

TRANSBOUNDARY TRASH TRADE & THE ENVIRONMENT¹

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I. INTRODUCTION

A. The Trash Situation

Humans generate waste as a byproduct of their daily lives. In the United States, trash generation increased from 2.68 pounds-per-person-per-day in 1960 to 4.41 pounds-per-person-per-day in 2001.² Total trash generation in 2001 amounted to 229.2 millions of pounds.³ Trash, as an item of commerce, possesses a unique quality. While everyone creates it, almost no one wants it to remain anywhere near their home. This attitude has been coined the NIMBY (“Not in my backyard”) principle.⁴

Economic and political forces are largely responsible for the fate of trash. Michigan’s battle with trash imports is a prime example. Since 2003, the City of Toronto, Ontario has shipped 100% of its municipal waste to Michigan.⁵ For many years, Toronto residents had fought proposals to expand the City’s existing landfills and plans to build new ones nearby. In 2003, Toronto’s Keele Valley Landfill closed⁶ and the city abandoned the prospect of a new landfill at Adams Mine. At that time, Michigan’s landfill operators were able to attract waste imports due, in large part, to the State’s high landfill capacity⁷ and low cost of disposal.⁸ Michigan’s 1978 Solid Waste Management Program required counties to “ensure disposal capacity for a number of years into the future,” by securing “the ability to use landfills that currently exist” or by providing for the “siting of new landfill capacity within the county.”⁹ This program created an abundance of landfill space, which probably allowed the cost of disposal to remain at \$25.00 per ton in Michigan while the cost was \$35.00 in other Midwestern states.¹⁰

Low costs and the prospect of continued landfill space well into the future created an opportunity for waste disposal firms to attract out-of state clients.¹¹ They successfully marketed Michigan’s landfills to Canadian authorities at “competitive or superior prices.”¹² The

“transboundary movement of waste between Canada and the United States” now “constitutes an active and extensive trade, generating significant revenues for companies on both sides of the border.”¹³ Today, over 410 trucks of Canadian trash cross into Michigan each day.¹⁴ For the 2005 fiscal year, 19.5% of waste disposed of in Michigan was from Canada.¹⁵ Other U.S. states delivered an additional 11.2%.¹⁶

B. Transportation of Municipal Waste from an Environmental Perspective

In some instances, the transport of trash away from one area for deposit in a distant landfill appears to benefit the environment. Some locations are geologically and ecologically more suitable than others. Transporting waste rather than landfilling it nearby may reduce adverse impacts on water quality and endangered species. For example, areas with little rain and clay soil “offer superior environmental protection because leachate movement will be lower.”¹⁷ Landfill siting considerations include soil conditions, hydrology and topography, climate, local environmental issues, hauling distances, land use patterns, and other issues.¹⁸ In areas where land is unsuitable or unavailable for landfill siting, municipalities may dispose of trash by incineration. Incineration, however, has a harmful impact on health and environment.¹⁹ Incinerators pollute the air²⁰ and emit particulate matter, which contributes to acid rain and smog. Thus, sending trash away from one's own backyard to a landfill in a more suitable area as an alternative to siting a landfill in a less-suitable area or building an incinerator results in a relative environmental benefit.

The ultimate impact municipal waste transport has on the environment, however, is to promote production of more waste. Transporting waste away from its source creates a disincentive for people to reduce their trash production. When one's trash disappears without any substantial cost to the individual, that person is less likely to decrease his or her production of

waste. If the individual were forced to look at his or her own waste each day and to smell that waste, he or she would be more motivated and more likely to create less waste.

Transportation of waste fosters a “race to the bottom.” In the U.S., the Resource Conservation and Recovery Act (RCRA) governs the siting of new landfills and expansion of existing landfills. RCRA restricts – but does not prohibit – development in wetlands, unstable soils, fault areas and other specific locations. States are free to impose stricter regulations than those set forth in RCRA. However, if some states do impose stricter regulations, those states where regulations are more lax for landfill development will attract landfill developers.

Trash transportation perpetuates environmental injustice.²¹ Landfill operators often provide for municipal services in communities where landfills are located. Often, the less advantaged communities will be willing to accept a landfill in their neighborhood, despite its negative externalities, in exchange for the funds it will direct to their municipal services. People are less likely to protest a landfill in their backyard when it offers indispensable employment opportunities and sources of municipal service funds. As a result, landfills disproportionately burden lower income persons who find the incentives more attractive.

C. Transportation of Municipal Waste From an Economic Perspective

Transportation of municipal waste offers numerous economic advantages. First, it may cost a municipality less to export trash than to build a new and safe landfill in a geologically unsuitable area. Second, exporters can take advantage of landfills that provide the most cost-effective option for waste disposal. For example, Michigan currently offers a lower cost per ton than many of its neighbors and no tipping fees. This makes cost of disposal relatively low and therefore attractive. Lax regulations also appeal to exporters by decreasing costs of compliance. Third, transportation may offer benefits to the importing community. Landfill operations provide

funding for municipal services²² through royalties or tax revenues.²³ Landfill operations also create jobs in the waste disposal services sector.²⁴ Finally, landfill operators profit when distant municipalities purchase their waste disposal services.

Transportation of municipal waste also has some economic disadvantages. Municipalities, and ultimately taxpayers, must pay more to transport their waste long distances.²⁵ International shipments add border fees to the equation. Communities where landfills locate experience decreased property values. Landfills make surrounding properties less desirable due to landfill externalities such as noise, odors and pests. Jurisdictions that trash trucks pass through experience similar externalities in addition to increased costs for road maintenance.²⁶

International trade theory supports actions that stimulate economic gains. These gains, in principle, increase the aggregate welfare of all trading nations. However, the independent goals of free trade and environmental protection have often come into conflict with one another. For example, if Michigan or the U.S. wish to ban or limit trash imports in the interest of environmental protection, international trade law presents several barriers that limit policies and regulations lawmakers can implement to do so. However, this paper will demonstrate that in the case of trash trade, international trade law restrictions actually force countries desiring to decrease deposits of trash to implement tougher laws and regulations to satisfy this goal. Any policy designed to protect the environment from excess trash must apply across-the-board – to US and Canadian trash – encouraging producers in both nations to curb trash production.

II. INTERNATIONAL TRADE PRINCIPLES AND LAW

A. Economic Principles Behind International Trade

To understand the legal framework that constrains environmental policy decisions, it is important to recognize some of the basic principles of international trade. Several fundamental

principles of international trade include trade liberalization, non-discrimination, efficiency and comparative advantage. To liberalize trade, countries should work together, through negotiation, to eliminate trade barriers. These barriers include customs duties (tariffs), quotas and import bans. Members of the World Trade Organization (WTO) progressively eliminate their tariffs through rounds of trade negotiations. In general, a country may not discriminate between trading partners or between itself and a trading partner.

Efficiency in the marketplace is achieved when each country focuses on producing products in which it has a comparative advantage.²⁷ All countries have assets – human, industrial, natural, or financial. Countries can employ their assets to produce goods and services for domestic or foreign markets. The economic principle of comparative advantage states that countries prosper by directing assets toward what they produce best and by trading these products for those that other countries produce best. For example, Country A produces everything better than country B. Country A is *much* better at producing cars than country B. Country A is *slightly* better at producing bread than country B. Country A should invest resources in making cars. Country B should invest resources in making bread (it has a *comparative advantage* in breadmaking). Both countries will gain from trade.²⁸

Data shows a statistical link between freer trade and economic growth.²⁹ Trade motivates countries to compete with one another. It creates incentive for motivation and innovation. It leads to better products, better design, better price and greater demand. However, a nation that “cheats” the system by implementing a disguised protectionist measure poisons the system for all participants. Politicians have an incentive to implement such measures because in the short-term, the measures may translate into more jobs and greater political support from the favorably affected workers and interest groups. However, the negative short-term effects include lower

quality products, less innovative designs, and higher prices. In the long-term, there will be less demand for the protected product, inadequate resources to support production, factory closures, and lost jobs. Due to the undesirable effects a protectionist measure can have on the global economy, international trade dispute resolution panels closely scrutinize environmental measures for hidden agendas.

B. International Trade Law

The U.S. and Canada are both parties to the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA). The obligations set forth in these trade agreements are binding on both countries. Any action the U.S. takes to limit trash imports must be consistent with the rules set forth in these agreements.

a. World Trade Organization (WTO)

Under the General Agreement on Tariffs and Trade (GATT), which applies to the trade of goods between WTO members, the U.S. may attempt to impose measures of two general categories against trash imports: (1) internal measures and (2) border measures. Internal measures apply to goods that have crossed the importing country's border, while border measures apply at customs - before the goods cross over. The following measures are relevant to analysis of trash trade policy.

1) Border Measures – GATT Article XI:1

GATT Article XI prohibits quotas and import bans. It does not prohibit tariffs, but the GATT's overall goal is the "substantial reduction of tariffs"³⁰ through rounds of negotiations.

Technically, a tariff on municipal waste is a permissible measure to limit or eliminate Canadian trash.³¹ The GATT permits WTO members to impose import duties on goods, but the U.S., at present, imports municipal waste duty free.³² If the U.S. levies a duty on trash imports—

at a rate that will raise the cost of waste disposal in Michigan to equal or exceed that in Canada—it can effectively reduce Canadian trash imports to a minimum level.

As WTO members, the U.S. and Canada participate in negotiations to progressively reduce and bind tariff rates at agreed-upon levels, creating a ceiling on permissible customs tariff rates. The U.S. has agreed to bind municipal solid waste at 0%. However, GATT Article XXVIII permits WTO members to re-negotiate their “bindings” on particular goods and modify or withdraw concessions in exchange for compensatory adjustments with respect other products.

Any tariff modification undertaken by the U.S. must also be consistent with NAFTA. While NAFTA members cannot generally “increase any existing customs duty, or adopt any customs duty, on an originating good,”³³ Note 3 to the agreement provides that this obligation is “not intended to prevent any party from modifying its *non-NAFTA tariffs* on originating goods for which *no NAFTA tariff preference is claimed*”.³⁴ This language suggests that the NAFTA countries have not specifically committed to lower trade barriers for municipal waste. Municipal waste could not have appeared in the “Schedule to Annex 302.2,” which lists the original commitments of each party for a phased tariff elimination, as NAFTA was adopted in 1994, before the Harmonized Tariff Schedule classified municipal waste as a good in 2002. Furthermore, the U.S. International Trade Commission website indicates that municipal waste from Canada is “not eligible” for “NAFTA Canada Preference”³⁵ Since it appears that “no NAFTA preference is claimed,” arguably, the U.S. is free to re-negotiate its tariffs for trash.

2) **Internal Measures – GATT Article III**

GATT Article III imposes a National Treatment obligation on the parties. Once goods cross an importing country’s border, that country should not treat imported goods any less favorably than domestic “*like products*”³⁶ and it should not apply measures “to imported or

domestic products so as to afford protection to domestic production.”³⁷ These requirements require equal application of all laws and regulations.³⁸

The WTO Appellate Body set forth the method for analyzing an alleged Article III:4 violation in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*.³⁹ First, “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”⁴⁰ This determination involves “an unavoidable element of individual, discretionary judgment” that “has to be made on a case-by-case basis.”⁴¹ Four criteria may assist the analysis of “likeness”: (1) the properties, nature and quality of the products (this includes evidence relating to the health risks associated with the product);⁴² (2) the end uses of the products; (3) the consumers’ tastes and habits; and (4) the tariff classification of the products.⁴³ A reviewing panel must examine “evidence relating to *each* of the four criteria” and then weigh all evidence to make an “overall determination of whether the products at issue may be characterized as ‘like.’”⁴⁴ If the products are like, the second inquiry examines whether “the [challenged] measure accords to the group of ‘like’ *imported* products ‘less favorable treatment’ than it accords to the group of ‘like’ *domestic* products.”⁴⁵ Discriminatory treatment results in an Article III violation.

3) General Exceptions – GATT Article XX

Despite a violation of a substantive GATT obligation, a country may be justified in imposing a measure if it satisfies one of the “General Exceptions” in Article XX. The purpose for these exceptions is to “ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources”⁴⁶ and the protection of human, animal or plant life or health.

The Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline* described the application of the Article XX General Exception as “two-tiered: 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.” The introductory clause is generally referred to as the “chapeau.”

Paragraph (b) creates an exception for measures “necessary to protect human, animal or plant life or health.” A reviewing panel determines whether life or health is at stake by expert testimony.⁴⁷ If life or health is at stake, the panel then turns to the necessity of the measure imposed. A measure is “necessary” if there is no “alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.”⁴⁸

Paragraph (g) creates an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁴⁹ A qualifying “exhaustible natural resource” may be either living or nonliving.⁵⁰ The measure imposed “relates to the conservation of” the natural resource if it is “primarily aimed” at its conservation.⁵¹ This means that there is a “close and genuine relationship of ends and means.”⁵² The Appellate Body in the *Gasoline* case held that the requirement that the “measures are made effective in conjunction with restrictions on domestic production or consumption”⁵³ “is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of the imported [good] but also with respect to the domestic [like product].”⁵⁴ The Appellate Body described this requirement as one of “*even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”⁵⁵

Even if a measure satisfies paragraphs (b) or (g) of Article XX, the chapeau prohibits that

measure if it constitutes: (1) “arbitrary discrimination” between countries where the same conditions prevail; (2) “unjustifiable discrimination” between countries where the same conditions prevail; or (3) a “disguised restriction” on international trade.⁵⁶ The purpose of these requirements is to prevent abuse of the Article XX exceptions.⁵⁷

b. North American Free Trade Agreement (NAFTA)

NAFTA also governs U.S. - Canadian trade relations. NAFTA adopts the GATT obligations described above. NAFTA’s Article 301 provides that “Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the [GATT].” Article 309 incorporates GATT Article XI, the quantitative measure prohibition, and makes it part of NAFTA. Similarly, Article 2101 incorporates GATT Article XX. After adopting the GATT provision, Article 2101 clarifies that “the measures referred to in GATT Article XX(b) *include environmental measures* necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of the *living and non-living exhaustible natural resources*.”⁵⁸

NAFTA contains an additional exception absent from the GATT. Article 104 provides that “in the event of any inconsistency” between NAFTA and the trade obligations set out in The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (the “Transboundary Agreement”), the latter’s obligations shall prevail to the extent of the inconsistency.⁵⁹

The U.S. and Canada entered into the Transboundary Agreement in 1986 and amended it to include municipal solid waste in 1992. In general, the Transboundary Agreement provides that the U.S. and Canada “shall permit the export, import, and transit” of waste across their common border for “treatment, storage, or disposal....”⁶⁰ However, it also provides that a designated

authority of the country of export notify a designated authority of the country of import of the proposed waste shipments.⁶¹ From the date the U.S. receives notice, the EPA Administrator has 30 days to indicate consent, conditional consent, or objection to importation.⁶² If the EPA does not respond within 30 days, Canada may presume consent. While U.S. congressional leaders have proposed to implement the Transboundary Agreement in several sessions of Congress,⁶³ to date, the U.S. has not implemented the Transboundary Agreement.⁶⁴

C. Trade & Environment Disputes Before the WTO

The WTO has completed three proceedings that involve an examination of environmental or human health related measures under Article XX of the 1994 GATT. Under the original 1947 agreement, the GATT panel examined six such disputes but adopted reports of only three.⁶⁵

a. Trade Decisions Under 1947 GATT

Two reported conflicts under the original GATT illustrate the dispute resolution body will not grant Article XX(g) justification to measures taken for reasons other than environmental conservation. In *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, the U.S. imposed an import prohibition on tuna and tuna products from Canada.⁶⁶ The U.S. took this action in retaliation against Canada's seizure of U.S. fishing vessels and arrest of U.S. fishermen. The fishermen were in an area Canada considered under its jurisdiction and the U.S. considered outside of any state's jurisdiction.⁶⁷ The Panel found the U.S.'s import prohibition a quantitative measure prohibited by Article XI:1⁶⁸ and unjustifiable under Article XX(g).⁶⁹ The Panel noted that the measures were not "made effective in conjunction with restrictions on domestic production and consumption"⁷⁰ because the U.S. did not apply restrictions on domestic tuna production similar to those it imposed on Canadian tuna production.⁷¹

In *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, Canada imposed regulations prohibiting the exportation of unprocessed herring and pink and sockeye salmon.⁷² Canada conceded that the prohibitions were contrary to GATT Article XI:1,⁷³ but contended that its actions were justified under Article XX(g). The Panel disagreed. First, the panel concluded, to fall within paragraph (g), a measure must be “primarily aimed” at the conservation of an exhaustible natural resource.⁷⁴ In this case, Canada admitted that its measures “were not conservation measures per se but had an effect on conservation.”⁷⁵ This led the Panel to hold that since the measures were not “primarily aimed” at conservation, the export prohibitions were not justified by Article XX(g)⁷⁶

Many commentators viewed the third adopted report as an illustration that economic policy under the GATT hinders adoption of public health or environmental policy.⁷⁷ In *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes*, Thailand imposed internal taxes on cigarettes and allowed only licensed imports.⁷⁸ Thailand sought to protect the health of its citizens from cigarettes which, it claimed, posed a greater threat to human health than those that it licensed. The Panel found that the license requirement constituted a violation of Article XI:1 as Thailand had not granted any new licenses for the importation of cigarettes for over 10 years.⁷⁹ After hearing evidence from the World Health Organization, the Panel accepted that “smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b).”⁸⁰ Nevertheless, it concluded that the measure was not justified because it was not “necessary.” According to the Panel, there were “alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”⁸¹ The high standard set by this decision appeared to be an impediment to

non-economic policy.⁸²

b. Trade Decisions Under 1994 GATT (WTO)

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, decided under the 1994 GATT, seems to show that a legitimate health policy will now justify imposition of GATT-prohibited measures. In the *Asbestos* case, France banned the import of asbestos and products containing asbestos but permitted sale of asbestos substitutes. The Appellate Body concluded that France’s ban on asbestos products did not violate Article III after finding that the asbestos and asbestos substitutes were not “like products.” It considered the fact that the products were physically different because the asbestos was associated with high health risks while the substitutes were not.

The Appellate Body also found that Article XX(b) applied. First, it acknowledged that asbestos products posed a risk to human life and health. Second, it found that the measure was necessary and that no reasonable available and less trade restrictive alternatives existed.⁸³ The Appellate Body seemingly loosened the standard set in *Thailand Cigarettes*, by stating that “France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the [measure] seeks to ‘halt’. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection.”⁸⁴

In both Article XX(g) cases examined under the WTO, conservation measures were “provisionally” justified under paragraph (g), but failed to meet the chapeau’s requirements. Under the 1994 GATT, like the 1947 GATT, nations must make best efforts to comply with their trade obligations. The reported decisions seem to indicate that a showing of attempts made to avoid the discrimination prohibited by the chapeau is sufficient to avoid or cure a chapeau

violation.

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the U.S. imposed a ban on shrimp and shrimp product imports from countries that did not comply with U.S. regulations established to protect sea turtles. The Endangered Species Act (ESA) of 1973,⁸⁵ required U.S. shrimp trawlers to use “turtle excluder devices” (TEDs) in their nets when fishing in areas where there was a “significant mortality of sea turtles in shrimp harvesting.”⁸⁶ To protect sea turtles further, Section 609 of U.S. Public Law 101-162 imposed “an import ban on shrimp harvested with...technology which may adversely affect sea turtles.”⁸⁷ If, however, countries obtained certification from the Department of State, the U.S. exempted them from the ban.⁸⁸

The Panel found that the ban violated GATT Article XI and was unjustifiable under Article XX.⁸⁹ The U.S. appealed the Panel’s decision with respect to Article XX. The Appellate Body found that the U.S. ban was provisionally justified under Article XX(g),⁹⁰ but concluded that the U.S. failed to meet the requirements of the chapeau. First, the Appellate Body held that Section 609 was a measure “relating to” the conservation of an exhaustible natural resource.⁹¹ Section 609 was “designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen.”⁹² Exemptions from the import ban “relate[d] clearly and directly to the policy goal of conserving sea turtles.”⁹³ These findings led the Appellate Body to conclude that “the means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible” natural resource was an “observably close and real one....”⁹⁴

Next, the Appellate Body held that “Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp.”⁹⁵ It was an “even handed”

measure because the U.S. imposed similar restrictions domestically. Specifically, the ESA imposed restrictions on U.S. shrimp trawl vessels, requiring them to use approved TEDs.⁹⁶

Despite the Appellate Body's conclusion that Section 609 fell within the scope of Article XX(g), it held that the measure was unacceptable because it did not comply with the chapeau. The Appellate Body found the "differences in means of application of Section 609 to various shrimp exporting countries" to be "unjustifiable discrimination' between exporting countries desiring" to access the U.S. shrimp market.⁹⁷ The Appellate Body discussed at least five reasons for this conclusion. First, while Section 609 itself only required TEDs "comparable" in effectiveness to those in the U.S.,⁹⁸ in application, the U.S. Guidelines imposed an economic embargo on countries that did not adopt "essentially the same" policy for sea turtle protection as that imposed on U.S. domestic sea trawlers.⁹⁹ Second, the Appellate Body found that the U.S. application of Section 609 failed to take "into account different conditions which may occur" in the importing countries.¹⁰⁰ It explained that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for an inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."¹⁰¹ Third, the U.S. excluded from its market "shrimp caught using methods identical to those employed in the U.S." solely because they were caught in waters that were not certified by the U.S. The Appellate Body found this result "difficult to reconcile with the declared policy objective of conserving sea turtles."¹⁰² Fourth, the U.S. failed to engage in serious negotiations for the protection and conservation of sea turtles with the complaining countries before enforcing the import prohibition.¹⁰³ However, U.S. did negotiate seriously with other countries. The Appellate Body considered that imposing an embargo on the complaining countries without serious attempts to negotiate first was "plainly

discriminatory” and unjustifiable.¹⁰⁴ Finally, the U.S. gave fourteen countries a “phase-in” period of 3 years before they had to fully comply with the TED requirements. However, other countries, including the complaining countries, only had 4 months to implement TED use.¹⁰⁵ The Appellate Body found these actions discriminatory in violation to the chapeau.

The Appellate Body further found that the “United States measure [was] applied in a manner which amount[ed] to a means of...‘arbitrary discrimination’ between countries where the same conditions prevail....” The U.S. did not inquire into the appropriateness of the regulations to the conditions prevailing in the exporting country.¹⁰⁶ Furthermore, its certification process was neither transparent nor predictable.¹⁰⁷ According to the Appellate Body, these findings supported the conclusion that application of the measure “arbitrary.” Since the U.S. failed to satisfy the chapeau’s requirements, it was not justified in its actions under Article XX.

The Appellate Body issued recommendations for changes in the U.S.’s measure to make it compatible with the Article XX exception. In *Shrimp II*,¹⁰⁸ the U.S. implemented the recommendations in its Revised Guidelines. It also attempted to negotiate an international agreement for the protection of sea turtles, as instructed by the Appellate Body in *Shrimp I*. Malaysia argued that measures under the Revised Guidelines were still impermissible. It contended that measure constituted a means of “arbitrary or unjustifiable discrimination” under Article XX. The Appellate Body found that the U.S. Revised Guidelines now complied with Article XX as the U.S. attempted to negotiate and agreement in good faith. Just because the U.S. did not conclude the international agreement does not mean that it engaged in “arbitrary and unjustifiable discrimination” under the chapeau of Article XX.

In the *Gasoline* case, The EPA promulgated regulations¹⁰⁹ pursuant to the Clean Air Act of 1990 (the "CAA") to “control toxic and other pollution caused by the combustion of gasoline

manufactured in or imported into the United States.”¹¹⁰ The CAA required gasoline sold to U.S. refiners, blenders and importers to remain as clean as the 1990 baseline levels.¹¹¹ “Compliance [was] measured by comparing emissions from...gasoline sold by domestic refiners, blenders and importers against emissions from a 1990 baseline....”¹¹² Baseline Establishment Rules provided that baselines could “be either individual (established by the entity itself) or statutory (established by the EPA and intended to reflect average 1990 U.S. gasoline quality), depending on the nature of the entity concerned.”¹¹³ Foreign refiners, however, did not have the option to establish an individual baseline and were subject to the statutory baseline.¹¹⁴ The effect was that the regulations were tougher on imported gasoline than on domestically refined gasoline. Venezuela and Brazil alleged that the U.S. gasoline regulation discriminated against their gasoline in violation of Article III. The Panel concluded that the baseline establishment rules were not consistent with GATT Article III:4 and could not be justified under Article XX.¹¹⁵

The U.S. appealed the Panel’s finding that the baseline establishment rules were not justified under Article XX. The Appellate Body concluded that the rules *were* justified under Article XX(g), however, they failed to satisfy the chapeau’s requirements. The rules satisfied paragraph (g) because (1) they were “primarily aimed at” the conservation of natural resources for the purposes of Article XX(g) and (2) they were “made effective in conjunction with restrictions on domestic production or consumption.”¹¹⁶ The first of the two requirements was satisfied because the rules were designed to monitor the compliance of gasoline refiners, importers and blenders with “non-degradation” requirements set out elsewhere in the rule.¹¹⁷ The Appellate Body found that the EPA’s baselines enabled authorities to monitor compliance with the “Gasoline Rule” to “stabiliz[e] and prevent[] further deterioration of the level of air pollution prevailing in 1990.”¹¹⁸ The second requirement was satisfied because the rules *affected*

“both domestic gasoline and imported gasoline, providing for – generally speaking – individual baselines for domestic refiners and blenders and statutory baselines for importers.”¹¹⁹ However, the Appellate Body ultimately found that although the baseline establishment rules were “within the terms of Article XX(g), they were “not entitled to the justifying protection afforded by Article XX as a whole” because they did not satisfy the chapeau.¹²⁰ The U.S. had “more than one alternative course of action available...in promulgating regulations implementing the CAA.”¹²¹ The U.S. could have imposed the statutory baselines without differentiating between domestic and imported gasoline, or it could have made individual baselines available to foreign refiners as well as domestic refiners.¹²² The U.S. argued that these alternatives were unrealistic, citing administrative difficulty in verification and enforcement.¹²³ The Appellate Body found the U.S.’s argument unpersuasive. It opined that the U.S. should have “pursued the possibility of entering into cooperative arrangements with the governments of [the importing countries]” or at least attempted to do so “to the point where it encountered governments that were unwilling to cooperate.”¹²⁴

The U.S. also argued that it was not “feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The U.S. wished to give domestic refiners time to restructure their operations and adjust to the requirements of the Gasoline Rule.”¹²⁵ However, the Appellate Body was unsympathetic. It noted that “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 disregard that kind of consideration when it came to foreign refiners.”¹²⁶ The Appellate Body found that these omissions by the U.S. constituted “unjustifiable discrimination” and a “disguised restriction on international trade.”

c. A New Direction?

The original GATT, as adopted in 1947, favored economic policy over other policy goals. The preamble of the 1947 GATT stated that “relations in the field of trade and economic endeavour should be conducted *with a view to...developing the full use of the resources of the world.*”¹²⁷ Despite the Article XX exceptions, the goal of developing full use of resources conflicted directly with the goal environmental conservation. With the establishment of the WTO in 1994, however, the parties modified the original statement and recognized that their:

relations in the field of trade and economic endeavour should be conducted with a view to...expanding the production of and trade in goods and services, ***while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so*** in a manner consistent with their respective needs and concerns at different levels of economic development, ...¹²⁸

The new objectives have influenced WTO dispute resolution.

The Appellate Body in *U.S. Shrimp* stated that this new “preambular language... must add colour, texture and shading” to its interpretation of the GATT.¹²⁹ When the Appellate Body under the WTO found measures taken to protect the environment unjustifiable under Article XX, it emphasized in its report:

“[w]e have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species.... Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”¹³⁰

Likewise, in *US Refined Gasoline*, the Appellate Body highlighted that its decision

does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the

environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression...***WTO Members have a large measure of autonomy to determine their own policies on the environment*** (including its relationship with trade), ***their environmental objectives and the environmental legislation they enact and implement***. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.¹³¹

These statements illustrate that the WTO recognizes a nation's sovereign right to enact and implement policies to achieve its environmental objectives. However, parties to the WTO also have an obligation to make an effort to uphold the organization's trade policies and to avoid, to the extent possible, protectionist measures. In *U.S. Shrimp*, the Appellate Body further conveyed this message in the following terms:

“What [it] decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, ***WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.***¹³²

III. ATTEMPTS TO STOP TRASH TRADE

For over a decade Michigan's state and federal lawmakers have proposed legislation to curb trash imports to Michigan. However, some of these proposals, if implemented, would violate international trade obligations between the U.S. and Canada under the WTO and

NAFTA. This section examines several policies Michigan has considered to reduce the state's trash imports and analyzes their compatibility with international trade law. In general, policies that treat U.S. trash and Canadian trash unequally will not pass muster under international trade law. However, those policies that implement the same measures to trash produced in both countries will avoid potential violations of international trade obligations.

A. A Trash Import Ban is Incompatible With International Trade Obligations

On March 9, 2006, Governor Granholm approved legislation that bans Canadian waste from Michigan's landfills.¹³³ This law cannot take effect until the U.S. Congress enacts legislation authorizing the prohibition.¹³⁴ However, even if Congress were to pass a law providing Michigan with the authority it seeks, Canada could successfully challenge any action taken pursuant to this authority as a violation, by the U.S., of international trade obligations under the WTO and NAFTA.

First, an import ban violates GATT Article XI:1 and NAFTA Article 309. GATT Article XI expressly prohibits quotas. A ban is essentially a quota of zero. Second, an import ban violates GATT Article III and NAFTA Article 301. A violation under these Articles occurs when a country imposes a measure that treats like imported products less favorably than like domestic products. Trash from Canada and trash from the U.S. are most likely "like products" under the criteria set forth by the Appellate Body in the *Asbestos* case. The properties, nature, and quality of municipal waste from both sources consist of a wide range of unwanted remains of human activity. The end use of both sources of trash is burial in a landfill. The consumers in this case are landfill operators whose only preference for trash is quantity, not quality, to maximize profits. Finally, the Harmonized Schedule classification for trash from both sources is identical. The "Municipal waste" classification includes "waste of a kind collected from households,

hotels, restaurants, hospitals, shops, offices, etc., road and pavement sweepings, as well as construction and demolition waste.”¹³⁵ These facts make it challenging if not impossible to show the products are not “like.”

In the next step of the analysis, an import ban necessarily treats Canadian trash destined for the U.S. less favorably than the domestic trash. It permits domestic trash in commerce and disallows foreign trash. Therefore, an import ban would violate the National Treatment requirement.

Despite these violations, the ban would still be permissible if the U.S. could satisfy a GATT Article XX or NAFTA Article 2101 exception. However, such a trash import ban would not pass muster under Article XX(b). With favorable expert testimony, the U.S. may be able to satisfy the first requirement and show that the measure protects “human, animal, or plant life or health.” A showing of necessity, however, would fail. The Panel and Appellate Body have found measures “necessary” only where no “alternative measure” would “achieve the same end” and be “less restrictive of trade than a prohibition.” Numerous “alternative measures” that do not violate Articles III or XI are listed below, however. If the Panel or Appellate Body were to find these alternatives “reasonable,” the U.S. would not satisfy the necessity requirement.

Likewise, the measure would not pass muster under article XX(g). Neither the Panel nor Appellate body have determined that land is an “exhaustible natural resource,” but such a showing is possible.¹³⁶ A showing that the measure is “primarily aimed at” the conservation of the resource - that there is a “close and genuine relationship of means and ends.” – might also be possible. If the end is to preserve land by reducing conversion to landfills, then a measure to reduce waste serves this objective. However, the analysis fails at the third step. The U.S. cannot successfully show that the measure is made effective in conjunction with restrictions on the

domestic production and consumption. Due to the nature of trash, it is not presently feasible for the U.S. to ban production of domestic trash or its flow in commerce.

B. Implementation of the Transboundary Agreement May Be Incompatible With International Trade Obligations

Federal legislators have repeatedly introduced legislation to implement the Transboundary Agreement between the U.S. and Canada, described in Section II(b) above, and to enforce its “notice and consent” provision.¹³⁷ Such legislation appears compatible with U.S. international trade obligations under NAFTA. NAFTA contains an explicit carve-out provision recognizing the Transboundary Agreement’s authority.¹³⁸ Specifically, in the event of any inconsistency between NAFTA and the trade obligations set out in the Transboundary Agreement, the latter’s “obligations shall prevail to the extent of the inconsistency....”¹³⁹ However, exercise of the Transboundary Agreement’s “notice and consent” provision may conflict with U.S. international trade obligations under the WTO. If the EPA Administrator denied consent to trash shipments, this would constitute a ban, or a quota of “zero,” and violate the WTO’s Article XI quantitative restriction prohibition.

The *Shrimp* and *Shrimp II* cases suggest that perhaps, since the U.S. and Canada negotiated the Transboundary Agreement to protect against the dangers of transboundary waste shipments, its implementation would not violate the chapeau of Article XX. The U.S. can implement the Transboundary Agreement in a manner that avoids the arbitrary and unjustifiable discrimination the Appellate Body found in *Shrimp*. In *Shrimp*, the U.S.’s failure to inquire into the appropriateness of its measure based upon the conditions of the exporting country supported the Appellate Body’s conclusion that the measure constituted unjustifiable discrimination. In this case, the U.S. and Canada negotiated and adopted the Transboundary Agreement by treaty. In *Shrimp*, there were allegations that U.S. treated other countries more favorably than the

complaining countries. Here, the U.S. can choose to treat other nations as favorably as Canada with respect to trash imports when it implements the Transboundary Agreement. In *Shrimp*, the Appellate Body found arbitrariness in the lack of transparency in the shrimp import licensing process. Here, the U.S. can implement a transparent procedure for giving or denying consent.

Although the chapeau requirements could potentially be satisfied for implementation of the Transboundary Agreement, the U.S. may find trouble in the Article XX(g) requirement that the measure is made effective in conjunction with restrictions on the domestic production and consumption. Once again, due to the nature of trash, it is not presently feasible for the U.S. to “deny consent” to production of domestic trash of its flow in commerce.

The U.S. would also find it challenging to satisfy Article XX(b)’s necessity requirement. Even under the *Asbestos* decision, which admits that an importing country “could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the [measure] seeks to ‘halt’”,¹⁴⁰ there are reasonable alternatives available. Those alternatives, described below, are less restrictive on trade and can serve better to protect human, animal and plant life or health from the impacts of trash disposal.

C. Across-the-Board Regulations Restricting the Content of all Waste Deposited in Michigan’s Landfills Would Not Violate International Trade Obligations

Michigan may adopt regulations that restrict the content of waste deposited in the State’s landfills and exclude trash that fails to meet prescribed requirements. It could then “ban importation of trash that does not meet Michigan's standards.”¹⁴¹ Michigan already prohibits certain types of waste from its landfills. Public Act 34 of 2004 expanded the list of items banned from landfills to include “more than a de minimus number of used beverage containers and more than a de minimus number of whole motor vehicle tires.”¹⁴² Public Act 37 required the DEQ to compile a list of countries, states, provinces and local jurisdictions that either prohibited the

banned items from landfill disposal or prevented them through enforceable solid waste disposal requirements.¹⁴³ Finally, Public Act 40 prohibited landfill owners or operators from accepting for disposal solid waste that was generated outside Michigan, unless (1) the jurisdiction where the waste was generated was on the DEQ list of approved jurisdictions; (2) the solid waste was received through a transfer station or another facility that removed the items banned from disposal in a landfill; or (3) the waste consisted of a uniform type of items, material, or substance that met Michigan's requirements for landfill disposal.¹⁴⁴

Such measures aimed at decreasing trash deposits in Michigan's landfills would consequentially have the effect of decreasing imports without violating NAFTA or WTO obligations. Regulations that restrict trash content do not implicate the quantitative restrictions of Article XI. Since they apply equally to foreign and domestic trash, they are consistent with Article III's national treatment requirements. Without these substantive violations, no Article XX justification is required.

Regulation of trash content creates a number of incentives to limit trash production. First, Public Act 34 of 2004 promoted waste diversion in Toronto. As of October 2004, Toronto and four other municipalities in Ontario were all certified for disposal of municipal waste under the new guidelines. This implies that they implemented policies to comply with Michigan's strengthened trash disposal guidelines. Additionally, these regulations increase cost of disposal and further promote policies that encourage waste producers to eliminate prohibited items from their trash. Before Toronto ships its trash to Michigan, it passes through a transfer facility that removes prohibited items from the trash. This is an added cost to the municipality, and consequently to taxpayers – the trash producers. As a result, taxpayers will act to reduce this cost by diverting prohibited items away from their waste flow to avoid additional sorting costs at

the transfer facility and the possibility that Michigan will return their trash for failure to comply with the State's standards.

D. A Tipping Fee Increase Would Not Violate International Trade Obligations

Michigan's House of Representatives recently passed HB 4221 of 2007.¹⁴⁵ This bill, if it becomes law, would assess a surcharge of \$7.50 on each ton of solid waste that is disposed of in a landfill. Like regulations restricting trash content, a tipping fee does not conflict with NAFTA or WTO obligations, so long as Michigan applies it equally to foreign and domestic trash. The fee makes trash disposal in Michigan less economical and less attractive. The increased cost of disposing of trash as a result of its transportation to Michigan already gave Toronto an incentive to embark on a large-scale waste diversion program.¹⁴⁶ The additional cost from a tipping fee would create additional pressure on Toronto and the City's taxpayer's. It would also impose a burden on Michigan residents. The more trash they produce, the more they will need to pay for disposal. The result is an incentive for everyone to reduce trash production.

E. A Moratorium on Landfill Expansion Would Not Violate International Trade Obligations

Michigan can ban landfill expansion until a specified date. This would decrease the amount of space available to landfill in Michigan, and potentially increase the cost to bury trash. This policy would not conflict with NAFTA or WTO obligations. It would counteract the source of attraction for Michigan landfills - their abundant capacity. If the government imposes a moratorium on landfill expansion and creation until a set date, this will create incentives to divert waste away from landfills. A moratorium would stimulate development and implementation of recycling and composting policies – thus reducing the quantity of trash landfilled.

IV. CONCLUSION

Michigan and other U.S. states cannot ban trash imports from Canada. However, while

international trade law requires compliance with the obligations in NAFTA and the WTO, it does not deprive the U.S. of solutions that limit waste imports from Canada. If the U.S., or any state, adopts a trash policy to protect the environment, and if it is willing to make sacrifices and efforts towards achieving this goal, international trade law does not stand in its way from implementing such a policy. A policy designed to reduce trash that will apply in the same way to trash produced within the U.S. and trash produced in Canada will not violate the countries' trade obligations.

¹ Portions of this paper appear in Katherine Razdolsky, *Trading Trash: An International Trade Law Perspective of Municipal Waste Imports from Canada*,” MICHIGAN INTERNATIONAL LAWYER, Summer 2006, at 10.

² U.S. EPA. MUNICIPAL SOLID WASTE IN THE UNITED STATES: 2001 FACTS AND FIGURES EXECUTIVE SUMMARY 4 (October 2003), *available at* <http://www.epa.gov/garbage/pubs/msw-sum01.pdf> (Note that in 1960, discards after recovery for recycling and composting was actually 2.51 pounds per person per day and in 2001 actually 3.10 pounds per person per day.)

³ *Id.* at 2.

⁴ See Wikipedia, *NIMBY*, <http://en.wikipedia.org/wiki/NIMBY> (NIMBY “describes the phenomenon in which residents oppose a development as inappropriate for their local area, but by implication do not oppose such development in another’s.”) (last visited Apr. 20, 2007)

⁵ City of Toronto Residual Waste Management Study (March 2007), *available at* http://www.toronto.ca/garbage/ceat/ea/pdf/background_document_4_draft_ea_tor_march19_city_of_toronto.pdf

⁶ James Rusk. *Toronto to send all trash to U.S.* GLOBE AND MAIL A20. (Dec. 5, 2001)

⁷ Jim Irwin. *Michigan fights imported Canadian trash.* ASSOCIATED PRESS. (Mar. 2, 2001)

⁸ Tim Martin. *Lawmakers hope to stem trash flow from Canada.* LANSING STATE JOURNAL. (Feb. 13, 2003), *available at* http://www.lsj.com/news/capitol/030213_trash_1a-8a.html (“Many neighboring states have surcharges that make it more expensive to dump.”)

⁹ Floor Speech by Senator Debbie Stabenow (June 8, 2005), *available at* <http://www.govtrack.us/congress/record.xpd>.

¹⁰ Frank Ruswick, Jr., Michigan Department of Economic Quality. Testimony Before the Senate Natural Resources and Environmental Affairs Committee, page 2 (September 23, 2003).

¹¹ Stabenow, *supra* note 9 at 1.

¹² Councillor Brad Duguid, “*Point/Counter-point.*” ADVISOR (May/June 2003), *available at* www.glc.org

¹³ Gracer, Jeffrey B. and Mansell, Robert. *NAFTA imposes liability on Canada for Waste Export Ban.* THE NEW YORK LAW JOURNAL (2000).

¹⁴ Congressman John D. Dingell. Michigan Delegation Introduce Bill to Curtail Importation of Canadian Trash (Jan. 17, 2007), *available at* http://www.house.gov/dingell/Press_Releases/110th/01-17-07.htm

¹⁵ Report of Solid Waste Landfilled in Michigan. October 1, 2005-September 30, 2006.

¹⁶ *Id.*

¹⁷ Statistics Canada. Solid Waste in Canada. HUMAN ACTIVITY AND THE ENVIRONMENT 14 (2005).

¹⁸ *Id.*

¹⁹ Statistics Canada, *supra* note 17 at 9 (“Incineration is a common waste management practice in some European and Asian countries, where space for landfills is at a premium”).

²⁰ *Id.*

²¹ U.S. EPA, *Environmental Justice*, <http://www.epa.gov/epaoswer/osw/ej/> (last visited April 20, 2007)(EPA defines Environmental Justice as “the fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies.”)

²² Wallace Immen. *Garbage Raises Stink in Michigan, U.S. critics vow to fight city decision to truck tonnes of waste over the border.* THE GLOBE AND MAIL. (Dec. 4, 2000).

²³ Martin, *supra* note 8 (Wayne County's Sumpter Township would lose more than \$1 million a year in revenue - a figure likely to increase as more Canadian trash makes its way to Michigan).

²⁴ *Id.* (“about 15 of the 44 employees at Wayne County's Carleton Farms Landfill would be laid off if Canadian trash was banned”).

²⁵ Danny Hakim. Trash from Toronto Upsets Michigan Town. NEW YORK TIMES (Jan. 15, 2003)(Toronto’s waste disposal budget increased when it began to ship all of its waste to MI).

²⁶ *Michigan may ban Toronto trash exports.* CBC NEWS (Oct. 13, 2002), available at http://www.cbc.ca/news/story/2002/10/13/michigan_trash021013.html (“In Windsor, Ont., city councillor Joyce Zuk is pleased that Michigan is preparing to put up a barrier. She says people in her city are tired of the garbage trucks rolling through on their way south. “Municipalities should be responsible for taking care of their own garbage, and the city of Toronto hasn't caught on to that one...”)

²⁷ World Trade Organization. UNDERSTANDING THE WTO 14 (2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (Comparative advantage should be distinguished from absolute advantage which occurs in the following situation: Country A is better at producing cars than country B. Country B is better at producing bread than country A. Both countries benefits if A sticks to making cars and B sticks to making bread).

²⁸ World Trade Organization, *supra* note 27 at 14 (uses the example with automobiles and breadmaking).

²⁹ World Trade Organization, *supra* note 27 at 13.

³⁰ General Agreement on Tariffs and Trade, Oct. 30 1947, preamble, paragraph 3 [hereinafter GATT].

³¹ Julia Qin and Katherine Razdolsky. “Tariffs: One way to stop trash,” THE DETROIT FREE PRESS, at 11A (Jan. 3, 2006).

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- ³² 19 U.S.C. §1202 (2006) (The U.S. Harmonized Tariff Schedule lists municipal waste, subheading 3825.10.00, as duty free).
- ³³ North American Free Trade Agreement, Dec. 17, 1992, U.S. – Can. – Mex. art. 302:1 [hereinafter NAFTA]
- ³⁴ NAFTA, *supra* note 33, Note 3.
- ³⁵ United States International Trade Commission, 2005 U.S. Tariff and Trade Data for a specific product, <http://dataweb.usitc.gov/scripts/tariff2005.asp> (search “38251000” and select “municipal waste”).
- ³⁶ GATT, *supra* note 30, Article III:4
- ³⁷ GATT, *supra* note 30, Article, III:1
- ³⁸ GATT, *supra* note 30, Article III:4
- ³⁹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11 (Mar. 12, 2001) [Hereinafter *E.C. Asbestos*].
- ⁴⁰ *E.C. Asbestos*, *supra* note 38, ¶ 99.
- ⁴¹ *E.C. Asbestos*, *supra* note 38, ¶ 101 (citations omitted).
- ⁴² *E.C. Asbestos*, *supra* note 38, ¶¶ 100, 113.
- ⁴³ *E.C. Asbestos*, *supra* note 38, ¶¶ 101, 133 (Appellate Body noted that the criteria are simply tools and are neither treaty mandated nor a closed list of criteria).
- ⁴⁴ *E.C. Asbestos*, *supra* note 38, ¶ 109.
- ⁴⁵ *E.C. Asbestos*, *supra* note 38, ¶ 100. (emphasis in original).
- ⁴⁶ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at 13, (Apr. 29, 1996)(citations omitted) [hereinafter *U.S. Gasoline*]
- ⁴⁷ *E.C. Asbestos*, *supra* note 38, ¶ 162.
- ⁴⁸ *E.C. Asbestos*, *supra* note 38, ¶ 172.
- ⁴⁹ GATT *supra* note 30, art. XX(g)
- ⁵⁰ Appellate Body Report. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R at 50 (Oct. 12, 1998)[hereinafter *Shrimp I*].
- ⁵¹ Panel Report. *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.6, BISD 35S/98 (Mar. 22, 1988) [hereinafter *Canada Herring*]
- ⁵² *Shrimp I*, *supra* note 49, ¶ 136.

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- ⁵³ GATT *supra* note 30, Article XX(g)
- ⁵⁴ *U.S. Gasoline*, *supra* note 45 at 18.
- ⁵⁵ *U.S. Gasoline*, *supra* note 45 at 18 (emphasis in original).
- ⁵⁶ *U.S. Gasoline*, *supra* note 45 at 20.
- ⁵⁷ *Shrimp I*, *supra* note 49 ¶ 151.
- ⁵⁸ NAFTA, *supra* note 33, art. 2101 (emphasis added).
- ⁵⁹ NAFTA, *supra* note 33, art. 104 and Annex 104.1.
- ⁶⁰ Agreement Concerning the Transboundary Movement of Hazardous Waste, U.S.-Can., art. 2, Oct. 28, 1986, 2120 UNTS 97. [hereinafter Transboundary Agreement].
- ⁶¹ Transboundary Agreement, *supra* note 59, art. 3(a).
- ⁶² Transboundary Agreement, *supra* note 59, art. 3(b).
- ⁶³ H.R. 2491, 109th U.S. Cong. (2005); H.R. 518 110th U.S. Cong. (2007)
- ⁶⁴ Frequently Asked Questions Regarding Canadian Trash, <http://stabenow.senate.gov/stoptrash/faq.htm> (last visited Mar. 26, 2006).
- ⁶⁵ WTO. *Environmental Disputes in GATT/WTO*. http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm (last visited April 20, 2007)
- ⁶⁶ Panel Report. *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, (BISD 29S/91), ¶1.1 (Feb. 22, 1982) [hereinafter *U.S. Tuna*]
- ⁶⁷ *U.S. Tuna*, *supra* note 65 ¶ 2.1.
- ⁶⁸ *U.S. Tuna*, *supra* note 65 ¶ 4.4.
- ⁶⁹ *U.S. Tuna*, *supra* note 65 ¶ 4.12.
- ⁷⁰ *U.S. Tuna*, *supra* note 65 ¶ 4.9.
- ⁷¹ *U.S. Tuna*, *supra* note 65 ¶ 4.10
- ⁷² *U.S. Tuna*, *supra* note 65 ¶ 1.1
- ⁷³ *U.S. Tuna*, *supra* note 65 ¶ 4.1
- ⁷⁴ *U.S. Tuna*, *supra* note 65 ¶ 4.6

⁷⁵ *U.S. Tuna*, *supra* note 65 ¶ 4.7

⁷⁶ *U.S. Tuna*, *supra* note 65 ¶ 4.7

⁷⁷ See e.g. George William Mugwanya. GLOBAL FREE TRADE VIS-A-VIS ENVIRONMENTAL REGULATION AND SUSTAINABLE DEVELOPMENT: REINVIGORATING EFFORTS TOWARDS A MORE INTEGRATED APPROACH 14 J. Envtl. L. & Litig. 401, 439-440 (1999) (“the panel invoked its stringently narrow approach to the “necessity” prong of Article XX(b)... this decision illustrates the narrow space within which states may adopt environmental measures to restrict trade and successfully bring them under the “necessity” prong in Article XX”); Bruce Neuling. THE SHRIMP-TURTLE CASE: IMPLICATIONS FOR ARTICLE XX OF GATT AND THE TRADE AND ENVIRONMENT DEBATE, 22 Loy. L.A. Int'l & Comp. L. Rev. 1, 18 -19 (.1999)(“Many environmentalists have argued that this result set an almost “impossibly high hurdle’ for environmental measures under Article XX(b). They argued that a less trade-intrusive policy “is almost always conceivable and therefore in some sense ‘available.’ „,According to one writer, the Panel’s approach ignores ‘the political difficulty of adopting optimal environmental policies that serve both trade and environmental purposes, effectively eviscerating Article XX[(b)].’ Indeed, the restrictive definition of ‘necessary’ does put a heavy burden on a country seeking to use Article XX(b) to defend a trade measure. Thai Cigarettes negatively influenced subsequent environmental litigation, making it difficult to use Article XX(b) as a shield for environmental measures. Instead, environmental litigation has revolved around Article XX(g).”)

⁷⁸ *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes*, ¶ 1, [CITE] (Date) [hereinafter *Thai Cigarettes*].

⁷⁹ *Thai Cigarettes*, *supra* note 77, ¶ 67.

⁸⁰ *Thai Cigarettes*, *supra* note 77, ¶ 73.

⁸¹ *Thai Cigarettes*, *supra* note 77, ¶ 75.

⁸² See *supra* note 78.

⁸³ *E.C. Asbestos*, *supra* note 38, ¶ 175.

⁸⁴ *E.C. Asbestos*, *supra* note 38, ¶ 174.

⁸⁵ Public Law 93-205, 16 U.S.C. 1531 *et. seq.*

⁸⁶ *Shrimp I*, *supra* note 49, ¶ 2.

⁸⁷ *Shrimp I*, *supra* note 49, ¶ 3.

⁸⁸ See *Shrimp I*, *supra* note 49, ¶ 3.

⁸⁹ *Shrimp I*, *supra* note 49, ¶ 8.1.

⁹⁰ *Shrimp I*, *supra* note 49, ¶ 147.

⁹¹ *Shrimp I*, *supra* note 49, ¶ 142.

⁹² *Shrimp I*, *supra* note 49, ¶ 138

⁹³ *Shrimp I*, *supra* note 49, ¶ 138.

⁹⁴ *Shrimp I*, *supra* note 49, ¶ 141.

⁹⁵ *Shrimp I*, *supra* note 49, ¶ 145.

⁹⁶ *Shrimp I*, *supra* note 49, ¶ 144.

⁹⁷ *Shrimp I*, *supra* note 49, ¶ 176.

⁹⁸ *Shrimp I*, *supra* note 49, ¶ 162.

⁹⁹ *Shrimp I*, *supra* note 49, ¶ 163.

¹⁰⁰ *Shrimp I*, *supra* note 49, ¶ 164.

¹⁰¹ *Shrimp I*, *supra* note 49, ¶ 165.

¹⁰² *Shrimp I*, *supra* note 49, ¶ 165.

¹⁰³ *Shrimp I*, *supra* note 49, ¶ 166.

¹⁰⁴ *Shrimp I*, *supra* note 49, ¶ 172.

¹⁰⁵ *Shrimp I*, *supra* note 49, ¶ 173.

¹⁰⁶ *Shrimp I*, *supra* note 49, ¶ 177.

¹⁰⁷ *Shrimp I*, *supra* note 49, ¶ 180.

¹⁰⁸ Appellate Body Report. United States – Import Prohibition of Certain Shrimp and Shrimp Products. WT/DS58/AB/RW (Nov. 21, 2001) [hereinafter *Shrimp II*].

¹⁰⁹ See 40 CFR 80, 59 Fed. Reg. 7716 (16 February 1994). This regulation is formally entitled "*Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline.*"

¹¹⁰ *U.S. Gasoline*, *supra* note 45 at 2

¹¹¹ *U.S. Gasoline*, *supra* note 45 at 4-5 (citing Section 211(k)(8) of the CAA)

¹¹² *U.S. Gasoline*, *supra* note 45 at 5 (citing Section 80.90 of the Gasoline Rule)

¹¹³ *U.S. Gasoline*, *supra* note 45 at 5.

¹¹⁴ *U.S. Gasoline*, *supra* note 45 at 6.

¹¹⁵ Panel Report. *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R ¶ 8.1 (Jan 29, 1996).

¹¹⁶ GATT *supra* note 30, art. XX(b)

¹¹⁷ *U.S. Gasoline*, *supra* note 45 at 17.

¹¹⁸ *U.S. Gasoline*, *supra* note 45 at 17.

¹¹⁹ *U.S. Gasoline*, *supra* note 45 at 19 (emphasis added).

¹²⁰ *U.S. Gasoline*, *supra* note 45 at 25.

¹²¹ *U.S. Gasoline*, *supra* note 45 at 22.

¹²² *U.S. Gasoline*, *supra* note 45 at 22.

¹²³ *U.S. Gasoline*, *supra* note 45 at 22-23.

¹²⁴ *U.S. Gasoline*, *supra* note 45 at 24.

¹²⁵ *U.S. Gasoline*, *supra* note 45 at 25.

¹²⁶ *U.S. Gasoline*, *supra* note 45 at 25.

¹²⁷ Preamble of 1947 GATT.

¹²⁸ Preamble of the *WTO Agreement*, first paragraph (emphasis added)

¹²⁹ *Shrimp I*, *supra* note 49, ¶ 129.

¹³⁰ *Shrimp I*, *supra* note 49, ¶ 185.

¹³¹ *U.S. Gasoline*, *supra* note 45 at 25-26.

¹³² *Shrimp I*, *supra* note 49, ¶ 185-186 (citations omitted)

¹³³ 2006 Mich. Pub. Acts 57-59 (prohibits the delivery and acceptance for disposal of municipal solid waste generated outside the United States provided that the U.S. Congress first enacts authorizing legislation).

¹³⁴ U.S. Const. art. I, §8, cl. 3 (“Congress shall have the power to...regulate Commerce with foreign Nations, and among the several States”); See also *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 359 (1992) (holding that a Michigan law, Public Act 475 of 1988, which required explicit authorization for disposal of out-of-county waste, was an unconstitutional restriction on the flow of commerce in violation of the Commerce Clause); See also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978), (holding that the interstate movement of waste is “commerce” within the meaning of the Commerce Clause).

¹³⁵ U.S. Tariff Schedules, 19 U.S.C. §1202(2006) (HS Classification for municipal waste is 3825.10.00)

¹³⁶ See *Shrimp I*, *supra* note 49, ¶¶127-134 (discussing what it takes to be an “exhaustible natural resource.”).

¹³⁷ See HR 518, 110th U.S. Cong. (2007); HR 2491, 109th U.S. Cong. (2005)(passed unanimously be house, did not pass senate, re-introduced as HR 518 for 2007); S 199, 108th U.S. Cong. (2003); S 383 108th U.S. Cong. (2003); H.R. 411 108th U.S. Cong. (2003).

¹³⁸ NAFTA, *supra* note 33, art. 104:1.

¹³⁹ NAFTA, *supra* note 33, art. 104:1(d).

¹⁴⁰ *E.C. Asbestos*, *supra* note 38, ¶ 174.

¹⁴¹ Martin, *supra* note 8.

¹⁴² Suzane Lowe. Disposal of Solid Waste in Michigan Landfills: Imported Waste and Environment Concerns at 2 (Jan. 2005).

¹⁴³ Lowe, *supra* note 141 at 3

¹⁴⁴ Lowe, *supra* note 141 at 2-3 (The National Solid Waste Management Association challenged the provisions of the aforementioned Public Acts, claiming that they violated the dormant Commerce Clause, the foreign Commerce Clause and the Foreign Affairs Power. The U.S. District Court for the Eastern District of Michigan denied the plaintiff’s motion of an injunction after finding that the legislation, on its face, did not unconstitutionally discriminate against out-of State commerce).

¹⁴⁵ Mich. H.B. 4221 (2007).

¹⁴⁶ David Nickle. City's tons of trash bound for Michigan. INSIDE TORONTO.COM (Jan. 3, 2003), available at <http://www.insidetoronto.ca/to/newscentre/story/809883p-962052c.html>.