantity, and composition records that existed in 1990.⁸⁰ However, most domestic and foreign refiners did not have actual and reliable data relating to their gasoline composition for 1990. Since most refiners did not have data for gasoline produced in 1990, EPA developed two other methods of backtracking to determine a refiner's 1990 gasoline characteristics, Methods 2 and 3. Methods 2 and 3 were based upon a computer generated model of the production values of the properties of gasoline produced subsequent to 1990. Method 2 allowed the refiner to utilize 1990 blendstock quality and production records to formulate a 1990 baseline.⁸¹ Method 3 allowed the refiner to utilize data from post-1990 gasoline blendstock, gasoline quality, and gasoline production records to formulate a 1990 baseline.⁸² This Method was only to be used if Methods 1 and 2 are unavailable.⁸³

Clearly, each Method was dependent upon the reliability of the data being used. The entire 1990 Act is dependent upon this data. In short, the reduction in a refiner's VOC and toxic emissions is based upon that refiner's individual baseline. The accuracy of the baseline is dependent upon the method being used (1, 2 or 3) and the data being plugged into the method.⁸⁴ If the data is incorrect or fraudulent, the baseline is worthless. Without an accurate, useful baseline, it is impossible to determine a proper level of reduction.

To summarize, the individual baseline is based upon actual 1990 data.⁸⁵ If the data is not complete or available, it is supplemented with Method 2 data until a 1990 baseline can be estab-

79. As you will see later, this is one of the two methods that importers of foreign gasoline are allowed to use to determine their baseline. Moreover, by 1995 the 1990 baseline is required to be used for all conventional gasoline as well as reformulated gasoline. Therefore by 1995 all gasoline will be regulated in a way so that all gasoline will be no dirtier than it was in 1990.

80. *Id.*

81. 40 C.F.R. § 80.91. Blendstock is the term used to describe liquids and additives after blended into gasoline.

82. *Id.*

83. If a refiner uses Method 3, it must include a detailed narrative discussing and comparing the refinery's 1990 and post-1990 operations. Then, it must perform detailed calculations to adjust for changes in operations and technology (to be reviewed by EPA).

84. Once the baseline is established, the party or EPA plugs the parameters of the party's gasoline into a "simple or complex" model in order to test the gasoline's compliance. Therefore, the entire reformulated gasoline reduction and compliance scheme is completely dependent upon the creation of a proper baseline.

85. 40 C.F.R. § 80.91.

lished.⁸⁶ If the party has insufficient data to establish a reliable 1990 baseline based upon Method 1 data (actual 1990 data) and Method 2 data, the party must supplement its data using Method 3.⁸⁷

The regulation required the refiner to use independent auditors to verify, among other things, baseline methodology, the resulting parameters, the resulting emission values, the availability of data (or lack thereof), and the accuracy of the data.⁸⁸ EPA retained the right to conduct its own audits of the baseline submissions of the domestic refiners to determine the accuracy of the baseline. EPA also established a method of determining a party's baseline if there was no verifiable data available. In the case of such an event, a "statutory baseline" was used instead of Method 1, 2, or 3.⁸⁹

Instead of allowing the refiner to utilize actual production data, the statutory baseline sets the fuel parameters to be used as a baseline from which the performance standards are to be measured.⁹⁰ The refiner utilizing the statutory method was exempted from the auditing provision since this baseline's values are established by statute and do not vary for each individual refiner.⁹¹ That is to say, a party utilizing the statutory model has no chance of "gaming" the system. Again, this is because under the statutory baseline, the actual parameters used by the refiner are established within the regulations. The main problem with variable baselines was that a refiner would always want a lower baseline. This is because the lower the baseline the less the refiner has to do to meet statutory reduction standards. The lower the baseline, the less money a company may spend on compliance. Conversely, the lower the baseline, the higher the actual pollutants in the gasoline.

2. Foreign Refiners

The rules for foreign refiners were very different than for domestic refiners. Foreign refiners were allowed to use Method 1, but they were not allowed to use Methods 2 and 3.⁹² Foreign

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

refiners were only allowed to use actual 1990 data in order to determine a 1990 baseline.⁹³ If the foreign refiner did not have a sufficient amount of accurate and reliable data regarding its 1990 gasoline production and composition, it could not use a 1990 baseline at all.⁹⁴ However, the rules still allowed the foreign refiner to utilize the statutory baseline if it could not formulate a reliable 1990 baseline. Therefore, unlike domestic refiners, a foreign refiner was forced to use the statutory baseline in the absence of actual verifiable 1990 data sufficient to form a certifiable and verifiable 1990 baseline.

EPA stated many reasons for the difference in treatment.⁹⁵ First, there was no way for EPA to easily inspect facilities and data to verify the accuracy of gasoline composition and production information.⁹⁶ EPA's general enforcement authority over foreign refiners is debatable.⁹⁷ Moreover, there is a question of the extent of a U.S. Court's jurisdiction over a foreign refinery. Of course, if EPA issued an administrative compliance order or ordered civil penalties, the enforceability of the order would be tenuous at best. Also, it is difficult for EPA to determine the specific source of a particular batch of gasoline.⁹⁸ Actually, it is virtually impossible even to trace a particular batch of gasoline from its U.S. port of entry back to a specific country.⁹⁹ If EPA cannot trace the gasoline back to the country, it cannot possibly trace it back to a specific refiner. Without knowing the refiner associated with a batch of gasoline, it is impossible to verify its baseline calculations.¹⁰⁰ Moreover, if EPA cannot determine the refinery-of-origin, it cannot determine if the foreign gasoline is meeting its performance standards (even assuming a verifiable baseline had been determined). Additionally, it may be impossible to determine a refinery-of-origin since foreign gasoline often

93. *Id.*

94. As stated before, most refiners will not have the data necessary to formulate a 1990 baseline based solely upon Method 1 data. Most will need a combination of Method 1, Method 2, and possibly Method 3 data to create a certifiable 1990 baseline.

95. *See generally*, 59 Fed. Reg. 7785-7788.

96. *Id.* at 7787. Certainly, a surprise inspection or audit would be almost impossible to perform on a foreign refiner.

97. *Id.*

98. *Id.* at 7785.

99. *Id.*

100. *Id.* at 7787.

changes hands several times and is mixed with other gasoline prior to reaching the United States.¹⁰¹

The primary difference (from EPA's perspective) between the regulation of domestic and foreign gasoline is that EPA primarily regulates domestic gasoline at the refinery; however, it regulates foreign gasoline at the port. EPA argues that it is difficult if not impossible to properly regulate foreign refiners until their product reaches the shores of the United States.¹⁰² Therefore, a statutory baseline, EPA argues, is the only viable means of properly implementing the reformulated gasoline program for foreign refineries pursuant to the 1990 Clean Air Act.¹⁰³

Regardless of whether EPA's concerns are justified, it is indisputable that the reformulated gasoline regulations treat foreign refiners differently (albeit as EPA would argue, justifiably). Foreign commenters have argued that domestic refiners have the possibility of receiving a "dirtier" (i.e., more favorable) baseline because they may use actual or inferred data and production values from 1990.¹⁰⁴ Foreign refiners are discriminatorily subjected to the "cleaner" (i.e. less favorable) statutory standard.¹⁰⁵ Others have said that granting foreign refineries individual baselines would help enhance competition among gasoline suppliers to the ultimate benefit of the domestic consumer.¹⁰⁶ EPA rejected these comments and found that the rule had to treat foreign refiners differently in order to prevent "gaming", the establishment of inaccurate baselines, and problems for EPA in compliance monitoring and enforcement.¹⁰⁷ By its very nature, this regulation imposed a barrier to trade by increasing the complexity of standards exporters needed to satisfy in order to sell in the United States.¹⁰⁸

One of the prime objectors to the new regulations was Petroleos de Venezuela, S.A. ("PDVSA"), the Venezuelan national oil company. PDVSA claimed that the reformulated gasoline regulations violated the General Agreement on Tariffs and Trade

101. *Id.*

102. *Id.* at 7786.

103. *Id.*

104. *Id.* at 7787.

105. Of course, this assumes that in all cases the statutory baseline will result in a more restrictive baseline than Methods 1, 2, and/or 3 (or the combination of the 3).

106. *Id.* EPA stated that this comment was irrelevant.

107. *Id.* at 7788.

108. See generally, Jennifer Schultz, *The Demise of Green Protections: The WTO Decision on the U.S. Gasoline Rule*, 25 *DENV. J. INT'L L. & POL'Y* 1,2 (1996).

("GATT").¹⁰⁹ This dispute raised very serious questions about the conflict between United States' environmental and international responsibilities. In this case, the questions revolved around the issue of whether the United States' gasoline regulations are inconsistent with its obligations under GATT/WTO.

IV.

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

From 1947 until the creation of the WTO in 1995, GATT was the principal system governing global trade.¹¹⁰ It began after World War II with a membership of 23 developed nations who believed that future world wars could be avoided only through integrated attempts to promote trade liberalization and multilateral economic cooperation.¹¹¹ For several reasons, it never lived up to the dreams of its founders. First, GATT was supposed to be governed by the International Trade Organization ("ITO"), a permanent trade body with the power to eliminate nontariff barriers to trade and to reduce worldwide tariffs.¹¹² Yet, despite the fact that the United States was a principal architect of the ITO charter, the U.S. Congress rejected the plan due to a growing reluctance to weaken the country's economic sovereignty during

109. 59 Fed. Reg. 22800, 22801.

110. The WTO was created during Uruguay Round of GATT's multilateral trade negotiations. The Final Act was open for signatures on April 15, 1994 and the WTO entered into force on January 1, 1995. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *Legal Instrument Results of the Uruguay Round, vol. 1* (1994), 33 I.L.M. 1143 (1994) [hereinafter Final Act]. After ratifying the multilateral trade pact in December 1994, the United States became one of the organization's original 124 members. *GATT Focus Shifts to Approval in Europe*, Wall St. J., Dec. 5, 1994, at A1, col. 2.

111. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 5 (1990). GATT grew out of the Bretton Woods System which grew out of the belief that the disastrous tariff and trade policies of the 1930s had contributed to the outbreak of the Second World War. Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order For World Trade?*, 16 MICH. J. INT'L TRADE 349, 351 (1995).

112. The ITO was intended to serve as a third pillar, along with the International Monetary Fund and the World Bank, of a comprehensive global economic structure. PIERRE PESCATORE, *HANDBOOK OF GATT DISPUTE SETTLEMENT* 8 (1994). The World Bank was originally designed to assist the war-torn developed countries and lesser developed nations to reconstruct and upgrade or upgrade their economies. The [International Monetary Fund] was initially charged with facilitating trade and assisting governments in stabilizing their exchange rates so as to avoid a reversion to 1930s monetary policies which had stifled world trade and abetted tensions leading to the second great war of the twentieth century. Dillon, *supra* note 111, at 352. While the International Monetary Fund and the World Bank covered the financial aspects of this multilateral economic cooperation, the ITO was to serve an administrative and dispute resolution role. *Id.*

the recessionary period after World War II.¹¹³ Although the original GATT members had already begun negotiating tariff reductions, these negotiations lacked the oversight and administration the ITO was supposed to supply. Instead of an efficient organization, GATT became a series of several hundred treaties that provided a loose framework for trade relations among the members.¹¹⁴

Second, over the years GATT's basic composition changed radically. From the original 23 developed nations that created GATT in 1947, the membership soared to as many as 124 countries. Three-fourths of those members were developing nations.¹¹⁵ This tremendous diversity impeded efforts to achieve the consensus that was a hallmark of GATT decision making¹¹⁶ and was possible when the members all shared common economic interests.

Finally, the decentralized nature of GATT,¹¹⁷ coupled with frequent outbursts of protectionist trade sentiments throughout the world, triggered numerous trade conflicts. However, the dispute resolution mechanisms utilized by the GATT members were often ineffective in resolving more contentious cases. "The demise of the ITO meant, among other things, abandoning the ITO's consensus-based dispute resolution system, which included resort to the International Court of Justice for 'advisory opinions' and a binding arbitration option outside the ITO for disputing ITO members."¹¹⁸ Under GATT, disputants were directed to voluntarily negotiate a settlement of their trade conflicts. If these informal negotiations broke down, a complainant could initiate a formal consultation process. If consultations were unsuccess-

113. ERIC RICHARDS, *LAW FOR GLOBAL BUSINESS* 232 (1994).

114. *Id.* In 1960, the GATT members created the GATT Council (officially known as the Council of Representatives) to serve as an executive body. However, any of GATT's growing number of members could serve on the Council. And, in fact, generally 70 percent of the membership served on the Council. *See* PESCATORE, *supra* note 112, at 13-14.

115. *See* RICHARDS, *supra* note 113.

116. GATT required that all decisions be unanimous. *See* PESCATORE, *supra* note 112. The GATT members eventually created the Group of Eighteen to address this concern. This body was composed of 18 members who were selected to reflect the economic characteristics of GATT's total membership. Led by GATT's Director-General, the Group of Eighteen met several times a year to discuss major trade issues. *See* RICHARDS, *supra* note 113, at 233.

117. *See supra* text accompanying notes 112-114.

118. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *DUKE L. J.* 829, 840 (1995) (citations omitted).

cessful a hearing panel of experts from countries other than the disputing parties was formed to hear the dispute.¹¹⁹ After taking evidence, hearing arguments, and issuing a written decision, the dispute panel would submit its finding to the GATT Council for adoption.¹²⁰ However, the losing party was able to veto enforcement of the panel report because "even one vote 'including the party that lost the case' could block approval of the decision and prevent it from becoming 'GATT law.'"¹²¹ Because a winning party could not legally retaliate without the unanimous support of the GATT membership, there was growing dissatisfaction with the GATT dispute settlement process.¹²²

A. *The World Trade Organization*

The movement to reform GATT arose during the Uruguay Round of GATT negotiations.¹²³ This was a long and laborious process, due in large part to an extremely ambitious agenda. First, while GATT had long confined itself to global trade in goods, the Uruguay Round negotiators struggled to bring formerly excluded topics like services¹²⁴ and investment¹²⁵ within the GATT framework. They also included politically volatile issues such as intellectual property rights,¹²⁶ agricultural products,¹²⁷ and textiles¹²⁸ within their discussions.

The members also addressed GATT's glaring structural weakness¹²⁹ by erecting a permanent administrative body, known as the World Trade Organization, in the image of the rejected International Trade Organization. GATT was subsumed by the WTO. Thus, while the numerous treaties and international trade obligations created under the auspices of GATT remain in effect, they are now administered by the WTO.¹³⁰ "[T]he WTO plays the es-

119. See RICHARDS, *supra* note 113, at 239-241. Cf., JACKSON, *supra* note 111, at 61-62.

120. See *supra* note 114.

121. Shell, *supra* note 118, at 842. Cf. SCHOTT, *supra* note 9, at 128 and RICHARDS, *supra* note 113, at 241.

122. See SCHOTT, *supra* note 9, at 129.

123. See *supra* notes 7-12 and accompany text.

124. See SCHOTT, *supra* note 9, at 99-111; Negotiations, *supra* note 6, at 39-50.

125. See SCHOTT, *supra* note 9, at 112-114; Negotiations, *supra* note 6, at 24-25.

126. See SCHOTT, *supra* note 9, at 115-123; Negotiations, *supra* note 6, at 50-58.

127. See SCHOTT, *supra* note 9, at 43-54; Negotiations, *supra* note 6, at 12-18.

128. See SCHOTT, *supra* note 9, at 55-59; Negotiations, *supra* note 6, at 19-21.

129. See *supra* note 10 and notes 112-114 and accompanying text.

130. Dominique M. Calapi, *International Trade and Environmental Impact: WTO Reformulated Gasoline Case*, 3 ENV'T L. 209, 216 (1996). See also DANIEL C. ESTY,

stantial role of unifying the existing and new obligations under one administrative roof and further providing an internationally recognized organizational structure which its forerunner, the GATT, had lacked.”¹³¹

Finally, to combat the longstanding problems associated with the pre-Uruguay Round of GATT, the negotiators sought to enhance the GATT dispute resolution process to create a standardized and legalized dispute resolution process.¹³² They revamped GATT’s much maligned, dispute settlement mechanism in three important ways: (1) they erected a permanent Dispute Settlement Body; (2) they established a precise timetable governing the consultation, hearing, and compliance processes; and (3) they abolished the veto power that had permitted members to legally avoid compliance with dispute panel decisions.¹³³

1. The Dispute Settlement Body

Recognizing that trade disputes are inevitable in any complex trading system, the WTO developed a permanent Dispute Settlement Body (“DSB”) to coordinate the dispute resolution process.¹³⁴ While the WTO continued GATT’s tradition of encouraging informal resolution of disputes through bilateral consultations, it also recognized the need for a body to oversee and manage the dispute resolution process.¹³⁵ Thus, the DSB

GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 247 (1994). *See generally* Final Act, 33 I.L.M. at 1144.

131. Dillon, *supra* note 111, at 355. This unification solves two problems. First, the difficulty of incorporating the non-trade-in-goods obligations of protections of intellectual property rights and trade in services into the GATT is resolved by the WTO . . . Second, the establishment of the WTO settles the question of institutional status which has hindered GATT in its nearly five decades of history. *Id.*

132. David M. Parks, *GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation*, 15 U.C.L.A. J. ENV’T L. & POL’Y 151, 160 (1996-97). During the Uruguay Round, the trading partners experimented with trial reforms to the dispute settlement mechanism. These included strict time limits to speed up the resolution of trade disputes. Historically, GATT violators were able to delay the formation of hearing panels indefinitely by refusing to agree to the selection of panel members. The trial reforms stipulated that in cases where the disputants were unable to agree on the choice of panelists within 20 days, either party could request the GATT Director-General to fill the position within 10 days. The success of these trial reforms encouraged the members to develop a more sophisticated dispute settlement process within the WTO framework. RICHARDS, *supra* note 113, at 240-241.

133. *See* SCHOTT, *supra* note 9, at 125-140.

134. Final Act, *supra* note 110, at 1226.

135. *See generally* ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* (1997)(discussing the history and procedures of GATT/

was vested with authority to administer the consultation and dispute settlement process. Its functions include establishing panels, adopting panel reports, maintaining surveillance of the implementation of rulings and recommendations, and authorizing the suspension of concessions and other obligations when nations violate any of their treaty obligations.¹³⁶

The hearing panels created by the DSB are made up of independent experts¹³⁷ who possess the authority to make findings of fact and issue rulings or recommendations.¹³⁸ WTO rules require that panelists "be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."¹³⁹ The WTO's Secretariat maintains a list of qualified individuals who may serve as panelists. Generally, panels are composed of three members unless the parties to the dispute agree to have five panelists. The WTO Secretariat proposes the name of the panelists, although the parties to the dispute may reject a nomination. However, if the parties cannot agree on the composition of the panel within 20 days, the Director-General of the WTO may determine the composition of the panel.¹⁴⁰

As a further reform to the dispute settlement process, the WTO established a standing Appellate Body for the DSB. The Appellate Body is composed of seven members who serve four-year terms.¹⁴¹ Parties dissatisfied with panel rulings appeal their cases to the Appellate Body. Only three members of the Appellate Body hear any particular appeal. "The Appellate Body may

WTO); ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990) (analyzing GATT's dispute settlement process).

136. Final Act, *supra* note 110, at 1226.

137. "Citizens of Members whose governments are parties to the dispute . . . shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise." *Id.* at 1231 (footnote omitted).

The WTO's Secretariat maintains a list of qualified individuals who may serve as panelists. "For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements." *Id.*

138. Panelists are given the following terms of reference: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." *Id.*

139. *Id.*

140. *Id.* When there is a dispute between a developed country and a developing country, the developing country may insist that at least one of the panelists is from a developing country. *Id.* at 1232.

141. *Id.* at 1236. Appellate Body members may be reappointed only once.

uphold, modify or reverse the legal findings and conclusions of the panel.”¹⁴²

2. The Dispute Resolution Timetable

The GATT dispute settlement process was plagued by long delays in the establishment and conclusion of panel proceedings as well as foot dragging in complying with panel rulings.¹⁴³ Under the new WTO procedures:

Time limits for forming a panel, conducting a panel review, and issuing findings are reduced to ensure that disputes do not languish and that WTO violations are remedied more quickly . . . [P]rocedures are created to set time periods for compliance . . . From start to finish, the dispute process should not take more than 20 months—and less if the panel decision is not appealed.¹⁴⁴

Disputants are urged to settle their differences through consultations. However, if consultations are not successful within 60 days, the complaining party may insist on the formation of a hearing panel.¹⁴⁵ The time from when a panel is requested until the dispute is finally heard should not exceed 90 days.¹⁴⁶ The panel then has no more than 9 months to issue a report,¹⁴⁷ which must be adopted within a 60-day period.¹⁴⁸ When panel rulings are appealed to the Appellate Body, it may take that body up to 90 days to reach a decision and another 30 days for the adoption of the appellate report.¹⁴⁹

The losing party is given “a reasonable period of time” to comply with its trade obligations or to otherwise compensate the winning party.¹⁵⁰ If no satisfactory compensation or compliance is

142. Final Report, *supra* note 110, at 1237. The actual proceedings of the Appellate Body are to remain confidential and the opinions expressed by individuals serving on the body are to be kept anonymous. *Id.* at 1236. The United States has opposed the confidential nature of the dispute resolution mechanisms, arguing for greater openness in the deliberations of both the panel and appellate review process. *After Free Trade Euphoria, Now Comes The Hard Part*, 12 INT’L TRADE REP. (BNA) 129, 130 (1995).

143. SCHOTT, *supra* note 9, at 125.

144. See SCHOTT, *supra* note 9, at 126.

145. Final Act, *supra* note 110, at 1229. The panel may be requested within 10 days if the consultation request is ignored or within 30 days if the consultations are started. *Id.* at 1228-29. In cases of urgency the outer limit for completing consultations may be no more than 20 days. *Id.* at 1229.

146. See SCHOTT, *supra* note 9, at 127.

147. Final Act, *supra* note 110, at 1234.

148. *Id.* at 1235.

149. *Id.* at 1236-37.

150. *Id.* at 1238.

rendered within 20 days of the expiration of this "reasonable" time, the aggrieved member may request authorization from the DSB to initiate trade retaliations against the losing party.¹⁵¹ The DSB is required to act upon this request within 30 days.¹⁵² However, if the losing party objects to the level of retaliation, it may request binding arbitration to determine if the level of retaliation is equivalent to the original harm done to the aggrieved party. The arbitration process should not exceed 60 days.¹⁵³

3. Abolition of Veto Power

Under the original GATT system, the requirement that all decisions be made by consensus permitted individual members to block the adoption of adverse panel reports.¹⁵⁴ Thus, countries could ignore panel findings without any legal consequence.¹⁵⁵

The new WTO regime permits the establishment of a panel over the objections of a member.¹⁵⁶ Further, nations no longer can veto the findings of a panel nor unilaterally block a trade remedy. In fact, unless the DSB unanimously decides to reject a recommendation or ruling, it must adopt it.¹⁵⁷ Similarly, a single nation cannot block the adoption of Appellate Body reports. They may only be disregarded or modified if the DSB unanimously agrees to do so.¹⁵⁸

It is this loss of veto power that has rankled numerous WTO critics in the United States. However, fears that the new agreement threatens national sovereignty appear unfounded. First, "no treaty or international agreement can bind the United States if it does not wish to be bound. Congress may at any time override such an agreement or any provision of it by statute."¹⁵⁹ Second, U.S. courts traditionally have viewed this country's

151. *Id.* at 1238-39. This "reasonable" time is defined as a time period proposed by the member and approved by the DSB, a time period mutually agreed upon by the parties within 45 days of the adoption of the panel report or ruling, or, in the absence of such agreement, a period of time determined through binding arbitration. The arbitrator is directed to consider that the time generally should not exceed 15 months from the date of adoption of the panel or Appellate Body report.

152. *Id.* at 1240.

153. *Id.* at 1240-1241.

154. *See supra* text accompanying notes 120-122.

155. *See* SCHOTT, *supra* note 9, at 129.

156. *See* text accompanying note 140.

157. Final Act, *supra* note 110, at 1235.

158. *Id.* at 1237.

159. William H. Lash III, *Look Who's Afraid of WTO*, J. COM., June 14, 1994, at 8A (quoting former Appeals Court Judge Robert Bork).

commercial treaty obligations as non-self-executing.¹⁶⁰ Thus, absent some implementing action by the executive or legislative branches of government, WTO panel decisions will not become part of U.S. domestic law.¹⁶¹ Moreover, the WTO is not authorized to repeal United States' laws.¹⁶²

The WTO affords nations a great deal of discretion in how they will comply with an adverse panel decision. For instance, the dispute mechanisms specifically permit the parties to negotiate some mutually acceptable compensation as an alternative to immediate compliance with the losing party's WTO obligations.¹⁶³ And, even if a losing party chooses to ignore a panel ruling, it need not fear arbitrary sanctions.¹⁶⁴ Instead, any retaliatory measures sanctioned by the DSB may not exceed the damage caused to the complaining member.¹⁶⁵ However, compensation or retaliation is only a fallback in the event of non-compliance.¹⁶⁶ Once a dispute settlement report is adopted, it establishes a legal obligation upon the member in question to change its practices to make them consistent with its trade obligations.¹⁶⁷

This last point illustrates perhaps the greatest advantage the WTO dispute settlement process has over its GATT counterpart. A nation's failure to comply with a panel ruling certainly provides the possibility of legal retaliation by any injured nation. However, an economic powerhouse like the United States seldom must fear such retaliation because its trading partners are unlikely to risk losing general access to the U.S. market. However, an important "cost of noncompliance is that [a country] would have a harder time pressing cases against other WTO members . . . [because] its ability to apply moral suasion would be diminished."¹⁶⁸

160. Dillon, *supra* note 111, at 390-391.

161. *Id.* See RICHARDS, *supra* note 113, at 227-228.

162. See Schultz, *supra* note 108, at 22.

163. *Id.* See also Final Act, *supra* note 110, at 1239.

164. *Id.*

165. *Id.* at 1239-1240.

166. John H. Jackson, *The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT'L L. 60, 61 (1997).

167. *Id.* at 60.

168. SCHOTT, *supra* note 9, at 130. Further, "noncompliance by a major trading country would undercut confidence in the rules-based system as a whole and raise anew concerns about system erosion." *Id.*

B. Principles Underlying the Multilateral Trade Regime

The original GATT process rested on several basic principles of international trade: national treatment; most-favored national treatment; and tariff-based import restrictions.¹⁶⁹ These objectives were incorporated in the WTO agreement¹⁷⁰ and, accordingly, governed the trade relations between the United States and Venezuela in their reformulated gasoline dispute.

Under the national treatment principle, WTO members are precluded from subjecting imports to stricter standards than those imposed on domestic goods.¹⁷¹ This was a central thrust of the Venezuelan complaint; the reformulated gasoline regulations imposed less stringent standards on U.S. refiners than on Venezuelan refiners whose gasoline imported into the United States.¹⁷²

Most-favored-nation treatment requires that any privilege, advantage, or benefit granted to the imports of one WTO member must also be extended to similar products imported from any other member.¹⁷³ The reformulated gasoline rules would violate this principle if it could be shown that the United States provided more favorable treatment to imported gasoline from some third countries than it did for gasoline imports from Venezuela.

In the complaint it filed with the WTO, Venezuela specifically accused the United States of violating the national treatment and most-favored-nation treatment principles. However, it also suggested that the U.S. was simultaneously disregarding the tariff-based principle.¹⁷⁴ The essence of the tariff-based principle is that the WTO strives to make tariffs the only form of import protection imposed by nations. International trade rules specifically

169. See RICHARDS, *supra* note 113, at 234-236. Cf. Douglas Jake Caldwell, Note, *International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution*, 18 MD. J. INT'L L. & TRADE 173, 175-76 (1994) [hereinafter Caldwell].

170. Final Act, *supra* note 110, at 1154.

171. See RICHARDS, *supra* note 113, at 236. However, the national treatment principle does not prevent members from imposing tariffs on foreign goods entering the country. The equal treatment requirement is not triggered until after the goods have cleared customs.

172. See *infra* notes 191-209 and accompanying text.

173. See RICHARDS, *supra* note 113, at 235. Most-favored-nation treatment allows WTO members to conduct bilateral negotiations with trading partners for the reduction of tariff and nontariff barriers. Any reduction in barriers is then extended to all other WTO members through the most-favored-nation principle.

174. *WTO Panel Will Investigate Complaint By Venezuela Against U.S. Gas Rules*, 12 INT'L TRADE REP. (BNA) 658 (1995).

prohibit the use of nontariff barriers (quotas and quantitative restrictions).¹⁷⁵ Venezuela's suggestion that the U.S. reformulated gasoline rules constituted a disguised nontariff barrier to international trade¹⁷⁶ was consistent with the complaints often lodged by developing nations. They have long argued that many of the environmental measures erected by the developed world are, in fact, no more than hidden nontariff barriers to goods from the developing countries.¹⁷⁷

Environmentalists, on the other hand, complain that the principles underlying the WTO agreement directly conflict with environmental preservation and protection.¹⁷⁸ They warn that the new international legalism accompanying the WTO agreement is likely to diminish each member's environmental legislation by allowing the WTO to have final say over what domestic legislation is WTO-legal.¹⁷⁹ In fact, the United States, Norway, the European Union, and New Zealand have consistently argued that international trade rules be amended or interpreted to permit WTO members to enforce their domestic environmental rules.¹⁸⁰ However, their proposals have not met with success. This has lead environmental advocates to complain that the resolution of international environmental trade disputes have entailed scrutinizing the trade friendliness of the domestic environmental laws rather than whether the laws were environmentally sound.¹⁸¹ This seems to stem from the fact that the WTO's substantive provisions have not been interpreted to affirmatively require any level of environmental protection. On the contrary, they are read to prohibit all environmental laws to the extent they are deemed inappropriately trade restrictive or discriminatory.¹⁸²

175. See RICHARDS, *supra* note 133, at 236-239; Caldwell, *supra* note 169, at 176.

176. *WTO Panel Will Investigate Complaint By Venezuela Against U.S. Gas Rules*, 12 INT'L TRADE REP. (BNA) 658 (1995).

177. ESTY, *supra* note 130, at 238.

178. See Parks, *supra* note 132, at 152.

179. *Id.* at 152-53.

180. Richard Steinberg, *Trade Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 244 (1997).

181. *Id.* at 239.

182. *Id.* at 240.

V.

SEEKING A COMPROMISE: THE EPA'S
PROPOSED RULE

In response to the Venezuelan concerns, the EPA conducted a series of meetings with PDVSA, domestic refiners, the State Department, the Office of the U.S. Trade Representative and others. Finally, on May 3, 1994, the EPA filed notice of a proposed rule amending the reformulated gasoline regulations as applied to foreign refiners.¹⁸³ Under the proposed rule, foreign refiners would be allowed to utilize Methods 1, 2, or 3 in order to establish a 1990 baseline.¹⁸⁴ Yet, in order to receive the benefits of the 1990 baselines, a foreign refiner would be subjected to comply with a series of requirements.

First, a foreign refiner was required to petition the EPA for the baseline.¹⁸⁵ That petition needed to include the same data that domestic refiners submit pursuant to Methods 1, 2, or 3.¹⁸⁶ However, unlike their domestic counterparts, foreign refiners had to prove an additional element. They were required to conclusively establish the quality and quantity of gasoline actually shipped to the United States.¹⁸⁷ Moreover, if the EPA was unable to determine the foreign refiner's U.S. market share, the refiner would be forced to use the statutory baseline.¹⁸⁸

The proposed rule also required the foreign refiner to establish the refinery-of-origin.¹⁸⁹ This included testing at the point of departure and comparative testing at the U.S. port of entry.¹⁹⁰ If any single parameter did not match, the foreign refiner would no longer be allowed to use a 1990 individual baseline.¹⁹¹ Once the EPA and the foreign refiner established its 1990 U.S. market share, it would be limited to that share. In other words, any amount over the foreign refiner's 1990 U.S. market share would be subject to the statutory baseline.¹⁹² The proposed rule also required the foreign refiner to allow unannounced EPA audits

183. 59 Fed. Reg. 22800.

184. *Id.* at 22800-01.

185. *Id.* at 22802.

186. *Id.*

187. *Id.*

188. *Id.* at 22803.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 22804.

and inspections; it also required certification and attestation of all data (including sampling and testing).¹⁹³

In reliance on this proposed rule, Venezuela originally shelved its plans to bring a GATT complaint against the United States.¹⁹⁴ However, this compromise was rejected when the House of Representatives, in the EPA's appropriations bill, voted to prevent the EPA from allowing foreign refiners to use the same baseline as U.S. refiners. This set the stage for Venezuela officially filing its complaint first with GATT and ultimately, after the creation of the WTO, with the WTO.¹⁹⁵

Venezuela originally filed its claim under the GATT's dispute settlement procedures.¹⁹⁶ Yet, under the GATT rules, the United States could have unilaterally blocked an adverse panel ruling.¹⁹⁷ Therefore, after the creation of the WTO, Venezuela withdrew its complaint from GATT and refiled under the WTO.¹⁹⁸ This was a wise move, because under the WTO members are required to comply with the panel's decisions.¹⁹⁹

VI. THE CASE

Pursuant to the WTO rules, on January 23, 1995, the United States received a request from Venezuela to hold consultations concerning the reformulated gasoline rules.²⁰⁰ These preliminary discussions occurred on February 24, 1995.²⁰¹ Because the two countries were unable to resolve their differences through negoti-

193. *Id.*

194. *EPA Announces Fuel Plan For Venezuela; Threatened GATT Complaint Is Shelved*, 11 INT'L TRADE REP. (BNA) 504 (1994). At this time it was disclosed that the Venezuelans had been conducting secret negotiations with top U.S. officials. These negotiations between Venezuela and officials from the EPA, the State Department, the Department of Energy, the Office of the U.S. Trade Representative, and the White House angered several members of Congress who complained that this special treatment for Venezuela would harm air quality. *Id.* at 504-05.

195. *Venezuela Plans Challenge In GATT Protesting U.S. Reformulated Gas Rule*, 11 INT'L TRADE REP. (BNA) 1442 (1994).

196. *Council Accepts Venezuelan Demand For Panel On Reformulated Gas Rule*, 11 INT'L TRADE REP. (BNA) 1577 (1994).

197. *See supra* note 155 and accompanying text.

198. *WTO Panel Will Investigate Complaint By Venezuela Against U.S. Gas Rules*, 12 INT'L TRADE REP. (BNA) 658 (1995).

199. *See supra* notes 156-158 and accompanying text.

200. World Trade Organization: Report of the Panel in United States - Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, 277 (January 29, 1996) [hereinafter *The Panel*].

201. *Id.* at 277.

ations, Venezuela requested the formation of a dispute resolution panel.²⁰² A panel was established to hear the evidence and began meeting with parties to adjudicate the case on July 10, 1995.²⁰³

Venezuela's complaint focused on the national treatment guarantee found in Article III:4 of the GATT.²⁰⁴ Specifically, Article III:4 prohibits WTO members from distinguishing between domestic products and those of foreign origin with respect to "all laws, regulations and requirements affecting their internal sale, offering for sale, [and] purchase"²⁰⁵ It is designed to insure that once customs duties (tariffs) have been paid, imports will be treated no differently than domestically-produced goods.²⁰⁶

The gist of Venezuela's argument was that the reformulated gasoline regulations, specifically, the baseline determination methodology, discriminated against foreign refiners and products, in favor of U.S. refiners. However, at the same time, it emphasized that it "was not questioning the right of the United States to enact stringent environmental standards and regulations in order to improve air quality within the U.S. territory provided these standards and regulations treated imported products no less favorably than domestic like products."²⁰⁷ Specifically, Venezuela contended that:

The Gasoline Rule required imported gasoline to conform with the more stringent statutory baseline when U.S. gasoline had to comply only with a U.S. refiner's individual baseline. Practically, this meant that imported gasoline with certain parameter levels above the statutory baseline could not be directly sold in the U.S. market whereas gasoline with these same qualities produced in a

202. *Id.* On April 28, 1995, the parties agreed upon the members of a 3 person panel that would hear the case, Mr. Joseph Wong, Mr. Crawford Falconer, and Mr. Kim Luotonen.

203. *Id.* at 278.

204. *Id.* at 280. Venezuela also accused the United States of violating the most-favored-nation provision of Article I:1 of GATT because some United States trading partners received more favorable baseline rules than did Venezuela. However, the panel dismissed this part of the complaint on mootness grounds because that method was no longer in use in the United States. *Id.* at 295-296.

205. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 (1969), 4 B.I.S.D. 1 (1969) [hereinafter GATT].

206. See PESCATORE, *supra* note 112, at 29.

207. The Panel, *supra* note 200, at 280.

U.S. refinery could be freely sold on the U.S. market provided it conformed with that refiner's individual baseline.²⁰⁸

The United States responded to Venezuela's Article III:4 contentions in three ways. First, it argued that the national treatment requirement was not violated because foreign gasoline and refiners were treated the same as similarly situated domestic gasoline and refiners. Basically, the United States claimed that importers, like certain domestic refiners, lack consistent sources of gasoline, lack consistent quality of gasoline, and consequently, lack sufficient data to establish 1990 gasoline quality necessary for an individual baseline under the reformulated gasoline regulations.²⁰⁹ This, according to the United States, justified the difference in treatment between imported and domestic gasoline. Basically, the United States asserted that it did not violate the national treatment principle because similarly situated parties were treated the same.

Second, the United States asserted that, on the whole, imported gasoline was treated in a manner "no less favorable" than the treatment accorded domestic gasoline. The contention was that statutory baseline and the average sum of the individual baselines both corresponded to the average gasoline quality in 1990. Thus, "the Gasoline Rule did not treat imported gasoline less favorably than domestic gasoline overall."²¹⁰ Specifically, the United States contended that:

The environmental goal of the Gasoline Rule was to regulate the overall quality of the gasoline sold in the United States. Each importer had to satisfy on average the statutory baseline, which approximated average gasoline quality consumed in the U.S. in 1990, and domestic refiners had to satisfy on average their 1990 individual baselines, which overall roughly represented 1990 gasoline quality. Hence, overall domestically produced gasoline had to be at least as clean as foreign gasoline since roughly half of domestic gasoline would "cleaner" and roughly half would be "dirtier" than gasoline using the statutory baseline.²¹¹

208. *Id.* Venezuela commented that . . . [a] U.S. government official had publicly remarked that this type of discrimination was encouraged as a means of protecting U.S. gasoline. *Id.*

209. *Id.* at 294

210. *Id.* at 295.

211. *Id.* at 281. The basic argument was that since the statutory baseline is an average, if one average the individual baselines, one would discover that half of the individual baselines were cleaner than the statutory baselines and half were dirtier.

Third, the United States asserted that, even if the Gasoline Rules discriminated against imports, they were justified by the exceptions found within Article XX of the GATT. It cited three provisions provisions in Article XX, "subsections (b), (d), and (g)" in defense of its actions.²¹²

Article XX (b) states that the GATT does not prevent a nation party from adopting or enforcing measures "necessary to protect human, animal or plant life or health."²¹³ According to the United States, the Gasoline Rules fell within Article XX(b) because the aim of the reformulated gasoline rules was to control toxic air pollution from mobile sources and, hence, to protect the public health and welfare.²¹⁴

The United States also claimed that it was entitled to an exception to the national treatment principle under Article XX (d). That provision permits measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of . . . [the GATT] Agreement. . . ."²¹⁵ Specifically, "[t]he United States considered the Gasoline Rule's baseline establishment system was necessary to enforce the non-degradation requirements aiming at preventing deterioration of air quality."²¹⁶ It contended that those non-degradation requirements were "laws or regulations" and were not inconsistent with the GATT principles. Since the baseline methods secured compliance with the non-degradation requirements, they fell within Article XX(d).²¹⁷

Article XX(g) excepts from the general trade principles measures "relating to the conservation of exhaustible resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."²¹⁸ According to the United States,

[C]lean air was an exhaustible resource within the meaning of Article XX(g) since it could be exhausted by the emissions of pollutant . . . In most polluted areas, it could become chronically contaminated and remain so over long periods of time. Air containing pollutants could move long distances to contaminate other airsheds.²¹⁹

212. *Id.* at 296.

213. GATT, *supra* note 205, at XX(b).

214. The Panel, *supra* note 200, at 284.

215. GATT, *supra* note 205, at XX (d).

216. The Panel, *supra* note 200, at 287.

217. *Id.*

218. GATT, *supra* note 205, at XX(g).

219. The Panel, *supra* note 200, at 288.

Venezuela disagreed, claiming that the Article XX exceptions should be construed narrowly. In this vein, it asserted that “clean air was a ‘condition’ of air that was renewable rather than a resource that was exhaustible, such as petroleum or coal.”²²⁰ Citing previous GATT panel rulings recognizing that fish were an “exhaustible nature resource,”²²¹ the United States “maintained that air was undoubtedly a natural resource which could be exhausted if it was rendered unfit for human, animal, or plant consumption.”²²² Further, the United States argued that the Gasoline Rule fell within Article XX(g)’s requirement that such measures be “made effective in conjunction with restrictions on domestic production or consumption.”²²³ It believed that the Gasoline Rule “restricted consumption of clean air domestically through its restriction of air pollutants.”²²⁴

A. *The Panel Decision*

The Panel agreed with Venezuela’s assertion that the baseline establishment methods violated the national treatment principle embodied in Article III:4 of the GATT. It concluded that:

imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favorable sales conditions as were afforded domestic gasoline tied to the producer of a product, imported gasoline was treated less favorably than domestic gasoline.²²⁵

In reaching this conclusion, the Panel dismissed the U.S. argument that the terms of Article III:4 were met because imported gasoline was treated similarly to gasoline from similarly situated

220. *Id.*

221. *Id.* at 288 (citing *Canada Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98 (adopted on 22 March 1988) and *United States Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD 29S/91 (adopted on 22 February 1982)).

222. The Panel, *supra* note 200, at 288.

223. See *supra* text accompanying note 218.

224. The Panel, *supra* note 200, at 288. The United States considered that the Gasoline Rule restricted domestic production of gasoline by requiring manufacturers to limit their production of gasoline so that over the course of the year the average of particular components of the gasoline did not exceed certain maximum levels. It also restricted the domestic consumption by ensuring that the average of those components did not exceed certain maximum levels. *Id.*

225. *Id.* at 295.

domestic sources.²²⁶ It found the United States' argument to be contrary to the object and purpose of Article III:4 in that such an interpretation would make foreign goods prone to highly subjective and variable treatment based on factors that have nothing to do with the products being sold.²²⁷

This reasoning disregards the fact that the characteristics of the gas produced by the refiners directly affects the determination of the baseline and thus the enforceability of the Clean Air Act. Without verifiable data related to gasoline source consistency and gasoline quality consistency, the gasoline regulations are basically worthless. The U.S. must be able to verify the refiner's information or the refiner may simply fabricate it. However, the Panel emphasized that Article III:4 "deals with the treatment to be accorded like products; its wording does not allow less favorable treatment dependent on the characteristics of the producer and the nature of the data held by it."²²⁸

In finding a violation of the national treatment principle, the Panel also rejected the U.S. contention that "on the whole" foreign gasoline was treated no less favorably than domestic gasoline.²²⁹ First, it stressed that a country could not balance less favorable treatment against more favorable treatment and thereby achieve an overall equality of treatment.²³⁰ It stated that "the 'no less favorable' treatment requirement . . . has to be understood as applicable to each individual case of imported products."²³¹ Furthermore, the Panel believed that imported gasoline was treated less favorably than its domestic counterpart, even

226. See *supra* text accompanying note 209. The United States contended that "the difference in treatment between imported and domestic gasoline was justified because importers, like domestic refiners with limited 1990 operations and blenders, could not reliably establish their 1990 gasoline quality, lacked consistent sources and quality of gasoline, or had the flexibility to meet a statutory baseline since they were not constrained by refinery equipment and crude supplies." The Panel, *supra* note 200, at 294.

227. The Panel, *supra* note 200, at 294. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III. *Id.*

228. *Id.* The Panel noted that its conclusion was consistent with a previous GATT holding. *Id.* (citing United States Measures Affecting Alcoholic and Malt Beverages, BISD 39S/206, para. 5.19 (adopted on 19 June 1992)).

229. See *supra* text accompanying notes 210-211.

230. The Panel, *supra* note 200, at 295.

231. *Id.* (quoting United States-Section 337 of the Tariff Act of 1930, BISD 36S/345, para. 5.14 (adopted on 7 November 1989)).

when considering the treatments as a whole.²³² It found that 97 percent of all U.S. refiners did not meet the statutory baseline. However, unlike importers, the domestic refiners were not required by law to meet the statutory baseline, only their individual baselines. The result was that 98.5 percent of U.S. refiners received EPA approval of their individual baselines.²³³

After concluding that the baseline establishment methods treated imported gasoline less favorably than domestic gasoline, the Panel also rejected the U.S. argument that the measure was shielded by the Article XX exceptions.²³⁴ The United States was required to prove three elements to meet the Article XX(b) exception for measures “necessary to protect human health:”

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal, or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective; AND
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.²³⁵

The Panel held that measures would be deemed “necessary” if there were no other alternative measures available that were not inconsistent with the Agreement or at least less inconsistent with the Agreement.²³⁶ The United States argued that the regulation was “necessary” as written, by making the same arguments that it made when it promulgated the regulations at issue.²³⁷ The United States argued that it was necessary to differentiate between importers and domestic gasoline to prevent gaming; i.e., to prevent importers from having the discretion to choose between an individual baseline or a statutory baseline depending on which one was cheaper (dirtier).²³⁸ It argued that since gasoline is fun-

232. [C]onsidered even from the point of view of imported gasoline as a whole, treatment was generally less favorable. Importers of gasoline had to adapt to an assigned average standard not linked to the particular gasoline imported, while refiners of domestic gasoline had only to meet a standard linked to their own product in 1990. The Panel, *supra* note 200, at 295.

233. *Id.*

234. *See supra* text accompanying notes 212-224.

235. The Panel, *supra* note 200, at 296. “[A]s the party invoking an exception, the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope.” *Id.* To see the language of the introductory clause to Article XX (the chapeau), *see infra* text accompanying note 278.

236. The Panel, *supra* note 200, at 297.

237. *See supra* text accompanying notes 95-103.

238. The Panel, *supra* note 200, at 285.

gible and imported gasoline is usually a mixture from many different sources, importers would have a difficult time identifying and verifying the refinery of origin necessary for determining an individual baseline.²³⁹ This could also lead to gaming since the importer could claim whatever refinery of origin would be most beneficial relative to the baseline.²⁴⁰ The United States also argued that the regulation was necessary because it could not inspect foreign refineries to determine if the data provided for the individual baseline was correct, and it did not have jurisdiction to enforce civil or criminal penalties for violations.²⁴¹

The Panel held that EPA's goal of reducing toxic pollutants in gasoline and preventing the degradation of air quality was a legitimate effort to protect public health and welfare.²⁴² It also concluded that the preservation of air quality justified the regulations.²⁴³ Nevertheless, it determined that the United States regulations were not necessary, since the United States failed to prove that there was no other way for the United States to achieve its statutory goals.²⁴⁴ The Panel basically disregarded EPA's argument regarding verification, auditing, monitoring and enforcement relative to foreign refiners and simply held that the United States had not shouldered its burden.

To meet the Article XX(d) exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT, the United States was required to demonstrate three elements:

- (1) that the measures for which the exception is being invoked—that is, the particular trade measure inconsistent with the General Agreement—*secure compliance* with laws or regulations themselves not inconsistent with the General Agreement;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to secure compliance with those laws or regulations; AND
- (3) that the measures were applied in conformity with the *introductory clause* of Article XX.²⁴⁵

239. *Id.* at 285.

240. *Id.*

241. *Id.*

242. 42 *Id.*

243. *Id.* at 296.

244. *Id.* at 296-298.

245. *Id.* at 298. For the language of the introductory clause (the chapeau) to Article XX, see *infra* text accompanying note 278.

The United States was unable to meet the first step. Observing that even if the system of baselines was itself consistent with Article III:4, the Panel rejected the notion that the maintenance of discrimination between imported and domestic gasoline “secured compliance” with the baseline system.²⁴⁶ It concluded that the “methods were not an enforcement mechanism. They were simply rules for determining individual baselines. As such they were not the type of measures with which Article XX(d) was concerned.”²⁴⁷ Because the United States stumbled on the first element, the Panel found it unnecessary to consider the other two elements.²⁴⁸

Finally, the Panel rejected the United States argument that the Gasoline Rule fell within the Article XX(g) exception for measures “relating to the conservation of exhaustible natural resources.” To be successful on this claim, the United States was required to show:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies related to the conservation of exhaustible natural resources;
- (2) that the measures for which the exception was being invoked—that is the particular trade measures inconsistent with the General Agreement—were *related to* the conservation of exhaustible natural resources;
- (3) that the measures for which the exception was being invoked were made effective *in conjunction* with restrictions on domestic production and consumption; AND
- (4) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.²⁴⁹

On step 1, the Panel agreed that clean air was an exhaustible resource and that it could be exhausted by pollutants, including those emitted through the consumption of gasoline.²⁵⁰ However, the United States stumbled on the second step. Recognizing that the words “related” to were ambiguous, the Panel looked to language of an earlier GATT case, which held that “while a trade measure did not have to be necessary or essential to the conser-

246. The Panel, *supra* note 200, at 298.

247. *Id.*

248. *Id.*

249. *Id.* at 299. To see the language of the introductory clause of Article XX (the chapeau), see *infra* text accompanying note 278.

250. The Panel, *supra* note 200, at 299. It concluded that clean air was an exhaustible natural resource, since it was a resource (had value) and it was natural. *Id.*

vation of an exhaustible natural resource, it had to be *primarily aimed* at rendering effective these restrictions.”²⁵¹

Applying this test, the Panel concluded that the less favorable baselines methods that adversely affected imported gasoline were not “related to” the conservation of clean air because they were not “primarily aimed at” that objective.²⁵² It “saw no direct connection between the less favorable treatment of imported gasoline that was chemically identical to domestic gasoline, and the U.S. objective of improving air quality in the United States.”²⁵³ The Panel could not see how U.S. compliance with the national treatment principle would in any way hinder U.S. attainment of its air quality goals.²⁵⁴

After ruling against the United States, the Panel, in its concluding remarks, stressed that it did not pass upon the desirability or necessity of “the environmental objectives of the Clean Air Act or the Gasoline Rule.”²⁵⁵ It viewed its task as merely insuring that nations comply with their international trade obligations. Specifically, it stated that “WTO members . . . [are] free to set their own environmental objectives, but they . . . [are] bound to implement these objectives through measures consistent with . . . [GATT’s provisions], notably those on the relative treatment of domestic and imported products.”²⁵⁶

B. *The Appeal*

The United States appealed the Panel’s decision to the Appellate Body of the WTO. Specifically, it contested:

[T]he ruling that the baseline establishment rules do not constitute a “measure” “relating to” the conservation of clean air within the meaning of Article XX(g) . . . Consequently, it also . . . [contended]

251. *Id.* (quoting Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, BISD 35S/98, para. 4.6 (adopted on 22 March 1988)). The Panel cited the same case in concluding that the “in conjunction with” requirement of Step 3 also turned on whether the restriction was *primarily aimed* at rendering the restrictions effective. *Id.*

252. The Panel, *supra* note 200, at 299-300.

253. *Id.* at 300. It stressed that the purpose of Article XX(g) was not to “widen the scope” of trade policy measures, but to merely guarantee that the GATT principles do not unnecessarily restrict attempts to conserve exhaustible natural resources. *Id.*

254. *Id.* Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. *Id.* Because the United States was unable to carry its burden of proving the second step of the Article XX(g) test, the Panel found it unnecessary to examine steps three and four. *Id.*

255. *Id.*

256. *Id.*

that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.²⁵⁷

As the following discussion reveals, the Appellate Body reversed the Panel's analysis and conclusion on step 2.²⁵⁸ Further, it found in favor of the United States on step 3.²⁵⁹ Nevertheless, it ruled against the United States on step 4 of the Article XX(g) test.²⁶⁰

First, the Appellate Body held that the Panel erred in its finding that the baseline methods established in the reformulated gasoline regulations did not fall within the scope of Article XX(g) of the General Agreement because they were not "primarily aimed at" the conservation of clean air.²⁶¹ It pointed out that the "primarily aimed at" phrase the Panel used is not language contained within the GATT treaty and is therefore not a litmus test for the inclusion or exclusion of measures from Article XX(g).²⁶² It then cautioned that the words "relating to the conservation of exhaustible natural resources" cannot be read so broadly that they subvert the purposes of Article III:4. And, conversely, Article III:4 cannot be interpreted so expansively that it invalidates Article XX(g).²⁶³

With this in mind, the Appellate Body recognized that "[w]ithout baselines of some kind, . . . scrutiny [of the level of compliance] 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."²⁶⁴ Accordingly, the Appellate Body found that step 2 was met because "the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g)."²⁶⁵ This seemed to be an important step toward

257. World Trade Organization Appellate Body: Report of the Appellate Body In *United States-Standards For Reformulated And Conventional Gasoline* (adopted on 20 May 1996), 35 I.L.M. 603, 613 (1996) [hereinafter Appellate Body]. Basically, the United States was arguing that it met steps 1 and 2 of the Panel's Article XX(g) test and that it would also pass steps 3 and 4.

258. See *infra* text accompanying notes 261-266.

259. See *infra* notes 267-276 and accompanying text.

260. See *infra* notes 277-297 and accompanying text.

261. Appellate Body, *supra* note 257, at 633.

262. *Id.* at 623.

263. *Id.* at 622.

264. *Id.* at 623.

265. *Id.*

fuller recognition of environmental concerns in the conflict between the environment and international trade.²⁶⁶

Having found that the United States had met its burden of demonstrating that the baseline establishment rules were "related to the conservation of exhaustible natural resources" (step 2), the Appellate Body turned its attention to step 3 of the Article XX(g) analysis. This required that the U.S. to show that the trade restrictive measures "were made effective *in conjunction* with restrictions on domestic production and consumption."²⁶⁷ The United States claimed that this clause was met since "the burdens entailed by regulating the level of pollutants in the air emitted in the course combustion of gasoline, . . . [were] not imposed solely on, or in respect of, imported gasoline."²⁶⁸

In reviewing this issue, the Appellate Body felt obliged to follow the basic international rule of treaty interpretation that "the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose."²⁶⁹ Viewed in this manner, the Appellate Body agreed with the U.S. that step 3 of Article XX(g) requires that the "baseline establishment rules . . . [be] promulgated or brought into effect together with restrictions on domestic production of . . . natural resources."²⁷⁰ It described the clause as "a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."²⁷¹ At the same time, however, the Appellate Body could find no "tex-

266. Judith Bello and Maury Shenk, *WTO Dispute Settlement Body: Article XX Environmental Exceptions to GATT-National Treatment-Consistency with GATT of U.S. Rules Regarding Imports of Reformulated Gasoline*, 90 AM. J. INT'L L. 669, 672 (1996).

267. *See supra* text accompanying note 249. The Panel did not deal with this issue since it found that the United States had not carried its burden with respect to step 2. *See supra* note 254.

268. Appellate Body, *supra* note 257, at 624. Venezuela argued that this step was not met unless the measure was "primarily aimed at" making the domestic restrictions effective. Further, it claimed that "to be properly regarded as 'primarily aimed at' the conservation of natural resources, the baseline establishment rules must not only 'reflect a conservation purpose' but also be shown to have had 'some positive effect.'" *Id.*

269. *Id.* (referring to *Article 31 of the Vienna Convention on the Law of Treaties*, 8 I.L.M. 679 (1969)).

270. Appellate Body, *supra* note 257, at 624.

271. *Id.* at 625 (emphasis original). Put in a slightly different manner, we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline, but also with respect to domestic gasoline. *Id.*

tual basis for requiring identical treatment of domestic and imported products.”²⁷² But it also recognized that “if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed on imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals.”²⁷³

Applying this analysis to the case at hand, the Appellate Body concluded that “the baseline establishment rules affect[ed] both domestic gasoline and imported gasoline.”²⁷⁴ Thus, step 3 was met because the “restrictions on the consumption or depletion of clean air by regulating the domestic production of ‘dirty’ gasoline are established jointly with corresponding restrictions with respect to imported gasoline.”²⁷⁵ It was not deemed material for step 3 purposes that the imported gasoline may have been accorded less favorable treatment than the domestic gasoline.²⁷⁶

The Appellate Body then turned its attention to step 4 of the Article XX(g) test. This involved a determination of whether the U.S. measures “were applied in conformity with the requirements of the *introductory clause* of Article XX.”²⁷⁷ Known as the chapeau, this opening paragraph to the Article XX exceptions states:

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

272. *Id.* Indeed, where there is identity of treatment . . . it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. *Id.*

273. *Id.* The measure would simply be naked discrimination for protecting locally-produced goods. *Id.* See Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, BISD 35S/98 para. 5.1 (adopted on 22 March 1988) (finding that a ban on purchases by foreign buyers without a corresponding ban on purchases by domestic buyers was not justified by Article XX(g)).

274. Appellate Body, *supra* note 257, at 625.

275. *Id.* The Appellate Body dismissed the empirical effects test urged by Venezuela, *see supra* note 268, for two reasons. First, it always is difficult to determine causation. And, second, there often is too long period of time that must elapse before one may observe the outcome of conservation efforts. Appellate Body, *supra* note 257, at 625. But it went on to state that a step 3 might not be met if it become[s] clear realistically, [that] a specific measure cannot in any possible situation have any positive effect on conservation goals. *Id.* at 625-626.

276. Appellate Body, *supra* note 257, at 625. However, the less favorable treatment would become an issue in the step 4 analysis. *See infra* note 278.

277. *See supra* text accompanying note 249.

then lists the various exceptions (paragraphs (a) to (j) listed under Article XX.)²⁷⁸

According to the Appellate Body, the United States had the burden of demonstrating that the baseline establishment rules satisfied a two-tiered test: "first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."²⁷⁹ Although the Appellate Body had already ruled that the United States had already provisionally qualified for an exception under the first tier,²⁸⁰ it cautioned that the burden of meeting the second tier was much greater.²⁸¹ Otherwise, it was concerned that the exceptions would be "abused or misused."²⁸²

The Appellate Body observed that the chapeau prohibits the application of measures within the scope of Article XX(g) if they would constitute "arbitrary discrimination," "unjustifiable discrimination," or "disguised restriction" on international trade.²⁸³ While recognizing the ambiguity inherent in these terms, the Appellate Body decided they should be "read side-by-side . . . [so] they [may] impart meaning to one another."²⁸⁴ It felt that such an interpretation would better promote "the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."²⁸⁵

Following this course, the Appellate Body noted that:

There was more than one alternative course of action available to the United States in promulgating regulations implementing the . . . [Clean Air Act]. These included the imposition of statutory base-

278. GATT, *supra* note 205, Article XX. The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather that manner in which that measure is applied. Appellate Body, *supra* note 257, at 626.

279. Appellate Body, *supra* note 257, at 626.

280. *See supra* text accompanying notes 274-276.

281. The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue. Appellate Body, *supra* note 257, at 626-627.

282. *Id.* at 626. The chapeau is animated by the principle that while the exceptions to Article XX may be invoked as a matter of legal right, they should not be so applied to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. *Id.*

283. *Id.* at 627.

284. *Id.* at 629.

285. *Id.*

lines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners.²⁸⁶

It then acknowledged that the United States had explained the practical reasons why it had dismissed such options. These included administrative problems associated with verification and enforcement.²⁸⁷ However, Appellate Body found such reasoning to be “insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners”²⁸⁸ because there are “established techniques for checking, verification, assessment and enforcement of data relating to imported goods.”²⁸⁹

The Appellate Body admonished the United States for not having “pursued the possibility of entering into cooperative arrangements” with Venezuela to address these administrative difficulties.²⁹⁰ It did not overlook the dilemma faced by the EPA; Congress had blocked its previous efforts to arrive at a compromise solution with Venezuela.²⁹¹ However, it stressed that “[t]he fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.”²⁹²

The United States also was chastised for not treating domestic and foreign refiners the same by imposing the statutory the baseline requirement on both. The Appellate Body was not impressed by U.S. concerns over the problems that domestic refineries would have faced because, “while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than

286. *Id.*

287. *Id.* at 629-630.

288. *Id.* at 630.

289. *Id.* at 631.

290. *Id.* The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate.
Id.

291. *See supra* text accompanying notes 183-195.

292. Appellate Body, *supra* note 257, at 631-632.

disregard that kind of consideration when it came to foreign refiners.”²⁹³

The Appellate Body accused the United States of two fundamental omissions: (1) a failure to adequately explore means, particularly cooperation with Venezuela, of reducing the administrative problems associated with extending individual baselines to foreign refiners; and (2) a failure to consider the costs imposed on foreign refiners by the imposition of statutory baselines.²⁹⁴ In its view, “these two omissions . . . [went] well beyond what was necessary . . . to determine that a violation of Article III:4 had occurred.”²⁹⁵ Thus, it concluded that the baseline establishment rules, as applied, constituted “unjustifiable discrimination” and a “disguised restriction on international trade.”²⁹⁶ Accordingly, although the baseline establishment rules fell within the terms of the Article XX(g) exception, they violated U.S. international trade obligations because they were not entitled to the shelter protected by Article XX as a whole.²⁹⁷

VII. CONCLUSION

The reformulated gasoline dispute between the United States and Venezuela provided an excellent framework to examine the dispute resolution process developed by the WTO. From negotiation to adjudication to appeal, the full range of WTO dispute settlement procedures was demonstrated. The case illustrated a controversial feature of the new trade agreement, that is the growing tension between trade and the environment. Furthermore, it also focused attention on the conflict over the United States’ right to create laws governing its environment and a foreign company’s right to a free and open market.

It could be argued that the WTO decision does not affect the Clean Air Act and only affects the reformulated gasoline regula-

293. *Id.* at 632. Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements of the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 632-33.

297. *Id.* at 633.

tions indirectly. Yet, this argument is erroneous.²⁹⁸ The reformulated gasoline regulations were promulgated pursuant to the United States' Clean Air Act program.²⁹⁹ They were a culmination of thirty years of regulatory development and study. The regulations were specifically designed to reduce air pollution in the United States through the control of automobile fuel formulation.³⁰⁰ In addition, the entire reformulated gasoline program depends upon the use of sound verifiable data relating to gasoline composition, quality and quantity. It would be almost impossible for the EPA to verify this type of information from a foreign refiner.³⁰¹

The case highlights the accusation that the multilateral trade pact promotes free trade to the detriment of the environment.³⁰² The growing tension between global economic growth and environmental protection as illustrated by the reformulated gasoline dispute demonstrates the need for a treaty that assures environmentally sound economic development. One possible solution would be to amend Article XX of GATT to specifically exempt legitimate environmental laws and regulations, i.e. those that are non-pretextual and non-protectionist.

It is not clear that the Appellate Body's interpretation of the Article XX exceptions adequately addressed this need. It looked to see if the United States could have promulgated regulations that would have achieved the same environmental goal under Article XX(g) with a lesser impact on international trade principles.³⁰³ By stressing that "[t]he resulting discrimination must have been foreseen, and not merely inadvertent or unavoidable"³⁰⁴ the Appellate Body seemed to be applying a very strict version of a least trade-restrictive approach that may be overly hostile to domestic environmental concerns.³⁰⁵ A better ap-

298. Calapi, *supra* note 130, at 231 (recognizing that the reformulated gasoline decision does affect the Clean Air Act).

299. 42 U.S.C. § 7401

300. 42 U.S.C. § 7545.

301. *See generally*, 59 Fed. Reg. 7785-7788.

302. The WTO addressed these concerns through the establishment of a Committee on Trade and the Environment. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, *done* April 15, 1994, 33 I.L.M. 1125, 1126. This group has immediately begun investigating the relationship between the dispute settlement system and existing environmental accords. SCHOTT, *supra* note 9, at 35-37.

303. *See* Bello and Schenk, *supra* note 266, at 672.

304. Appellate Body, *supra* note 257, at 632.

305. Bello and Schenk, *supra* note 266, at 673.

proach might incorporate more consideration of the importance of the environmental issue measured against the seriousness of the alleged international trade violation.³⁰⁶ The ambiguity in the language of the Article XX exceptions suggests that reviewing panels have the discretion to perform such a balancing. Fuller consideration could be given to the sovereignty and environmental concerns of individual nations by scrutinizing the impact of trade obligations on domestic environmental policies as well as by considering the burden environmental measures place on trade obligations.³⁰⁷

Regardless of whether GATT is amended in this manner, future discussions must address ways to drastically reduce the conflict between the liberalization of trade and the preservation of the environment. Critics of international law usually argue that law in the international arena is ephemeral, existing only with the indulgence of nations and only when natural interests are not overly impaired.³⁰⁸ As environmental awareness and international environmental treaties increase, the tension between trade and the environment will certainly increase. The reformulated gasoline case demonstrates that nations must work to assure that the notions of a global environment and a global economy do not continue to clash. Through either an amendment or reinterpretation, international trade rules under GATT should be expanded to specifically allow for environmentally motivated, but marginally, trade restrictive, regulations.³⁰⁹ The GATT rules must be expanded in a way that recognizes and respects the reciprocal right of every nation to free trade and the responsibility of every nation to protect the environment.

306. *Id.*

307. See ESTY, *supra* note 130, at 117.

308. Dillon, *supra* note 111, at 397.

309. See Cynthia Maas, *Should the WTO Expand GATT Article XX: An Analysis of the United States Standards for Reformulated and Conventional Gasoline*, 5 MINN. J. GLOBAL TRADE 415, 439 (1997).