THE WTO SHRIMP-TURTLE CASE (UNITED STATES— IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS), 93 American Journal of International Law 507 (April 1999)

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In its report “United States- Import Prohibition of Certain Shrimp and Shrimp Products (hereafter "shrimp-turtle"), the WTO Appellate Body attempts to foster a process whereby diverse interests are accounted for when regulations addressing environmental issues affect trans-border trade. In this way, the Appellate Body decision significantly departs from former GATT jurisprudence and, in particular, the former GATT panel decisions in the two tuna-dolphin cases of 1991 and 1994. The Appellate Body decision can be viewed as a response to challenges to WTO legitimacy by powerful constituencies in the United States and Europe which successfully pressured their governmental representatives to seek changes in the application of GATT rules.

The shrimp-turtle case involved the application of GATT rules to a trade dispute over production and process methods (known as "ppms") for the trawling of shrimp, which kill endangered sea turtles. Four turtle species located in waters subject to the complaining parties' jurisdiction are endangered: the leatherback, the green, the hawksbill and the olive ridley. These turtles are listed as endangered under the Convention on International Trade of Endangered Species of Wild Flora and Fauna ("CITES"). They migrate over large distances, in and out of waters under the complaining parties' jurisdiction. Beginning in May 1996, the United States prohibited imports of shrimp from all countries which do not require commercial shrimp trawlers to use turtle excluder devices (known as "TEDs") in waters where these sea turtles may be present. The turtle excluder device is a mechanism which permits turtles to escape from trawling nets to avoid drowning.


3. [TEDs are relatively inexpensive, costing between $75 to $400 in the United States, although the cost of the “harder” varieties (which are increasingly being required) starts in the $200 range. There is not much data on the cost of TEDs in developing countries where labor is cheaper, though an Indian newspaper has stated that they are “inexpensive, costing only Rs 3,000” (around US$75), and a member of the U.S. National Marine Fisheries Service on a visit to India was told that the cost was actually in the $8-$12 range. If properly installed and used, TEDs allegedly have up to a 97% effective rate in permitting turtles to escape from shrimp trawl nets, while resulting in a negligible loss of shrimp catch. (Discussion of the author with a member of the National Marine Fisheries Service.}
In January 1997, India, Malaysia, Pakistan and Thailand requested the WTO Dispute Settlement Body to establish a panel to determine whether a United States import ban on shrimp and shrimp products pursuant to Section 609 of U.S. Public Law 101-162 ("Section 609") is in violation of the United States' WTO obligations. The four developing country complainants maintained, among other matters, that the U.S. import ban on shrimp and shrimp products (i) violated the prohibition of quantitative restrictions in Article XI of GATT (1994), and (ii) are not permitted under the exceptions set forth in Article XX of GATT (1994). The United States did not contest whether its ban violated GATT Article XI. Rather, the United States maintained that its import ban was permitted under the exceptions set forth in paragraphs (b) and (g) of GATT Article XX.4

In June 1987, the National Marine Fisheries Service ("NMFS") of the United States Department of Commerce first enacted regulations requiring shrimp trawlers of a certain size operating in the Gulf of Mexico to either use turtle excluder devices ("TEDs") or restrict the time they tow shrimp nets without boarding their catch.5 The NMFS adopted the regulation pursuant to authority granted it under the U.S. Endangered Species Act. The regulation was widely contested by U.S. shrimpers, who nicknamed TEDs "trawler elimination devices."6

About two years later, on November 21, 1989, Congress passed legislation which instructed the President to initiate negotiations with foreign governments to develop bilateral and multilateral agreements for the protection of sea turtles and to ban the import of shrimp and shrimp products "which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles."7 The legislation's object was two-fold. First, as declared by its sponsors, the legislation attempted to "level the playing field" between U.S. shrimpers who were subject to the costs of complying with U.S. environmental regulations and foreign shrimpers who were not.8

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

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

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption... " See GATT art. XX.


8. Section 609 was introduced and promoted by the two Senators from Louisiana, John Johnston and John Breaux, in large part to "help for the price of shrimp for our shrimpers in Louisiana." [These same Senators had opposed the Commerce Department's requirement that Louisiana shrimpers use TEDs in the first place, and "fought long and hard not only in the Senate but with our colleagues in the House to try to prevent this rule from coming into operation". Now they argued that if the U.S. was going to impose these costs on their constituents, it was going to impose them on everyone else who wanted to compete in the U.S. market.] See 135 CONG. REC. S12191-05 (1989).
Second, for environmentalists, the legislation would pressure foreign governments to change their domestic regulations to better protect endangered sea turtles.

Section 609(b) created a procedure whereby shrimp may not be imported into the United States unless “the President shall certify to Congress” that either (i) the “fishing environment of the harvesting nation does not pose a threat... such sea turtles,” or (ii) the foreign government has adopted “a regulatory program governing the incidental taking of such sea turtles... that is comparable to that of the United States,” and “the average rate of that incidental taking by the vessels of the harvesting nation is comparable” to that of U.S. vessels.

The President delegated to the State Department the authority to make the required certifications. The State Department first interpreted Section 609 to apply only to countries with coastlines bordering “the wider Caribbean and Western Atlantic region.” This limited application of Section 609 was successfully challenged by a number of U.S. environmental groups, led by the Earth Island Institute, as well as a commercial association of shrimp trawlers, packers and suppliers. In December 1995, the United States Court of International Trade (“CIT”) directed the State Department “to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely [the designated] species of sea turtles” (emphasis added).

Eleven countries filed third party submissions with the panel, all opposing the United States' position. The submission of the European Communities (“EC”) was arguably the most significant. While the EC asserted that the U.S. should lose in “the circumstances of this particular case,” its position on unilateral, extra-jurisdictional measures was more flexible than in the tuna-dolphin cases. The EC now asserted that “Article XX may, in certain circumstances, be relied upon to justify measures taken to protect global commons (globally shared environmental resources) or resources located outside the territory of a contracting party, provided, of course, that the other conditions of application of the relevant exception in Article XX, and the introductory clause thereof, are complied with” (emphasis added). The two most powerful members of the WTO were calling for an “evolution” in GATT jurisprudence, one which the Appellate Body soon provided.

Early signs suggested that the panel would seriously address the United States' substantive environmental claims, and not limit its assessment to trade-related arguments. First, the panel agreed to form a group of conservation biology experts pursuant to Article 13.2 of the Dispute Settlement


10. Earth Island Institute v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995). The State Department then issued new guidelines which, among other matters, permitted shrimp to be imported to the extent they were certified by a foreign government official to have been caught by TEDs, even if the foreign government in question did not have a “comparable regulatory program” mandating the use of TEDs. These guidelines were again challenged by the same groups and found by the U.S. Court of International Trade to be contrary to Section 609.

11. Third Party Submission by the EC to the panel (on file). See also AB Report, supra note 1, ¶¶ 65-74 (remarks of the EC).
Understanding. The panel designated five individuals to form the expert group, two recommended by the United States and three by the complainants. Not surprisingly, while the experts all confirmed that the sea turtles were endangered, they did not concur on the most appropriate conservation method for the complainants to utilize, and in particular, whether the means mandated by the United States' regulation was necessary or appropriate.

Second, environmental non-governmental organizations ("NGOs") submitted two amicus briefs to the panel in support of the U.S. ban. A consortium of NGOs led by two U.S.-based groups filed one brief. The WWF-World Wildlife Fund for Nature filed the other. While the panel refused to accept the amicus briefs as independent documents, it accepted the factual portion of the consortium's brief as an exhibit to the United States' second written submission.

In its report of May 15, 1998, the WTO dispute settlement panel held that the U.S. import ban violated GATT Article XI and was "not within the scope of measures permitted under the chapeau of Article XX." Controversially, the panel reasoned that the U.S. import restrictions on shrimp and shrimp products "were clearly a threat to the multilateral trading system." On October 12, 1998, the WTO Appellate Body overruled the initial panel in its reasoning, but not in its substantive result. In doing so, the Appellate Body significantly changed the WTO's approach to environmental regulations having an extra-jurisdictional object. In each of the Appellate Body's three reversals of panel findings, it appeared to respond to charges that the WTO's dispute settlement process is trade-biased. First, the Appellate Body held that WTO rules do not prohibit a panel from accepting unsolicited amicus curiae briefs submitted by environmental NGOs. Second, it confirmed that the U.S. ban legitimately "relates to the protection of exhaustible natural resources" for purposes of Article XX(g). Third, it criticized the panel for its "overly broad" depiction of the WTO Agreement's purpose and its focus on a priori "categories" of measures, rather than on a factual analysis of how the United States actually applied its particular import ban.

The Appellate Body first overruled the panel's holding that "accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU." The Appellate Body made this determination even though the language of Article 13 of the WTO

12. [The two members recommended by the United States were Mr. Scott Eckert, a U.S. sea turtle conservationist who publishes the Marine Turtle Newsletter and Mr Jack Frazier, a sea turtle biologist currently working in Mexico. The three members recommended by the complainants were Mr. Michael Guinea and Mr Ian Pointer of Australia and Mr. Hock Chark Lieu of Malaysia. Eckert, Frazier and Lieu are members of the Marine Turtle Specialist Network of the IUCN (International Union for the Conservation of Nature).]

13. [The Center for International Environmental Law and the Center for Marine Conservation, based in Washington D.C., were joined by three groups based in developing countries, The Environmental Foundation Ltd of Sri Lanka, The Philippine Ecological Network and the Red Nacional de Accion Ecologica of Chile.]


15. Id. The panel repeated its claim that the U.S. environmental measures "undermine," "threaten" and "put at risk" the trading system eight times. See id. ¶¶ 7.44, 7.45, 7.51, 7.55, 7.60 and 7.61.


17. See id. ¶ 110.
Dispute Settlement Understanding refers to a panel's “right to seek information,” and the panel clearly did not “seek” “non-requested” information. In the appeal, the Appellate Body not only accepted “for consideration” three NGO briefs attached as exhibits to the United States' submission, it also accepted a revised version of one of these briefs independently submitted by a group of NGOs.

On the one hand, the acceptance of the NGO briefs was largely symbolic. The Appellate Body focused “on the legal arguments in the main U.S. appellant submission,” and not those in the NGO briefs, in its analysis. On the other hand, a panel's acceptance of amicus briefs could primarily benefit business enterprises, since business interests lie behind most trade disputes. Business associations and private lawyers would like to assume greater control of the WTO litigation process through shaping the factual and legal arguments presented to WTO panels.

The Appellate Body next admonished the panel for failing to examine whether the U.S. measures were permissible under Article XX(g) as a “measure relating to the conservation of exhaustible natural resources.” The United States maintained that endangered sea turtles are clearly covered under Article XX(g), citing the earlier U.S.-Reformulated Gasoline case. The complainants countered that the term “exhaustible natural resources” refers only to non-biological resources, such as minerals. They also cited the two tuna-dolphin panel decisions which held that the U.S. tuna embargo was not “primarily aimed at the conservation of dolphins" because it attempted to coerce foreign countries to modify their domestic regulations.

The Appellate Body confirmed that the term “natural resources” incorporates the protection of living species, that there was a “sufficient nexus between the migratory and endangered marine populations involved and the United States,” and that the U.S. measures thus fell within

18. [These briefs were submitted by (i) collectively, the Earth Island Institute, the Humane Society, and the Sierra Club; (ii) collectively, the Center for International Environmental Law (CIEL), the Center for Marine Conservation, the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia; and (iii) collectively, the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development.]

19. [This was submitted by CIEL et al.]

20. Id. ¶ 91.

21. While not addressing Article XX(g), the shrimp-turtle panel held that, even if the U.S. restrictions fell within the scope of paragraph (g), they were unjustifiable under the Article XX “chapeau.”

22. See World Trade Organization: Report of the Panel in United States - Standards for Reformulated and Conventional Gasoline Treatment of Imported Gasoline and like Products of National Origin, 35 I.L.M. 274, 299 (May 20, 1996). The WTO panel held that “clean air” was an exhaustible natural resource and thus the U.S. measure fell within the scope of Article XX(g). [The decision also set forth a procedure for addressing Article XX defenses which provided that a panel must first address whether a measure falls within the scope of one of listed exceptions (in this case paragraphs (b) or (g) of Article XX) and then determine whether the measure was applied consistently with the conditional language in the Article XX “chapeau.”]

23. The second tuna dolphin panel held that the primary aim of the U.S. measures was “to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins.” Tuna-dolphin II, supra note 2, ¶ 5.24.

24. AB Report, supra note 1, ¶ 133.
the scope of the Article XX(g) exception. The U.S. measures were thereby “provisionally” justified, subject to application of the Article XX “chapeau.” 25 Though the Appellate Body limited its finding to the “specific circumstances of the case before us,” it effectively rejected the reasoning of the tuna-dolphin panel decisions. As the shrimp-turtle panel report, the tuna-dolphin cases focused on a category of measures (import restrictions based on foreign production methods), as opposed to the particular characteristics of the import restriction in question. 26 The Appellate Body rejected this generic type of analysis. Curiously, it did so without ever citing the tuna-dolphin decisions.

In interpreting Article XX(g), an Article “crafted more than 50 years ago,” the Appellate Body focused less on the context of “the overall WTO Agreement,” than on the contemporary context in which it must render its politically sensitive decision. Rather than analyze the “original intent” or drafting history of Article XX, the Appellate Body affirmed that the term “exhaustible natural resources” is “not ‘static’ in its content or reference but is rather by definition, evolutionary” (emphasis added). The Appellate Body held that the words “must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” As evidence of the contemporary context, the Appellate Body emphasized the reference in the preamble of the WTO Agreement to “the objective of sustainable development,” a reference which did not appear in the original GATT. The Appellate Body stated that “it is too late in the day” to limit Article XX(g) coverage to “the conservation of exhaustible mineral or other non-living resources” as the complainants desired. “In the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994,” 27 the Appellate Body amended prior GATT analysis in light of contemporary perspectives.

The Appellate Body finally turned its analysis to the conditions set forth in the Article XX “chapeau,” where it sought to maintain “a balance... between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members” (emphasis added). 28 The Appellate Body defined its “task” as “the delicate one of locating and marking out a line of equilibrium” which “is not fixed and unchanging,” but “moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ” (emphasis added). 29 In searching for this “equilibrium,” the Appellate Body attempted to “delicately” apply Article XX to the United States’ indelicate application of an import ban. Rather than apply a

25. See AB Report, supra note 1, ¶ 187(c). For reasons of judicial economy, the Appellate Body did not address whether the U.S. import ban was also “necessary to protect human, animal or plant life or health” under Article XX(b). Id. ¶ 146.

26. The shrimp-turtle panel used the same rationale under the Article XX “chapeau” as applied by the tuna-dolphin panels under Article XX(g). Both the tuna-dolphin panels and the shrimp-turtle panel held that the respective import embargoes were impermissible because they were “types” of measures which could “undermine” the trading system. The tuna-dolphin II panel claimed, “Under such an interpretation the General agreement could no longer serve as a multilateral framework for trade among contracting parties.” See Tuna-dolphin II, supra note 2, ¶ 5.26. The shrimp-turtle panel cited the Tuna-dolphin II decision with approval. See Panel Report, supra note 15, ¶ 7.46.

27. AB Report, supra note 1, ¶ 155.

28. Id. ¶ 156.

29. Id. ¶ 159.
generic analysis of import bans based on foreign production and process methods, the Appellate Body turned to the “facts making up” the “specific case.”

The Appellate Body found six flaws in the United States' application of Section 609. First, and “perhaps the most conspicuous flaw in this measure's application,” the U.S. requires all “exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy” as that applied in the United States. The report found that this has an unjustifiably “coercive effect” on policy decisions made by foreign governments. The Appellate Body admonished the United States for failing to take “into consideration the different conditions which may occur in the territories of... other Members.” The U.S. was thus unable to assure that its policies were appropriate for the local “conditions prevailing” in these countries.

Second, the Appellate Body emphasized that even where shrimp are caught using U.S.-prescribed methods, the United States still prohibits their importation if they come from countries which do not require the use of TEDs. The report suggested that the United States was “more concerned with effectively influencing WTO members to adopt” US-prescribed regulatory regimes than assuring that shrimp actually imported into the U.S. are caught with methods which do not endanger migratory sea turtles.

Third, the report criticized the United States for not seriously attempting to reach a multilateral solution. The report noted that the U.S. successfully negotiated the signature of an Inter-American Convention for the protection and conservation of sea turtles, which demonstrates that “multilateral procedures are available and feasible.” Yet the report found that the United States never seriously attempted to negotiate a similar agreement with the four complainants.

Fourth, the Appellate Body held that the United States discriminated among WTO members by applying different “phase-in” periods during which they must require shrimp trawlers to use TEDs. Whereas countries in the Carribean/western Atlantic region were permitted a three year phase-in period, the rest of the world was granted “only four months.” Fifth, the report faulted the United States for making far “greater efforts to transfer [TED technology]” to countries in the Carribean/western Atlantic region “than to other exporting countries, including the appellees.” The Appellate Body found that all six of these examples constitute “unjustifiable discrimination” in the application of the U.S. regulation within the meaning of the Article XX “chapeau.”

Finally, the Appellate Body flushed out the meaning of Article XX's reference to “arbitrary discrimination.” The Appellate Body effectively required the United States to create an administrative procedure pursuant to which foreign governments or traders would have an

30. Id. ¶ 161.
31. Id. ¶ 164.
32. Id. ¶ 165.
33. Id. ¶ 166-170.
34. This was the result of a decision of the U.S. Court of International Trade, a body for which the United States “bears responsibility." Id. ¶ 173.
35. Id. ¶ 175.
opportunity to comment on and challenge regulations before U.S. administrative bodies or courts. The Appellate Body held that the application of the U.S. measure is “arbitrary” in that the certification process is not “transparent” or “predictable,” and does not provide any “formal opportunity for an applicant country to be heard or to respond to any arguments that may be made against it.”

The report noted that the U.S. implementing agency issues “no formal written, reasoned decision, whether of acceptance or rejection,” and there is “no procedure for review of, or appeal from, a denial of an application.”

The Appellate Body cited Article X of GATT 1994 as requiring the U.S. to grant foreign traders and countries these “due process rights.” Without these procedures, foreign traders’ only protection from arbitrary administrative action is through their government representatives before the WTO dispute settlement body.

Judiciously, the Appellate Body did not criticize the U.S. Congress, but rather the U.S. implementing agency, the Department of State, which drafted the applicable Guidelines. The Appellate Body noted that the actual statutory provisions of Section 609 “appear to permit a degree of discretion or flexibility” which has been “effectively eliminated in [their] implementation... by the Department of State.”

The Appellate Body implied that Congress, in using the term “comparable,” would permit conservation measures which do not require the use of TEDs.

The Appellate Body decision was critiqued by environmentalists, the complaining parties, and (at least in private) some WTO trade law specialists. Earth Island Institute, the NGO which, through U.S. courts, compelled the United States to apply Section 609 to all countries, dubbed the decision “a death blow for sea turtles.” The developing country complainants called the Appellate Body’s approach “dangerous,” fearing that the ruling “will result in explosive growth in unilateral, discriminatory, trade-related environmental measures.”

Some trade law experts questioned the appropriateness of a WTO panel reviewing domestic legislative and administrative procedures.

The United States has since notified the Dispute Settlement Body that it will comply with the Appellate Body ruling within thirteen months of its adoption by the DSB (i.e. by December 6, 1999). The State Department has already revised its guidelines to permit shrimp to be imported into the United States if they are caught by vessels using TEDs, even if the foreign country does not

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36. Id. ¶ 180.
37. Id.
38. Id. ¶ 182. Paragraph 3 of Article X, for example, requires parties to “administer in a uniform, impartial and reasonable manner” their laws and regulations, and to “maintain... judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action....”
39. AB Report, supra note 1, ¶ 161.
42. Confidential discussion with an individual who periodically serves on WTO dispute settlement panels.
require them. During the implementation period, the U.S. State Department will likely further revise its guidelines to permit complainants to show they use “comparable” methods to protect sea turtles from shrimp trawling, such as through limiting the time or area in which trawlers may operate. Revised guidelines should also offer foreign governments greater “due process” rights, including the right to challenge “preliminary” State Department findings before they become definitive, in particular concerning the local “condition” of endangered sea turtles and the comparability of their shrimp trawling requirements. Finally, the U.S. will likely create a “paper trail” of its offer to negotiate a multilateral sea turtle protection convention and to provide the complainants with TED technology and consulting services. The State Department is already attempting to raise funds to finance an international conference to negotiate a treaty.

As in the tuna-dolphin conflict, in the end, while the U.S. lost the legal case, the developing country complainants may be prompted to upgrade their environmental regulations. In the end, foreign shrimpers wishing to export shrimp to the U.S. market will likely be forced to use TEDs.

44. See 63 Fed. Reg. 46,094 (1998). This followed a successful government appeal of an earlier CIT judgment. See Earth Island Institute v. Albright, 147 F.3d 1352 (Fed. Cir. 1998). The U.S. Court of Appeals decision is discussed in 15 Int’l Trade Rep. (BNA) 1063 (June 17, 1998). The revised guidelines are again being challenged before the CIT by the Earth Island Institute and other environmental organizations.

45. Telephone Interview with a representative of the U.S. Department of State (Feb. 8, 1999).