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UNITED STATES — STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE: THE EFFECT OF THE WORLD TRADE ORGANIZATION DECISION ON THE U.S. AND ITS ADMINISTRATIVE AGENCIES*

In March 1996, the World Trade Organization ("WTO") handed down its first Dispute Settlement Panel decision since its inception in January 1995.¹ The new procedure was one of many changes promulgated by the Uruguay Round on the General Agreement on Tariffs and Trade ("GATT"), but this change created a new organization, the World Trade Organization (WTO), which supplements GATT as a governing institution. Not only does the WTO hear trade disputes brought by WTO member countries, but the WTO now has an enforcement power which GATT never had. At issue in the WTO’s first case was a very sensitive, yet burgeoning, area of international trade law—the environment.

In 1963 the Clean Air Act ("CAA") was passed by Congress in an effort to put an end to the ever increasing air pollution caused by factories and automobiles. Congress amended the CAA in 1990 in order to introduce new regulations to reduce vehicle emissions from gasoline and its constituents.² The Environmental Protection Agency ("EPA") introduced the final rule in 1993 that set forth the baseline constituent levels that gasoline could have based on 1990 figures.³ The regulation designated nine highly-populated areas of the United States as "non-attainment areas," where only reformulated gasoline is allowed in order to reduce vehicle emissions.⁴ The rest of the United States was allowed to use gasoline that was as clean as 1990 gasoline, called conventional gasoline.

This Note will discuss in detail how the Gasoline case developed. First, this Note will examine the EPA’s rule in controversy, which was issued as a

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* The official title for this decision is United States-standards for Reformulated and Conventional Gasoline, WTO No. W/DS2/R (Jan. 17, 1996) [hereinafter Gasoline case]. While the Panel issued its decision January 29, 1996 to all member countries of GATT, the decision was not released to the public until March, 1996.

3. See 42 U.S.C. §7545(k)(6)(A). The Environmental Protection Agency went through the notice, comment, and publication process required under the Administrative Procedure Act § 553. Initial notice of the proposed rule was given in 61 Fed. Reg. 33703.
result of the CAA amendments in 1990. Second, this Note will examine the initial decision by the WTO Dispute Settlement Body and the appeal heard by the WTO Standing Appellate Body (the "Appellate Panel"). Finally, this Note will analyze the United States' reaction to the decision, including how the Executive Branch rulemaking process works in relation to such a decision and how the process may change as a result.

I. THE DEVELOPMENT OF THE DISPUTE

A. The Reformulated and Conventional Gasoline Standards Defined

At issue in the dispute was how to reach the "baselines," which determine what the 1990 constituent levels were. There were two different programs that had these developed "baselines"—the reformulated gasoline program and the conventional gasoline program. The two programs used were based on whether the gasoline use was in a non-attainment area. The reformulated gasoline program was divided into a simple and complex model. The simple model is effective for 1995-1998 and includes requirements for particular constituents in the gasoline, such as benzene, oxygen, and Reid Vapor Pressure. These constituents are governed by the "non-degradation standard" and must meet at least 1990 levels. On the other hand, the complex model does not apply the "non-degradation standard" to any of these gasoline constituents. Instead, all constituents will be regulated, including T-90, sulfur, and olefins.

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7. See supra note 6, at 417.

8. See id.

9. See id. The EPA did not include these three components in the statutory requirement due to a lack of data regarding their effects on the environment. See id. at 418 (citing Summary of the Submission of the Government of the Republic of Venezuela to the WTO Dispute Settlement Panel in United States—Measures on Gasoline, at 2-3 (June 1995)). The EPA wanted to allow refineries to continue production and prepare for the future. The simple model approach thus seemed to be the best solution.

10. The baseline gasoline fuel properties for the complex model are:

<table>
<thead>
<tr>
<th>Property</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>API Gravity</td>
<td>57.4</td>
</tr>
<tr>
<td>Sulfur, ppm</td>
<td>339.</td>
</tr>
<tr>
<td>Benzene, %</td>
<td>1.53</td>
</tr>
<tr>
<td>RVP, psi</td>
<td>8.7</td>
</tr>
<tr>
<td>Octane</td>
<td>87.3</td>
</tr>
<tr>
<td>IBP, °F</td>
<td>91.</td>
</tr>
<tr>
<td>10%, °F</td>
<td>128.</td>
</tr>
<tr>
<td>50%, °F</td>
<td>218.</td>
</tr>
<tr>
<td>90%, °F</td>
<td>330.</td>
</tr>
<tr>
<td>End Point, °F</td>
<td>415.</td>
</tr>
<tr>
<td>Aromatics, %</td>
<td>32.0</td>
</tr>
<tr>
<td>Olefins, %</td>
<td>9.2</td>
</tr>
<tr>
<td>Saturates, %</td>
<td>58.8</td>
</tr>
</tbody>
</table>
The conventional gasoline program does not contain a specific time period for compliance but requires that the refiners must meet the same non-degradation requirements for all constituents. This type of gasoline, which accounts for two-thirds of that consumed in the United States, must meet the 1990 quality levels for all ingredients, not just those spelled out in the reformulated gasoline program.11

Venezuela and Brazil claimed that discrimination in favor of domestic refiners was in the non-degradation program for both reformulated and conventional gasoline.12 Each domestic refiner has three methods to use to determine its own individual baseline concerning the "ozone-forming constituents."13 If the refiner does not have the data or was only in production part of or after 1990, it must use the statutory baseline.14

For domestic refiners, the three methods available to help determine what their particular baseline would be are somewhat complex and require inspection of the facilities in most instances to determine that the data was correctly generated. Method One requires that "the refiner must use the quality data and volume records of its 1990 gasoline."15 This particular method is difficult even for the domestic refiners to meet because many do not have all the necessary data in order to calculate this baseline. These types of records and data were not required in 1990 for any refiner; therefore, only the most detailed refiner will be able to use this method to set its individual baseline. If the domestic refiner cannot meet the Method One requirements, it must use its "blendstock quality data and 1990 blendstock production records" to determine its individual baseline under Method Two.16 As a last resort, the domestic refiner can use Meth-

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11. See Mass, supra note 6, at 418.
12. See Chamovitz, supra note 2, at 459.
13. See 40 C.F.R. § 80.91(b)(1)(i) (1996). "Method 1-type data shall consist of quality (composition and property data) and volume records of gasoline produced in or shipped from the refinery in 1990, excluding exported gasoline." Id. § 80.91(c)(1)(i). "A refiner or importer must determine a baseline fuel parameter value using only Method 1-type data if sufficient Method 1-type data is available per paragraph (d)(1)(ii) of this section." Id. § 80.91(c)(4)(i). "Method 1 sampling requirements. At least half of the batches, or shipments if not batch blended, in a calendar month shall have been sampled over a minimum of six months in 1990." Id. § 80.91(d)(1)(ii).
14. See id. § 80.91(b)(4)(iii). The regulation provides: "An importer which cannot meet the criteria of paragraphs (b)(4)(i) or (ii) of this section for baseline determination shall have the parameter values listed in section (c)(5) of this section as its individual baseline parameter values." Id. "An importer of gasoline shall determine an individual baseline value for each fuel parameter listed in paragraph (b)(2) of this section using Method 1-type data on every batch of gasoline imported by that importer into the United States in 1990." Id. § 80.91(b)(4)(i). "An importer which is also a foreign refiner must determine its individual baseline using Method 1, 2 and/or 3-type data (per paragraph (c) of this section) if it imported at least 75 percent, by volume, of the gasoline produced at its foreign refinery in 1990 into the United States in 1990." Id. § 80.91(b)(4)(ii). See supra, note 12 for equivalent parameter value found in section (c)(5).
15. 40 C.F.R. § 80.91(b).
16. 40 C.F.R. § 80.91(c)(2);
Method 2-type data. Method 2-type data shall consist of 1990 gasoline blendstock quality data and 1990 blendstock production records, specifically the measured fuel parameter values and volumes of blendstock used in the production of gasoline within the refinery. Blendstock data shall include volumes purchased or otherwise received, including intracompany transfers, if the volumes were blended as part of the refiner's or importer's 1990 gasoline. Henceforth in §§ 80.91 through 80.93, "blendstock(s)" or "gasoline blendstock(s)" shall include those products or streams commercially blended to form gasoline. Id.
od Three, which allows the domestic refiner to use "its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show its 1990 gasoline composition." These domestic refiners do not have the option of the statutory baseline.

For foreign refiners and importers, there was only one option if they did not produce or import at least 75% of the gasoline produced by that particular refinery in 1990. Their option was to comply with the statutory baseline. That baseline is determined by the EPA based on the average gasoline quality in 1990, not the individual refiner's average gasoline quality in 1990. Venezuela and Brazil filed their complaint based on this very disadvantage. Foreign refiners do not have the option of Method 1 unless the 75% rule is met. Furthermore, they do not have the option to meet Methods 2 or 3 in any form. They are required to stick to the statutory baseline which meant to Venezuela and Brazil they did not enjoy the same individual baselines like domestic refiners. These individual baselines allow the refiner to continue producing "dirtier" gasoline than that produced by refiners using the statutory baseline in some circumstances. This statutory baseline rule applies to the foreign refiners for both reformulated and conventional gasoline with the exception being that a domestic refiner producing in excess of the volume caps for conventional gasoline will also have to meet the statutory baseline for that excess.

17. 40 C.F.R. § 80.91(c)(3)-(7).
Method 3-type data shall consist of post-1990 gasoline blendstock and/or gasoline quality data and 1990 blendstock and gasoline production records, specifically the measured fuel parameter values and volumes of blendstock used in the production of gasoline within the refinery. Blendstock data shall include volumes purchased or otherwise received, including intracompany transfers, if the volumes were blended as part of the refiner's or importer's 1990 gasoline. (ii) In order to use Method 3-type data, the refiner or importer must do all of the following: (A) Include a detailed discussion comparing its 1990 and post-1990 refinery operations and all other differences which would cause the 1990 and post-1990 fuel parameters values to differ; and (B) Perform the appropriate calculations so as to adjust for the differences determined in paragraph (c)(3)(ii)(A) of this section; and (C) Include a narrative, discussing the methodology and reasoning for the adjustments made per paragraph (c)(3)(ii)(B) of this section . . . (I) The post-1990 volumetric fraction of that blendstock in 1990 gasoline. For example, if a 1990 blendstock constituted 30 percent of 1990 gasoline, this criterion would be met if the post-1990 volumetric fraction of the blendstock in post-1990 gasoline was 27.0-33.0 volume percent. (B) The post-1990 volumetric fraction of a blendstock is within (-)/2.0 volume percent of the absolute value of the 1990 volumetric fraction. For example, if a 1990 blendstock constituted 5 volume percent of 1990 gasoline, this criterion would be met if the post-1990 volumetric fraction of the blendstock in post-1990 gasoline was 3-7 volume percent. If using post-1990 gasoline data, post-1990 gasoline blendstock which left a facility and which could become gasoline solely upon the addition of oxygenate shall be included in the baseline determination, per the requirements specified in (c)(1)(ii) of this section. Id. at (c)(3).

18. See 40 C.F.R. § 80.91(c)(2).
19. See id.
B. Interim Efforts to Avoid a Filed Complaint

The EPA gave certain justifications for using the two very different schemes for domestic and foreign refiners.\textsuperscript{20} First, the EPA claimed that they could not use the same modeling techniques the domestic refiners could use because these techniques do not account for any changes in the production process.\textsuperscript{21} Based on the EPA's claim that foreign processes have changed many times since 1990, the establishment of the refinery of origin would be difficult for setting individual baselines.\textsuperscript{22} This fact is important because often importers mix the gasoline from many foreign refiners to reach their end product. The EPA also claimed that they could not monitor and inspect foreign refineries like they could domestic ones. The EPA concluded that individual baselines for foreign refiners were "technical[ly] infeasib[le]."\textsuperscript{23} In an effort to avoid a GATT complaint by Venezuela against the United States, the U.S. State Department worked with the EPA to negotiate a new rule that would allow foreign refiners to use individual baselines for reformulated gasoline.\textsuperscript{24} In the notice and comment period of this proposed rule, environmental groups and large oil companies lobbied Congress to place an appropriations rider on the EPA; in essence forbidding any spending on this particular new rule once it became effective and thereby forcing abandonment of the negotiations.\textsuperscript{25}

II. THE WTO'S DECISION

A. The Complaint and the Ensuing Initial Panel Decision

Venezuela reinstated its GATT complaint after the Congressional "restraining action." Simultaneously, GATT transferred its adjudicative authority to the WTO in compliance with the Uruguay Round. Venezuela decided it would be best to refile its complaint with the WTO because of the "significant advantages to complaining countries under the new [WTO] rules."\textsuperscript{26} The particular ad-

\begin{itemize}
  \item \textsuperscript{21} See id.
  \item \textsuperscript{22} See id.
  \item \textsuperscript{23} Id. at 7785.
  \item \textsuperscript{24} See Gasoline case at 7. The panel briefly discussed the efforts made by the U.S. Department of State and the Environmental Protection Agency to avoid a registered complaint by Venezuela. See also, Charnovitz, supra note 2, at 459. "[T]he U.S. Department of State negotiated an agreement with Venezuela in early 1994 that [the] EPA would change the regulation if Venezuela withdrew its complaint." Id. After Venezuela did withdraw its complaint, the EPA subsequently began to follow-through on these new rules. The EPA was forced by court order to implement the initial rules found in 40 C.F.R. Part 80. In order to comply with the negotiated deal, the EPA was forced to begin a new rule-making procedure. Once environmental and oil groups were informed of the negotiated agreement with Venezuela, these groups began a strong lobby of Congress in order to hopefully avoid such an agreement. The pressure exerted by these lobby groups convinced Congress that they needed to adopt an appropriations rider, which had the effect of forcing the EPA to abandon any further efforts in complying with the negotiated agreement. See id. The appropriations rider can be found at 108 Stat. 2322. See id.
  \item \textsuperscript{25} See id.
  \item \textsuperscript{26} Id.
\end{itemize}
vantages that Venezuela relied on were the "automatic adoption of panel reports unless every country oppose[d] adoption"; whereas, prior to the WTO format, these same panel reports required unanimous approval by all the countries sitting on the council. After filing the complaint with the WTO, Venezuela requested that a Dispute Resolution Panel be established to deal with this case. Brazil joined the action as co-complainant once the Panel was established in April 1995.

The Panel consisted of three highly qualified officials with long, outstanding records in international trade. Joseph Wong from Hong Kong acted as the Chairman. He had previously acted as the Hong Kong representative to GATT. Crawford Falconer from New Zealand was the second panelist. He had previously acted as the director of his country's trade negotiation sector and is currently in charge of the Trade Directorate of the Organization for Economic Cooperation and Development (OECD). Kim Luotonen was the third panelist from Finland. He had also previously served his country as representative to GATT.

Venezuela and Brazil argued to the Panel that the United States EPA rule violated Article I and III of GATT (1994), was not excepted under Article XX of GATT (1994), and violated Article 2 of the Agreement on Technical Barriers to Trade ("TBT"). Both countries asked that the Panel nullify the rule under Article XXIII:1(b) and force the United States to bring the Gasoline Rule into compliance with GATT and TBT provisions. The United States argued that their policy fell into exceptions under Article XX(b), (d), and (g) of GATT (1994) even if the Panel found it to violate Articles I and/or III.

i. Article III:4

The Panel began its decision by addressing whether the Gasoline Rule violated Article III:4 of GATT (1994). There were two elements that Venezuela and Brazil needed to prove in order to succeed with their claim. First, they had to show a "law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product." Second, they had to show "treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported product than to the like product of national origin."

27. Id.
28. See id. at 11. See also, Gasoline case at 1. This information is significant because panel decisions are binding against the member countries involved in the complaint.
29. See Gasoline case at 7.
30. See id. at 7-8.
31. See id. at 8.
32. GATT Article III:4 provides in relevant part:
The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
33. Gasoline case, supra note 1, at 47.
34. Id.
In order to decide this issue, the Panel had to decide if “like” products were involved in the dispute. Unfortunately, there is no definitive answer as to what aspects need to be present in order to decide whether the products are “like.” The Panel looked to the Vienna Convention on the Law of Treaties to determine what rules should govern this type of interpretation.\textsuperscript{35} The Convention stated that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\textsuperscript{36} (emphasis added.) Looking at the ordinary meaning of the term “like,” the Panel decided that because the products were chemically identical, have the same end uses, and are substitutable, gasoline from domestic and foreign refiners satisfies the definition of “like” products under Article III:4.\textsuperscript{37} Furthermore, the Panel decided that future decisions on whether products were “like” needed to be determined on an ad hoc basis. In other words, the Panel refused to set a precedent for future proceedings by definitively determining what would constitute “like” products.

Second, the Panel had to decide whether the EPA had been treating the gasoline from foreign refiners less favorably than gasoline from domestic refiners. In order to decide this issue, the Panel had to look at whether or not forcing the foreign refiners to use the statutory baseline was to be considered “treatment less favorable” than that given to the domestic refiners. The Panel determined that unless the foreign refiners were given the same opportunity to formulate their own individual baseline, they were “prevented from benefiting from as favourable sales conditions as were afforded domestic gasoline.”\textsuperscript{38} The Panel believed this discriminatory practice attributed to the reality that domestic refiners were able to produce “dirtier” gasoline than the foreign refiners since the domestic refiners were able to set their individual baselines.

The Panel next went to dismiss the United States’ argument that the foreign refiners were “similarly situated” to domestic producers who were not in production all of 1990 or did not begin production until after 1990. The panel dismissed this argument by stating that an Article III:4 violation is determined by looking at the products, not at the “characteristics of the producer and the nature of the data held by it.”\textsuperscript{39} The Panel cited to the Malt Beverages case in support of its finding on this point.\textsuperscript{40}

The Panel also dismissed the United States’ argument that on balance there had been no more favorable treatment to domestic refiners. The U.S. formulated this argument based on the precept that the Gasoline Rule did not discriminate based on the nature of the statutory baseline calculation and because the aver-

\textsuperscript{35} See id. at 48. See also VIENNA CONVENTION ON THE LAW OF TREATIES, January 27, 1980, art. 31, 1155 U.N.T.S. 331 [hereinafter VIENNA CONVENTION].
\textsuperscript{36} VIENNA CONVENTION at art. 31(1).
\textsuperscript{37} See Gasoline case at 48-9.
\textsuperscript{38} Id. at 49-50.
\textsuperscript{39} Id. at 50.
\textsuperscript{40} See id. (citing GATT Dispute Resolution Panel on United States-Measures Affecting Alcoholic and Malt Beverages, B.I.S.D. 395/206, para. 5.19 (adopted on June 19, 1992)).
age individual baselines were substantially the same. The Panel dismissed this argument by stating that there can be no balancing act in determining whether there has been more favorable treatment to domestic products. In essence, there can be no “offset” if treatment is more favorable in one area and less favorable in another. The Panel relied on the *Section 337 of the Tariff Act of 1930* case in this respect because the Panel in that case had “rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products.”

Under Article III:4, the Panel decided that the United States was in violation because “like” products were involved and that the individual baseline methods granted more favorable treatment to the domestic refiners over foreign refiners who did not have the option to choose their own individual baselines. This finding was consistent with other GATT dispute panel decisions. Furthermore, the Panel seemed to be correct in finding that Article III:4 is violated by the Gasoline Rule because it puts an “importer performance requirement” on the foreign refiners while the same requirement(s) do not apply to the domestic refiners.

ii. Article XX

The Panel proceeded to examine whether Article XX(b), (d), or (g) could be used to justify the United States action in the Gasoline Rule. Under the GATT rules and regulations, there are exempted actions that fall under Article XX. Of these exceptions used by the United States, two of the three are considered environmental: sections (b) and (g).

a. *Section (b)*

Under Article XX(b), the exception allows measures to be adopted that are discriminatory if they are “necessary to protect human, animal or plant life or health.” The party trying to invoke the exception carries the burden of proof and must prove three elements. First, the party must prove 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.” The Panel agreed that the Clean Air Act and its amendments was such a policy that concerned the “protection of human, animal or plant life or health” under Article XX(b).

Second, the United States needed to prove that “the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy

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41. *See id.* at 51.
42. *Id.* (quoting from GATT Dispute Resolution Panel on United States-Section 337 of the Tariff Act of 1930, B.I.S.D. 365/345, para. 5.14 (November 7, 1989)).
43. *See id.* at 52.
44. *Id.* at 54.
45. *See id.*
objective."^{46} The Panel had to examine and define what the term "necessary" meant in regards to this particular element. The Panel used the Section 337 of the Tariff Act of 1930 case to assert that what is necessary cannot be justified if "an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to [the opposing party]."^{47} While this definition had been adopted while deciding an Article XX(d) case, the Panel used the Thai Cigarette decision to show that it applied to Article XX(b) as well.^{48} Under this element, the Panel decided that the United States did have an alternative measure. The Panel suggested the idea that foreign refiners could be given individual baselines or that the United States could assign the statutory baseline to all producers.^{49} This particular area of the decision has come under sharp criticism because the Panel did not establish "an experts advisory group," which is allowed under the new WTO rules. Rather, the Panel relied on its own interpretation and "saw no need to understand the pollution implications of its decision."^{50} Lastly, the United States needed to prove "that the measures were applied in conformity with the requirements of the introductory clause of Article XX." The Panel did not decide this issue because the United States had already failed to meet the second element under Article XX(b).^{51}

b. Section (d)

The United States also relied on Article XX(d) as an exception to compliance with GATT rules. Article XX(d) allows an exception to GATT principles if the rule "secure[s] compliance with laws or regulations themselves not inconsistent with the [GATT]."^{52} The Panel dismissed this exception quickly by stating that the Gasoline Rule was already in violation of Article III:4 and could not be considered a method of securing compliance to the baseline system. The Gasoline Rule was simply a rule "for determining the individual baselines."^{53} The Panel dismissed this exception readily because the first element was lacking in proof by the United States.^{54}

46. Id.
47. Id. at 56 (quoting from GATT Dispute Resolution Panel on United States-Section 337 of the Tariff Act of 1930, B.L.S.D. 365/345, para. 5.26 (November 7, 1989)).
49. See Gasoline case at 57-59. Steve Charnovitz questioned the panel's decision on this issue because the Panel did not assemble an experts' advisory panel in order to determine how feasible certain alternatives measures would be. He notes that assigning the statutory baseline to all producers would require another amendment to the Clean Air Act by Congress. Whether or not Congress is willing to go so far in complying with its international obligations has yet to be determined. Currently, a powerful lobbying effort is in progress in Washington to persuade Congress to only adopt the minimum measures required to bring the United States into compliance with this decision. See Charnovitz, supra note 2, at 462.
50. Charnovitz, supra note 2, at 462.
51. See Gasoline case at 60.
52. Id.
53. Id.
54. The Panel did not discuss the other two elements needed to be proven in order to use this exception. If the first element had been met, the United States would have to prove that "the inconsistent measures for
c. Section (g)

As a last resort, the United States attempted to rely on Article XX(g). Article XX(g) states the exception applies if the measures are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Once again, the United States had the burden of proof on four elements. First, the United States had to prove "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." The Panel held that clean air fit the definition of an "exhaustible resource" because "it could be depleted." Second, the United States had to prove "that the measures for which the exception was being invoked -this is the particular trade measure inconsistent with the [GATT]- were related to the conservation of exhaustible natural resources." In order to define "related to", the Panel looked to the Herring and Salmon case. That Panel decided that while "a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation with the meaning of Article XX(g)." ThPanel concluded that this particular element had not been met because there was "no direct connection" between the discrimination against foreign refiners and the United States "objective of improving air quality in the United States." The Panel did not decide the third and fourth elements under this exception because it believed that the United States had failed to prove the second element. The Panel's decision on this issue seems confused because they based their decision on "a factual determination that consistency with Article III would not prevent [the] EPA from attaining 'the desired level of conservation of natural resources under the [G]asoline [R]ule.'" This particular dis-

which the exception was being invoked were necessary to secure compliance with those laws or regulations; and that the measures were applied in conformity with the requirements of the introductory clause of Article XX." Id.

55. See id. at 62.
56. Id.
57. Id. at 62-3. Venezuela argued the United States' assertion that air was an exhaustible natural resource in relation to Article XX(g) because the air's "condition changed depending on its cleanliness." Id. The Panel dismissed this argument because it determined that "[t]he fact that the depleted resource was defined with respect to its qualities was not . . . decisive." Id. at 63.
58. Id. at 62.
60. Gasoline case, supra note 1, at 63-4 (citing from Herring and Salmon case).
61. Id. at 64.
62. The Panel did not address the third and fourth elements under the Article XX(g) exception, but if the United States had succeeded in showing that its regulation was related to the conservation of exhaustible natural resources, the Panel would have been required to answer the following two questions. First, whether "the measures for which the exception was being invoked were made effective in conjunction with restrictions on domestic production and consumption." Id. at 62. The second question was whether "the measures were applied in conformity with the requirements of the introductory clause of Article XX."Id.
63. Charnovitz, supra note 2, at 462.
discussion is confusing because Article XX(g) does not require that the non-compliance with GATT be "necessary."

iii. Article XXIII:1(b) and the Technical Barriers to Trade

The Panel concluded that it was unnecessary to examine Venezuela's arguments under Article XXIII:1(b) because the Panel had already decided that the EPA regulation had violated Article III:4 and could not satisfy any of the exceptions under Article XX. Furthermore, the Panel decided not to address any of the TBT arguments presented by Venezuela and Brazil. The Panel gave no reasons for this non-decision other than that its decisions under the GATT resolved the issue at hand.\textsuperscript{64} When the Panel decided not to address the TBT arguments, the member countries realized that their founded reliance on the TBT in helping uphold environmental regulations was completely unfounded. The Panel helped clarify "the relationship between the longtime GATT and the new TBT rules."\textsuperscript{65} The United States, even under an Article XX exception, would still have had to meet the additional requirements under the TBT. The TBT is viewed as additional member requirements under the GATT. Furthermore, the Panel made no mention of the preamble to the WTO which included language regarding the environment. The United States partially relied upon this language when joining the WTO because President Clinton believed that the WTO would bring about the "greening" of world trade regulations.\textsuperscript{66} Currently, the member countries are unsure of how their environmental regulations will be viewed under the WTO procedures since the TBT and the preamble were not discussed in the Panel's decision in this case. The future decisions of the Panel clearly need to clarify the role of these two important pieces of WTO/GATT membership.

B. The Appeal

Following the Panel's decision, the United States appealed to the WTO's Standing Appellate Body on February 22, 1996. In the Appellate Body's decision, the Panel noted that Venezuela and Brazil had every right to cross-appeal the initial Panel's conclusions that air was an "exhaustible natural resource" under the Article XX(g) analysis and the initial Panel's failure to answer and resolve the TBT issues. Following this merely procedural finding, the Appellate Panel agreed with the initial Panel's decision that the EPA regulation violated Article III:4 and that the United States would have to find an Article XX exception in order to avoid the violation. Where the Appellate Panel disagreed with the initial Panel was under its Article XX(g) analysis. The Appellate Panel determined that the overall Gasoline Rule was to be viewed in order to determine discrimination rather than differing baselines.\textsuperscript{67} The Appellate Panel de-

\textsuperscript{64} See Gasoline case at 65.
\textsuperscript{65} Charnovitz, supra note 2, at 463.
\textsuperscript{66} See id.
\textsuperscript{67} See Stephen L. Kass, Clean Air, Trade and WTO's New International Law, N.Y.L.J., June 3, 1996 at
terminated that the United States had met the Article XX(g) requirement that the regulation "relate to" conservation. In the end, the Appellate Panel decided that the United States was not in compliance with the Article XX preamble. The United States was required to show that the different discriminatory rules were "justifiable" and that no "reasonable alternative" existed. The Appellate Panel was not satisfied that the United States had exhausted all other non-discriminatory regulations before using the Gasoline Rule. In fact, the Appellate Panel pointed out that the United States seemed sensitive to their own U.S. refiners and their difficulties with compliance while at the same time ignoring the same issues on a foreign level. The Appellate Panel went to great lengths to expand the initial Panel decision under Article XX(g) and recognized that legitimate environmental regulations may satisfy this exception as long as it does not violate the preamble to the Article.

The United States appeal was heard by three of the seven members of the Dispute Standing Body (DSB). The appellate ruling was required to come down within 60 to 90 days of the filing of the appeal. The appellate decision is considered the final avenue of adjudication and the decision is considered binding and absolute once adopted by the GATT Council.

III. UNITED STATES’ REACTION AND CONSEQUENCES OF DECISION

A. Initial Reaction by Congress and the EPA

At the time of the initial Panel decision and the administration's decision to appeal, Congress issued an order to the EPA stating that it should "stand firm" because any compliance might open up issues with other U.S. environmental laws. One setback for the WTO settlement procedure is that violating member countries do not have to implement changes to their WTO-invalidated law. When the appeal was filed, Congress urged non-compliance with the initial Panel decision. What Congress did not realize at the time was that non-compliance could mean trade sanctions against the United States. Congress believed that the United States had to decide at this point which was more important—global trade efforts or the administration's environmental efforts. At this stage of the dispute, the administration seemed to be leaning towards the environmental efforts and indicated an intended abandonment of its trade advancements. On the other hand, the administration did not have to appeal. It could

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68. See id.
69. See id.
70. See id.
71. Under the old dispute settlement system, a decision was only binding if all GATT council members accepted the Panel decision. In other words, one council member could veto the decision and avoid any binding effect. The new dispute settlement system requires that all GATT council members vote against the Panel decision in order to nullify the decision.
73. Mickey Kantor, then United States Trade Representative, said at the time of the appeal that the WTO...
have opted to comply with the decision and rid the regulation of the discrimination or it could have compensated Venezuela and Brazil by offsetting the damages with lower tariffs for that particular product.74

Why the administration acted in this manner is questioned by many. Mickey Kantor at the time of the initial decision was quoted as saying that he was "not surprised" by the Panel's decision.75 The appeal decision should not have come as a surprise to Mr. Kantor either. The United States lost the appeal in late April, after administration officials told the public that the appeals process could take until the 1998 standards for reformulated gasoline went into effect, thus negating any decision against the United States with regards to reformulated gasoline.76 Even after the appeals decision came down, the EPA announced its intentions to change nothing with regard to the reformulated Gasoline Rule.77 The United States was faced once again with three options: 1) to comply with the WTO appeals decision and eliminate the discrimination in the EPA regulation, 2) to offer Venezuela and Brazil lower tariffs and/or damages to compensate for their trade losses, or 3) to subject the United States to WTO-authorized trade sanctions and retaliation. The latter decision would not be wise for the United States considering that the United States economically depends on its exports.78 While there have been many negative soundbites by environmental groups, by some liberals who say that the environmental goals of the Clinton administration will be compromised, and by conservatives, like Pat Buchanan, who see the WTO as a sovereignty-usurping organization, the United

decision had no force in the United States. He was quoted as saying "it is for the United States to determine how to respond," but that the dispute would "not, and cannot, compromise the Clinton Administration's commitment to our environmental laws." USTR Files Appeal of WTO RFG Ruling, Autoparts Rep., March 1, 1996, available in Westlaw Autopart database.

74. See Judith Bello, Mr. Kantor Meet Mr. Buchanan, WASH. TIMES, March 22, 1996, at A21. Ms. Bello supported the view that the United States should have simply complied with the decision because of the administration's hard-fought passage of the North American Free Trade Agreement (NAFTA) and for Uruguay Round of GATT, which established the WTO. Ms. Bello believes that the administration by appealing was only furthering Pat Buchanan's arguments that the WTO was an "unjust, anti-U.S. bureaucracy." Id.

75. See Charnovitz, supra note 2, at 463. Steve Charnovitz, who is the Director of the Global Environment and Trade Study at Yale, believed that the United States should have been prepared for this decision. Of the eight decisions on environmental regulations that the United States Trade Representative's office has had to defend, the office has won only three. Charnovitz also expressed the view that many of the editorials that were published on the Panel's decision actually supported the decision because the United States' discrimination was obvious. Even though the likes of Pat Buchanan and environmental groups have expressed serious concerns with Panel's decision, the author believes that the USTR should have been well-prepared for such an initial decision. See id.

76. As noted before, the 1998 standards will apply to all refiners of reformulated gasoline; thus, discrimination will not be an issue for reformulated gasoline because all refiners must act within the same parameters. The discrimination with conventional gasoline will still stand until the U.S. revises its regulations, though.

77. Carol Browner, an EPA administrator, stated that the EPA would not revise its rules even in light of the WTO appeal. She stated that the United States' response should come from the United States Trade Representative's Office, not the EPA. Despite WTO Decision, US to Stand By RFG Rules, Platt's Oilgram News, Vol. 74, No. 93, May 13, 1996, available in Westlaw Platon database.

78. See Bello, supra note 74, at A21. The United States leads the world in exporting and to some degree depends on the open markets of countries around the world who are members of GATT. If the United States is allowed to discriminate on certain products, the WTO has the power to authorize discriminatory action in member countries. The United States gets the full benefits of "nondiscrimination in other countries' markets, in return for which [the United States is] obliged to reciprocate by not discriminating in our market." Id.
States has emerged as the leading country in instituting WTO actions against other member countries.79

B. The Decision to Comply and the Parameters

Finally, on June 19, 1996, the United States decided to abide by the WTO ruling. The United States had 60 days from the day of the Appellate Panel decision to decide whether it would comply and revamp the regulation, whether it would pay compensation to the two countries, or whether it would suffer the trade sanctions.80 The United States Trade Representative Office ("USTR"), under acting Trade Representative Charlene Barshefsky, warned Congress and the administration against succumbing to retaliatory measures authorized by the WTO because the United States would suffer not only in the Venezuelan and Brazilian markets but also in markets around the world. The European Community and Norway submitted briefs in support of the Venezuela and Brazil governments during the initial action and purported to support retaliatory action against the United States unless compliance with the decision or payment of damages occurred.

While deciding to comply with the WTO decision, the United States must do so within a reasonable time acceptable by Venezuela and Brazil or by a time set by a WTO arbitration panel established upon request by Venezuela and Brazil. The actions that the United States takes during this “reasonable” compliance period will determine the impact of the decision on the United States and its administrative agencies. The USTR required that the EPA begin “soliciting comments on possible options” from industry components.81 Unfortunately, the process of publishing the matter in the Federal Register and allowing time for public comment is very time-consuming. Some administration officials have insinuated that the matter could be stretched out until the 1998 uniform reformulated gasoline regulations go into effect.82 This potential fact worries Venezuela and Brazil, who have spent countless hours and money trying to get the interim rule changed. The two countries stand to lose $300 to $500 million per year while this discriminatory standard remains in place.83 At the same time, Venezuela and Brazil may end up declaring a “moral victory” rather than a monetary victory because they are already in the process of meeting the 1998 gasoline requirements and may very well be prepared to meet those standards

79. See Anne Swardson, Trial for the Trade Police; The WTO Has a Lot to Lose When It Hears a Complaint, WASH. POST, October 16, 1996, at C11.
81. WTO: U.S. Plans to Comply With Ruling in Gas Case, INT'L TRADE REP., June 26, 1996, at 1051. The USTR pointed out in this article that compliance would include “protecting public health and the environment,” while still eliminating the discriminatory measures of the regulation. Id.
82. See id. The WTO itself acknowledges that this territory has been uncharted because it has never had to decide what a “reasonable” time for compliance is. As noted, this was the WTO's first case to decide under the new Uruguay Round structure. WTO officials have been cited as saying that the process for compliance could take one to two years. Id.
by the time an interim non-discriminatory reformulated Gasoline Rule is made.\textsuperscript{84} While this anticipated final outcome to the issue may not prove to be efficient, many countries are declaring the WTO procedural framework a success.\textsuperscript{85} Since the Gasoline case was decided, \textit{38} complaints have been presented to the WTO, but many of these have been resolved through out-of-court settlements. Still, the WTO and the Dispute Settlement Body have become active “arbiter[s] in international trade disputes.”\textsuperscript{86}

This fact may not settle well with the United States Congress, the Clinton Administration, or the Environmental Protection Agency. Even though most political groups supported the WTO during its initial formation, the United States in general is not happy about the outcome in this case, but at the same time the United States has used the same system more than any other country.\textsuperscript{87} Unfortunately, that fact does not stop the U.S.-based oil companies and their lobbyists. Congress still has the power to put the EPA funding in a bind if it decides to follow through with the rulemaking functions to change the reformulated Gasoline Rule. Congress while addressing this decision issued a ‘sense of the Senate’ amendment” without any force of law that asked the EPA to strongly consider health and environmental concerns while still meeting international treaty obligations.\textsuperscript{88} While Congress did not reject any EPA action by using an appropriations rider, like previously done while the EPA and the

\textsuperscript{84} Gerry Karey, \ldots while RFG Rules Overhaul Gets Underway, \textit{PLATT'S INT'L PETROCHEMICAL REP.}, June 27, 1996, available in Westlaw Plattigr database. See also, Gerald Karey, Venezuela Asks EPA To Shift RFG Rule, \textit{Cites WTO Stance on Discrimination}, \textit{PLATT'S OILGRAM NEWS}, Monday, October 7, 1996, available in Westlaw Plattin database. The national oil company of Venezuela filed its comments with the Environmental Protection Agency during the comment period, asking that the EPA “proceed \ldots with all deliberate speed to amend the rule to comply with the \ldots WTO.” \textit{Id.} PDVSA (the national oil company of Venezuela) noted that the EPA could have proceeded to initiate a new rule immediately without following the notice and comment procedure. PDVSA claims that the EPA merely asked for comments regarding “the general issue of imported gasoline, and not on specific proposed regulatory language.” PDVSA focused on the discriminatory effect of conventional gasoline in its comments because it realized that by using the notice and comment procedure the EPA is unlikely to fashion a new rule for reformulated gasoline before the 1998 standards become effective. \textit{Id.}

\textsuperscript{85} Sir Leon Brittan, the European Commissioner for Trade, stated that the WTO dispute settlement procedures were successful on five counts: 1) “[The action] was brought to a conclusion fast, just 16 months from the date consultations were requested, including the appeal,” 2) “[The process was entirely automatic, with no possibility for the US to block the establishment of the panel or the adoption by the DSB of the report of the Appellate Body,” 3) “[The quality of the legal reasoning of the Appellate Body is very good, and firmly based on a general interpretation of rules of public international law,” 4) “[The Appellate Body showed a lot of common sense in interpreting GATT provisions according to their normal and reasonable meaning,” and 5) “[It was also quite astute politically in accepting, but for good legal reasons, part of the US Administration’s arguments in its appeal. This softened the blow to the US Administration, and made acceptance of the report on the US home front easier.” \textit{EUWTO: Dispute Settlement Procedure Approved By Commission}, \textit{EUROPEAN REP.}, July 6, 1996, available in Westlaw Eurorep database.

\textsuperscript{86} Irene Ngoo, \textit{New Dispute Mechanism Puts WTO on Right Track}, \textit{SINGAPORE STRAITS TIMES}, September 10, 1996, available in Westlaw Strstn database. Ms. Ngoo points out that the DSB has become “the most active WTO body with meetings held almost twice a month.” At the time of her piece, there were six active panels, one requested panel, and 25 trade disputes being decided by the WTO. \textit{Id.}

\textsuperscript{87} See supra, note 81.

\textsuperscript{88} Gerald Karey, \textit{EPA Funding Is Caught In Senate Snag, But Resolution On Gasoline Imports Is Passed}, \textit{PLATT'S OILGRAM NEWS}, September 6, 1996, available in Westlaw Plattin database. This type of Congressional amendment does not have any force of law, but the amendment seeks to influence the EPA “not to accept any individual refiner baselines unless it determines that issues of auditing and inspection of foreign facilities, as well as enforcement, have been addressed.” \textit{Id.}
USTR were trying to negotiate a compromise with Venezuela before this initial action, similar amendments are expected. Senator Conrad Burns tried to introduce an amendment that would “ban use of EPA funds to implement the foreign refiner baseline rule for reformulated gasoline” during a subcommittee markup of EPA funding legislation. The Burns amendment was not introduced during the floor debate, and Congress seems to be allowing the EPA and USTR to bring the United States into compliance.

C. Consequences to Administrative Agency Normal Procedure

Normally, the United States could have implemented changes more quickly through different administrative actions. Instead of following the traditional informal rulemaking procedures contained in the Administrative Procedure Act (“APA”), the EPA could have normally used a number of exceptions to issue a more immediate, amended regulation. Under the APA, public property and foreign or military affairs are exempted from informal rulemaking procedure. The various agencies can also exempt actions from the informal rulemaking procedures if the action involves agency management and personnel, rules of procedure for the agency, statements of policy, interpretive rules, or good cause. But, these type of exceptions are not available when modifying a rule because of a WTO adjudication decision. The EPA could have issued a statement of policy or claimed good cause and implemented a non-discriminatory rule immediately, though, while still complying with the Uruguay Round Agreements Act (“URAA”). Venezuela and Brazil have yet to take issue with the informal rulemaking procedure being used, but both countries still have the right to institute a complaint with the WTO claiming that the United States is not acting within a reasonable time considering that the 1998 reformulated gasoline regulations are fast approaching. If an arbitration panel is set up by the WTO to hear a complaint on the expediency of the United States’ action,

89. Senator Burns (R-Mont.) was requested to withdraw his amendment and introduce it on the floor of the Senate after Chairman Bond (R-Mo.) requested that “controversial amendments be offered on the Senate floor, not in markup.” Kimberley Music, Burns Pledges to Offer Amendment on Foreign Refining on Senate Floor, THE OIL DAILY, July 11, 1996, available in Westlaw Oil Daily database. Senator Mikulski (D-Md.) warned Burns of the “retaliatory trade actions” that could be taken if his proposed amendment passed. She agreed with his idea because she had contemplated offering an amendment to favor the U.S. refiners earlier during the issue, but she remained skeptical because of the retaliatory measures that are authorized under the WTO. Id.

90. See Administrative Procedure Act, 5 U.S.C. § 553(a)(1) & (2). “Rule making: (a) This section applies, according to the provisions thereof, except to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” Id. Also, see the exceptions under § 553(b)(A) & (B) for interpretive rules, general statements of policy, etc.

91. See infra, note 94.

92. See Gerald Karel, Venezuela Asks EPA to Shift RFG Rule, Cites WTO Stance on Discrimination, PLATT’S OILGRAM NEWS, October 7, 1996, available in Westlaw Platten database. PDVSA stated that “in light of [the] EPA’s extensive consideration of the treatment of imported gasoline in previous rulemakings and its intimate involvement in the WTO case, it could have ‘proceeded directly to a proposed regulation to eliminate the discrimination.’ Instead, PDVSA said, EPA has initiated a rule making by requesting public comment . . . .” Id. Venezuela obviously is well aware of how long informal notice and comment rulemaking can take, but they have yet to take any action with the WTO to establish an arbitration panel.
the possibility still exists that a decision will not be made until late 1997. Venezuela and Brazil might still benefit from the ability to import reformulated gasoline free of the discriminatory rule even if only for a few months. Both countries’ inaction may rest in the fact that both have already begun the compliance process for the 1998 regulations. If both meet the 1998 regulations before the arbitration panel could decide the untimely action issue against the United States, any decision by the WTO would be moot on the reformulated Gasoline Rule because both countries could import their gasoline automatically into the United States using the 1998 regulations. But, both Venezuela and Brazil would benefit from a non-discriminatory conventional gasoline rule, which applies to non-attainment areas, constituting about 2/3 of the United States.

The “moral victory” that both Venezuela and Brazil can claim will not only be for the oil industry but also for any other industry that the United States has discriminatory regulations in place. However, the United States will still have the delaying tactic in its favor. If the United States wants to remain one of the international powerhouses in the global trading game, administrative agencies will need to address these discriminatory practices in a timely fashion. Currently, administrative agencies use the time-consuming informal rulemaking procedure which involves notice, comment, and publication of final rule. This procedure is dictated by Section 553 of the APA and takes an average of a year before the new rule or regulation takes effect. In the future, the United States could be faced with a problem if countries like Venezuela and Brazil win a WTO proceeding. While Venezuela and Brazil have not instituted a complaint because of untimeliness in compliance, other countries who obtain a decision in

93. At the time of publication, no arbitration panel was requested by Venezuela or Brazil regarding the issue of timely compliance.


(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

Id.
their favor from the WTO against the United States in the future could institute such an action for timely compliance. Any such action of this nature could bring the traditional yet time-consuming rulemaking procedures of agencies to issue. Before such a situation could develop, the United States would have to decide to comply with a WTO ruling. Once again, if the United States does not decide to comply, other countries can take WTO-approved retaliatory trade actions which can consist of sanctions, tariff increases and any number of other trade-inhibiting actions. Without saying, such retaliatory actions are not in the United States’ best interests as the world’s largest exporter. Conversely, if the United States decides to comply with a WTO decision and does not do so in a timely manner, a WTO arbitration panel can take actions to bring the United States into compliance. To this date, no arbitration panel has been called on to determine if a country’s compliance has been carried out in a timely manner.95

IV. CONCLUSION

In the meantime, many debates rage on about how the WTO dispute settlement system could undermine the executive branch rulemaking when the matter is settled in the early stages or even before the dispute ever reaches the adjudication setting in the WTO. Currently, however, when the WTO issues results in an adjudicative action, the simple “foreign affairs” exception of the APA cannot stand on its own when the agency issues a rule to comply with a WTO ruling. Rather, certain types of political controls exist so the exception is not convenient. Under the URRA, an agency must take multiple steps to include Congress and the public.96 Agencies are bound to a set of rules beyond the scope

95. See Bhushan Bahree, Rules of the Game, WALL ST. J. EUR., July 23, 1996, at 4. Mr. Bahree discusses the problems with the WTO while praising the efficiency of the organization at the same time. One “worry” that the author points out is that there are “concerns” over the: implementation of WTO’s finding. While specific about many other matters, the dispute-settlement agreement is vague about the implementation time frame. For example, the agreement says that after an appellate report, which is a final ruling, the “reasonable period of time to implement should not exceed fifteen months from the date of adoption (of the finding).” The agreement then adds: “however, that time may be shorter or longer, depending on the particular circumstances.” Id.

This vagueness in defining what time frame may be used could result in a stalling tactic used by countries who receive a decision against them. The United States is able to use this vague rule to take fifteen months or longer, if proven necessary, to comply with the decision against them. In the meantime, the United States government could be dragging its feet, wasting taxpayers’ money, and avoiding compliance altogether.


Before modifying any regulation or practice, the relevant agency or department must seek advice from the advisory committees, consult the appropriate congressional committees, submit to the congressional committees a report explaining and justifying the proposed rule or practice modifications, accompanied by a summary of the advice obtained from the advisory committees, and engage the public by providing notice and opportunity for public comment. The USTR and the head of the relevant department or agency must have consulted the appropriate congressional committees on the proposed final rule or other modification sixty days before the change goes into effect. The Senate Finance Committee or the House Ways and Means Committee may cast a nonbinding “vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or modification.”

Id. at 1286 (citing the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1)-(3), 108 Stat. 4809, 4831-2 (1994)).
of the APA when dealing with an adjudicative decision by the WTO.\textsuperscript{97} But, these types of actions are only required when the agency is acting on an adjudicative decision, not on a negotiated agreement, similar to the one attempted by Venezuela, the State Department, and the EPA before this action was filed with the WTO. This issue has yet to be addressed, but there have been suggestions for changes to the URAA as applied to the current WTO negotiation procedure in order to increase public participation to the level required in adjudicative actions.\textsuperscript{98}

Some industries have welcomed the decision in the \textit{Gasoline} case and the international powerplay by the WTO. For example, the chemical industry recognizes that the WTO/GATT means "truly free commerce."\textsuperscript{99} At the other end of the spectrum, certain industries fear that the WTO decision will infringe on their abilities to successfully lobby Congress. Not only has the oil industry been highly vocal, but certain farm groups, like American Corn Growers, have bitterly opposed any change in U.S. sovereignty over its own industries.\textsuperscript{100} What these embittered industries do not realize is that global trade is here to stay. As the world moves closer and closer every day to becoming its own free trade area, the more open-minded the economic powerhouse countries need to be when formulating their national policies. The \textit{Gasoline} case shows that no longer will these powerhouse countries be able to bully the smaller member countries.

At the other end of the spectrum, though, the United States' sovereignty is brought under scrutiny by deciding to comply with the decision.\textsuperscript{101} As one ar-

\textsuperscript{97} See id. at 1286.

\textsuperscript{98} See id. at 1287. The author suggests amending the Trade Act of 1974 and amending the URAA itself. The suggested amendments to the Trade Act include requiring the USTR to consult advisory committees, allow public participation in the areas that would not violate the secrecy required by the WTO, and involving Congress during the advisory committee stage. All of these amendments would affect section 135 of the Trade Act. The author also suggests amending the URAA to the effect that the same rule-making provisions that the URAA provides for adjudicatory actions will also apply to negotiations in the WTO. See id. at 1290. The issue that these amendments affect is secrecy. How can governments effectively negotiate a dispute while most, if not all, of the information is made public. The tendency under these amendments would be for more countries to forego the negotiations step in the WTO Dispute Settlement System and proceed directly to the adjudicative action; thus, the efficiency that the WTO prides itself on currently could vanish and disputes could drag on indefinitely without such negotiation steps.

\textsuperscript{99} David Wakeford, \textit{The Hidden Strength Behind International Trade}, \textit{Chemistry and Industry}, October 7, 1996, at 729. The author points out that the global chemical industry relies on "international transactions being predictable, fair and non-discriminatory" because their annual global trade averaged around $400 billion in 1994 alone with growth occurring since then. \textit{Id.} The author also points out that the formation of the WTO gives GATT the teeth it needed for a long time by forcing member countries to accept all provisions of the agreement and not allowing them to "cherry pick" the provisions that they don't like. \textit{Id.}

\textsuperscript{100} ACGA Responds to WTO Importing Decision, Clean Air Network Online Today, Sept. 26, 1996, available in Westlaw Canot database. ACGA was among the first groups to submit comments to the EPA when the United States decided to comply with the WTO decision. ACGA suggested in its comments that if foreign baselines were to be permitted that they be based on the "actual volume of imported RFG and conventional gasoline equal to the refiner's import volume in 1990." \textit{Id.} This type of requirement would mean that foreign refiners would not be able to account for their increase in imports from 1990 to present.

\textsuperscript{101} See Charley Reese, \textit{America Loses If Independence Is Sacrificed For World Government}, Orlando Sentinel, July 21, 1996, at G2. Mr. Reese argues that the United States is losing its independence as envisioned by the founders by being members of WTO/GATT and the United Nations. See id. What he fails to realize is that being a member of WTO/GATT does nothing but ensure that the United States remains a key global trading partner. The United States depends on its ability to export its products. Beyond the economics,
article put it, "[a]n international body caused the United States to reconsider its [own] laws." 102 Furthermore, critics of the decision say that not only is U.S. sovereignty in jeopardy but the environment is also threatened by the decision. But, the decision does neither. While the WTO decision did nullify an EPA rule, the dispute panel did not say that the United States had to allow dirtier gasoline into the United States. The WTO said that the United States must try harder to make the rules non-discriminatory. 103

The WTO decision in the Gasoline case was a good one for almost everyone. While the oil refining industry claims that allowing foreign refiners to set their own baselines will allow dirtier gasoline into the United States, the environmental groups that would listen should realize that the oil industries' allegations are self-motivated. At the same time, the environmental groups should be cautious when reviewing the decision because the WTO Dispute Settlement Panel and Appellate Panel did little to clarify the degree of justification that a country must give in order to satisfy foreign discrimination when promulgating a rule to preserve an exhaustible resource. The WTO is at a crucial turning point in proving its efficacy. Recently, the European Union instituted a complaint against the United States citing that the Helms-Burton Act, which penalizes other countries and their companies who continue to do business with Cuba, is in violation of WTO/GATT rules and regulations. 104 How the United States would decide to act if a decision comes down against it in this complaint is yet to be announced, but there is a strong feeling that the United States would again try to find an exception to the rule. 105 Fortunately, this expected case may resolve the sovereignty issue in the near future, but no case is set at the WTO to develop the environmental issues from the Gasoline case more fully. 106 The bitter war between free traders and environmentalists will continue

the United States actually gains by complying with the decision because currently the United States has brought more complaints than any other WTO member and has more complaints pending.

102. WTO and U.S. Trade, BANGOR DAILY NEWS, July 2, 1996. The author of the article points out that while the United States must reconsider its law, the decision by the WTO was appropriate and compliance is in the United States' best interest because of the United States' extended use of the WTO's adjudication system. See id.

103. See Fair Trade and Clean Air, WASH. POST, July 4, 1996, at A28. What is curious about the entire EPA process is that originally the gasoline rule was formulated to allow the foreign refiners to set their own baselines based on their data. Now, the EPA starts where it left off. While the WTO will allow a rule that protects an "exhaustible resource," the country instituting the rule must show that it has considered all other possibilities yet the discriminatory effect cannot be avoided. See id.

104. See INT'L TRADE REP., supra, note 81. The general consensus is that a decision by the United States not to comply with a WTO decision would place the entire new system in jeopardy. In fact, one former U.S. trade deputy, Rufus Yerxa, has said that "[t]he stakes are definitely getting higher for the WTO to show the decision-making process is credible and fair." Id. The WTO Director-General Renato Ruggiero points out that "[t]his is the only rules-based system with enforcement capacity[trade retaliation, such as higher tariffs] . . . These are the rules that governments have agreed on. The U.S. Congress has ratified these rules." Id.

105. See Averting Trade Wars, WASH. POST, Oct. 21, 1996, at A18. The author of this editorial speculates that the United States "might use a 'national security' defense—absurd in real terms but a likely winner in court" if the EU forces the U.S. into a WTO case. Id. The case acts like a two-edged sword to some degree. "If [the United States] succeeded, other countries would be tempted similarly to invoke national security to defend domestic sacred cows. If the United States lost, there could be a backlash in Congress." Id.

106. The European Union and the United States entered negotiations last spring in order to avoid a WTO action. The complaint was "deferred" until October 15 while the two countries try to broker a deal. Roger Cohen, French Scaff at U.S. Protest Over Gas Deal With Iran, N.Y. TIMES, September 30, 1997, at A1, A9.

https://digitalcommons.law.utulsa.edu/tlr/vol33/iss1/19
until the issue is more clearly developed and resolved.107

Telisa Webb Schelin

107. See WTO: Trade and Environment Committee Adopts Text For Singapore Meeting, INT’L. TRADE REP., Nov. 13, 1996 at 1730. The WTO Trade and Environment Committee took an excessive amount of time in negotiating its report for the WTO Singapore meeting set for December 1996. Committee delegates raised a number of concerns with regard to how the WTO would act and react to other environmental agreements, whether member countries would have to commit to “not introducing measures inconsistent with the WTO,” and whether eco-labeling should be addressed in December. Id. The final committee report consisted of many compromises which left some of these vital issues on the drawing board. Future committee reports will have to address these same issues if the WTO expects to maintain its prestige amongst the environmental groups of the world.