INTRODUCTION

Five years have passed since the World Trade Organization (WTO) was founded. The dispute settlement system of the WTO has been working well so far. The fact that a large number of cases have been brought shows the credibility with which members view the WTO dispute settlement system.\(^1\)

Ironically, however, this success has given rise to a new type of criticism. Recent critics have attacked the “powerful WTO.”\(^2\) The point is not the way the panels and the Appellate Body have dealt with disputes, but the extent of the discretion allocated to them.\(^3\)

More or less, judicial lawmaking is unavoidable, once a judicial body is created.\(^4\) However, the discretionary power of panels and the Appellate Body makes the situation very problematic in the context of trade and the environment. It seems that the WTO was designed to be a forum of promoting free trade and not equipped with resources necessary to reconcile

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1 As of March 23 of 2000, 191 complaints were brought before the WTO dispute settlement. WTO Secretariat, Overview of the State-of-play of WTO Dispute, at http://www.wto.org/wto/dispute/bulletin.htm (last visited Apr. 11, 2000).

2 See, e.g., WTO Secretariat, Criticism, Yes . . . Misinformation, No, at http://www.wto.org/wto/seattle/english/misinf_e/00list_e.htm (last visited Apr. 11, 2000).

3 For example, the Appellate Body itself described its discretionary power in interpreting treaty language with “the image of accordion.” Japan—Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, at 23 (Oct. 4, 1996).

4 Hersch Lauterpacht, The Development of International Law by the International Court 155 (1982).
two values that come from completely different perspectives. Panel resolutions of those issues might threaten to delegitimize the WTO dispute settlement system.5

Based on this background, this chapter focuses on the introductory clause (also called “the chapeau”) of Article XX of the General Agreement of Tariffs and Trade (GATT), which has come to play a critical role in deciding the relationship between trade and the environment. The first section of this chapter briefly reviews the basic structure of GATT and prior practices including the facts of the Gasoline case and the Shrimp-Turtle case. The second section discusses interpretative problems raised in the Gasoline case and further evolution of the law in the Shrimp-Turtle case. Finally, the third section discusses the limitation of the chapeau.

**FRAMEWORK OF THE CHAPEAU OF GATT ARTICLE XX**

**Text of GATT**

Article XX of GATT constitutes a conditional exception to GATT obligations. Although the word “environment” is not used, Article XX may be applied to justify environmentally inspired rules that conflict with other provisions of GATT.6 The relevant provision reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or 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:

> . . .

> (b) necessary to protect human, animal or plant life or health;

> . . .

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

Thus, even if a measure satisfies the test of these subparagraphs of Article XX, it would not be justified if the measure constitutes (1) arbitrary or unjustifiable discrimination between the countries where the same

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