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# The Appellate Body, the Protection of Sea Turtles and the Technique of "Completing the Analysis"

Sydney M. CONE, III*

## I. BACKGROUND

Sea turtles, which are internationally recognized as endangered species threatened with extinction, can drown if they are caught in nets used to harvest shrimp.[1] By federal statute and implementing regulations, the United States requires that (with certain exceptions) shrimp-trawl nets must be equipped with "turtle-excluder devices" designed to prevent sea turtles from drowning. The United States not only has imposed this requirement on US shrimp-trawl vessels, but has also banned the importation of shrimp harvested by foreign vessels that do not meet a similar requirement.[2] The import ban gave rise to the *Shrimp/Sea Turtles* case, in which reports were rendered first by a panel and subsequently by the Appellate Body of the World Trade Organization (WTO).[3]

The case arose when four Asian nations,[4] invoking the WTO Agreement known as the General Agreement on Tariffs and Trade (GATT) 1994,[5] disputed the legality of the United States applying its regulations to prevent the importation of shrimp from those nations. There was no serious doubt that the US ban on shrimp imports violated

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[1] For the international listing of all seven species of sea turtles as "endangered species" and six of these species as threatened with extinction, see the Panel Report (as note 3, below) at II(1) "Basic Facts About Sea Turtles" and V "Panel's Consultation With Scientific Experts".

[2] The US Endangered Species Act of 1973 and regulations issued thereunder in 1987 require US shrimp-trawl vessels, subject to certain exceptions, to install in their nets sea-turtle-excluder devices (grid trapdoors that pass shrimp into a net while directing sea turtles out of the net). In 1989, the United States enacted §609 of Public Law 101–102, 16 U.S.C. §1537, and in 1991 and 1993 issued Guidelines thereunder, pursuant to which the United States effectively banned the importation of shrimp harvested by vessels unless, subject to certain exceptions, they had installed sea-turtle-excluder devices in their nets. Initially, the 1991 and 1993 Guidelines applied §609 to only 14 countries in the Western Hemisphere. In December 1995 and again in April 1996, a US court ordered that §609 be applied worldwide. Earth Island Institute v. Christopher, 913 F.Supp. 559, 579–580 (U.S. Ct. Int'l Trade 1995), 992 F.Supp. 616, 627 (U.S. Ct. Int'l Trade 1996). As a result, the United States issued 1996 Guidelines to apply §609 worldwide. See generally the Panel Report (note 3, below) at II(2) ("The U.S. Endangered Species Act (ESA) and Related Legislation"). The application of §609, including the revision of the 1996 Guidelines on 28 August 1998, has continued to be the subject of litigation in the US courts, brought by environmental organizations against the US government (see note 15, below).

[3] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, World Trade Organization. Report of the Panel, WT/DS58/R (98-1710), 15 May 1998 (hereinafter, the "Panel Report"). Report of the Appellate Body, WT/DS58/AB/R (AB-1998-4), 12 October 1998 (hereinafter, the "Appellate Body Report").

[4] The complaining parties were India, Malaysia, Pakistan and Thailand. Third-party arguments were submitted by the European Union and 10 countries. In addition, two briefs were submitted to the panel by non-governmental organizations, one brief by the Center for Marine Conservation and the Center for International Environmental Law, the other brief by the World Wide Fund for Nature. The four complaining parties objected to these submissions. With the consent of the Panel, the United States designated a portion of the former brief as an annex to one of its submissions to the Panel. Panel Report at VII(B). The Appellate Body found that the panel had authority to accept submissions by non-governmental organizations. Appellate Body Report at paras 109–110.

[5] GATT 1994, Annex 1A, Final Act Embodying the Results of the Uruguay Round of Trade Negotiations (Marrakesh, 15 April 1994).

certain provisions of the GATT 1994,[6] and the only significant issue was whether, notwithstanding this violation, the US measures were justified by virtue of Article XX of the GATT 1994. The relevant provisions are Paragraph (g) of Article XX, under which it may be possible to justify the adoption of national environmental measures that restrain multilateral trade, and the introductory clause, or chapeau, of Article XX, which subjects the application of such measures to certain requirements.[7]

The WTO panel, in its report, analysed the US measures solely under the chapeau but not under Paragraph (g), and ruled in favour of the complainant nations on the ground that the United States had "taken unilateral measures which, by their nature, could put the multilateral trading system at risk". In reaching this conclusion, the Panel said that the GATT 1994 "only allows [WTO] Members to derogate from GATT provisions [here, the GATT provisions that forbid import barriers] so long as they [the Members] do not undermine the multilateral trading system ..."; and that a WTO panel, when considering a given national measure, "must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were adopted by other Members, would threaten the security and predictability of the multilateral trading system".[8]

The Panel Report was appealed to the WTO's Appellate Body which, in its Report, rejected what it called "the very broad formulation"—the prohibition of measures that "undermine the WTO multilateral trading system"—on which the Panel had relied. According to the Appellate Body: "maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise [of the GATT 1994], but it is not a right or an obligation, nor is it an interpretative rule [for applying the GATT 1994]".[9]

Having rejected the basis for the Panel Report, the Appellate Body reviewed the record in the case (at times amplifying that record). It found that the US regulations had been fashioned for the legitimate purpose of protecting and conserving sea turtles, and that there was a reasonable relationship between the rules requiring that shrimp-trawl vessels use sea-turtle-excluder devices "and the legitimate policy of conserving an exhaustible, and, in fact, endangered species". Thus, according to the Appellate Body, the US regulations were authorized by Paragraph (g) of Article XX of the GATT 1994, which permits the adoption of measures "relating to the conservation of exhaustible natural resources ...".[10]

As mentioned above, however, measures permitted by Paragraph (g) are subject to the requirements of the introductory clause, or chapeau, of Article XX. According to the chapeau, measures permitted by Paragraph (g), such as the US sea-turtle-excluder regulations, are:

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[6] The Panel Report, at VII(C), found that the US import ban was not consistent with Art. XI:1 of the GATT 1994, and indicated that the United States did not contest this finding.

[7] The relevant portions of Art. XX are quoted below.

[8] Panel Report, at VII(E)(2), Chapeau of Artticle XX.

[9] Appellate Body Report, at para. 116.

[10] See note 9, above, at paras 141–142.

"[s]ubject 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 ...".

On the basis of the Article XX chapeau (just quoted), the Appellate Body, taking up "unjustifiable discrimination" and "arbitrary discrimination" separately (and in that order), examined the manner in which the United States had regulated the importation of shrimp.[11] The Appellate Body concluded that, although the US import regulations constituted a measure serving a legitimate objective 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".[12]

Summarized below as "first" to "fifth" are the principal findings by the Appellate Body in respect of application by the United States of its import regulations. (The numbering, sequence and content of the summaries found below are the author's, not the Appellate Body's.)

The Appellate Body's finding of "arbitrary discrimination" rested on a single finding:

- First, that the United States had failed to adopt a transparent process whereby countries could apply for and obtain certification that they were acting in conformity with the US regulations.[13]

Findings "second" to "fifth", "considered in their cumulative effect", led to the Appellate Body's finding of "unjustifiable discrimination".[14] They were:

- Second, while the *Shrimp/Sea Turtles* case was pending before the WTO panel and Appellate Body, the United States had banned from its market shrimp harvested in the waters of nations that did not have programmes for their shrimp-trawl vessels similar to the programme applied by the United States to its vessels, even when the shrimp had been harvested by particular vessels that used sea-turtle-excluder devices in their nets.[15]

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[11] See note 9, above, at paras 163–176 ("unjustifiable discrimination"), 180–181 ("arbitrary discrimination").

[12] See note 9, above, at para. 186.

[13] See note 9, above, at paras 177–184. Here the Appellate Body relied on oral statements made at a hearing held by it. As there is no public record of these statements, the basis for the finding as to lack of transparency is itself somewhat lacking in transparency.

[14] See note 9, above, at para. 176.

[15] See note 9, above, at para. 165. In the US litigation referred to in note 2, above, environmental groups expressed concern that, if a nation limited its use of sea-turtle-excluder devices to its shrimp-trawl vessels supplying the US market, the rest of that nation's shrimp-trawl vessels, freed of any obligation to use the devices, could effectively subject all turtles in the region to the risk of being drowned. *Earth Island Institute v. Christopher*, 942 F.Supp. 597, 604–606 (U.S. Ct. Int'l Trade 1996), 948 F.Supp. 1062, 1064 (U.S. Ct. Int'l Trade 1996). This concern was repeated in oral argument on 14 December 1998 in *Earth Island Institute v. Albright* (U.S. Ct. Int'l Trade, Docket No. 98-09-02818), when plaintiffs, attacking the 28 August 1998 revision of the US Guidelines (see note 2, above), asserted (1) that in a particular nation's waters all shrimp-trawl vessels tend to be vessels of that nation, and (2) the US government, by certifying shrimp imports on a vessel-specific or shipment-by-shipment basis from a nation that does not have a sea-turtle-protection programme certified by the United States, could validate that nation's use of sea-turtle-excluder devices being limited to specific vessels, while the other vessels of that nation were at liberty to drown sea turtles by using trawl nets lacking excluder devices.

- Third, in determining whether a country would be permitted to export shrimp to the United States, US officials did not take account of all of the policies and measures that the exporting country may have adopted for the protection of sea turtles, and looked only to see whether that country's regulatory programme was essentially the same as the programme applied by the United States to its own shrimp-trawl vessels.[16]
- Fourth, although the United States had entered into an agreement with certain nations (not including the complainant nations) to implement programmes for the use of sea-turtle-excluder devices, the United States had not entered into "serious" negotiations with the complainant nations "with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles ...".[17]
- Fifth, the United States had given some nations three years to phase in the adoption of programmes for using sea-turtle-excluder devices, and had assisted them in achieving compliance, but had given the complainant nations only four months in which to adopt such programmes, and had not afforded them the same level of assistance.[18]

The Appellate Body's Report is analysed below from three perspectives:
- its implications for the US environmental regulations there at issue;
- its broader implications for Appellate Body review of Reports by WTO Panels; and
- its still broader implications for Reports by WTO Panels or the Appellate Body that impinge on, or are impinged on by, national environmental policies or programmes whose primary focus is not world trade.

## II. Implications for US Efforts to Protect Sea Turtles

Indicating its intention to implement the recommendations and rulings found in the Appellate Body's Report, the United States has said that compliance "will require a 'reasonable period of time'" within the meaning of the WTO Dispute Settlement Understanding (DSU),[19] and has further said: "We will implement [the Report] in a manner which is consistent not only with our WTO obligations but also with our firm commitment to the protection of endangered species, including sea turtles".[20]

[16] See note 9, above, at para. 163.

[17] See note 9, above, at paras 166–167 and 171–172. References to "serious" negotiations are found in paras 166, 167 and 171, and to negotiating "seriously" in para. 172. Apparently the only multilateral agreement on protecting and conserving sea turtles that to date has actually been entered into is the Inter-American Convention on the Protection and Conservation of Sea Turtles, concluded in 1996.

[18] See note 9, above, at paras 173–175.

[19] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, Final Act Embodying the Results of the Uruguay Round Negotiations (Marrakesh, 15 April 1994). Art. 21(3) thereof defines a "reasonable period of time" for compliance with a Panel or Appellate Body Report.

[20] United States Trade Representative, "Talking Points Regarding U.S. Intentions Regarding the Shrimp-Turtle Dispute", 24 November 1998.

The Appellate Body's finding "first" seems to suggest that the United States could comply promptly with that finding by adopting pertinent administrative procedures that are appropriately transparent from the perspective of applicants for US certification. Were this to be done, the US regulations would cease to constitute "arbitrary discrimination" within the meaning of the Article XX chapeau as interpreted by the Appellate Body.[21]

As regards the finding "second", it would seem that the United States is already in compliance as the result of its amendment, on 28 August 1998, of the applicable US regulations.[22] Prior to this amendment, exports of shrimp to the United States from a foreign country had been banned unless the exporting country had adopted a comprehensive programme, certified by the United States, for the use of sea-turtle-excluder devices. Subsequent to this amendment, the United States is to evaluate separately each shipment from an exporting country that does not have such a comprehensive programme and, if the relevant shrimp-trawl vessel(s) in respect of a particular shipment used sea-turtle-excluder devices, the US importation of that shipment is to be permitted.[23] (Related questions involving finding "second" itself are discussed in section III., below.[24])

Findings "third" and "fourth", respectively, would have the United States take account of the entirety of an exporting country's efforts to protect and conserve sea turtles, and make "serious" efforts to enter into agreements on sea-turtle protection and conservation with the complainant nations (and, possibly, other nations with which the United States has not yet concluded such agreements). As a practical matter, finding "third" might be subsumed under finding "fourth", that is the former might be an element in the negotiation of bilateral or multilateral agreements relating to the protection and conservation of sea turtles.

Obviously, the negotiation of an agreement is a two-party or multi-party process, and each party may have its own ideas as to what constitutes "serious" efforts at negotiation. In the background, there may be conflicting factors. In particular, sea turtles face extinction, and delays in negotiation will be unlikely to work in their favour or in the favour of those seeking to protect and conserve them. On the other hand, national measures taken to protect sea turtles can also have the effect of protecting national markets for shrimp. The opening or closing of the US market for shrimp to one or more other nations may have commercial consequences that are not necessarily related to protecting or conserving sea turtles. Although it may not be self-evident when efforts at negotiation are "serious", there is an existing international agreement on sea-turtle protection that might provide some guidance in this connection.[25]

Finally, there is finding "fifth"—that the United States should afford the complainant nations additional time in which to comply with the US regulations, and should offer

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[21] See the text at note 13, above.

[22] See note 2, above, final sentence.

[23] As mentioned in note 15, above, this approach to import certification has been challenged by US environmental organizations.

[24] See the sixth and seventh paras of text under section III, below.

[25] See note 17, above.

them additional assistance to enable them to do so. This finding addresses the fact that, as regards these factors of phase-in time and assistance, the United States had treated the Asian complainants less favourably than it had treated certain Western Hemisphere countries. Whatever the merits of this finding, the fact of discriminatory treatment in the past may be difficult to redress in the present. A grant of additional time and appropriations by the US Congress may be simply unattainable in the context of prompt and "serious" negotiations designed to reach fruition within a "reasonable period of time". Since the Appellate Body, in its analysis of "unjustifiable discrimination" within the meaning of the Article XX chapeau, referred to the "cumulative effect" of its findings "second" to "fifth",[26] it might be argued that US compliance with findings "second" to "fourth" would so diminish the "cumulative effect" as to constitute compliance with the Appellate Body's Report.

## III. Implications for the Review of Panel Reports by the Appellate Body

Under the DSU, the Appellate Body, in considering a Panel Report on appeal, is supposed to review only issues of law; and does not have authority to remand the case to the panel for further proceedings in light of the Appellate Body's rulings on issues of law.[27] Faced with the dilemma posed by these procedural constraints, on the one hand, and the overriding DSU objective of resolving cases rapidly,[28] on the other, the Appellate Body, rather than leave a case unresolved when it disagrees with a Panel Report, has developed a technique whereby it undertakes to "complete the analysis" found in the Panel Report (i.e. to act *de novo* as though it were itself a panel) and then, on the basis of the "analysis" thus "completed", to resume acting as the Appellate Body and reach definitive legal conclusions.[29] This is the technique that it employed in the *Shrimp/Sea Turtles* case.

The technique of "completing the analysis" exists outside the provisions set forth in the DSU. It is purely a case-law creation of the Appellate Body. Its justification is that, without this technique, the Appellate Body, subject to the procedural constraints mentioned above, would be unable to resolve a case as to which it agreed generally with the result reached by the Panel, but disagreed with some or much of the factual or legal analysis on which the Panel relied to reach that general result.

To date, the Appellate Body has not ruled on a case where it disagreed altogether with a Panel Report. Thus, the technique of "completing the analysis" has yet to be used by the Appellate Body in a case where, for example, it concludes that the party prevailing before the Panel should not have prevailed on any grounds whatsoever. As a matter of logic, however, the Appellate Body, were it so inclined, could extend the technique to

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[26] See note 14 and accompanying text, above.

[27] DSU, Art. 17(6).

[28] DSU, Art. 17(5).

[29] See the Appellate Body Report, at paras 123–124. See also Cone, *The Appellate Body and Harrowsmith Country Life*, 32 JWT 103, 113–115 (April 1998).

cover such a case. "Completing the analysis" is already a euphemism for rejecting some or much of the Panel's analysis. Carried to its logical limits, the technique would provide the Appellate Body with a procedure for deciding a case by substantially rejecting the Report of the Panel being considered on appeal, and then substituting its own Report that reflected its assumed dual role of both panel and Appellate Body.

The *Shrimp/Sea Turtles* case is not what might be called the ultimate exercise in analysis-completion, for the Appellate Body did not "complete the analysis" to the point that it threw out the Panel's work in its totality. The case can, however, be said to represent a major step toward the ultimate exercise in analysis-completion, in light of the following: the Appellate Body (unlike the Panel) recognized the environmental and WTO legitimacy of the US regulations under Paragraph (g) of Article XX of the GATT 1994, and then rejected the Panel's "very broad formulation" (cast in terms of "the WTO multilateral trading system") for applying the Article XX chapeau, and the Panel's finding of (in effect) a *per se* violation of the chapeau, as set forth in the Panel's conclusion that the United States had "taken unilateral measures which, by their nature, could put the multilateral trading system at risk";[30] that having been done, the Appellate Body (again unlike the Panel) seemed to put the US regulations within striking distance of conformity with the Article XX chapeau—if the United States were to modify five aspects of the application of those regulations.[31]

Notwithstanding these differences between the Appellate Body and the Panel, there are portions of the Appellate Body's Report, especially its findings "second" and "third", where the analysis, or lack of analysis, fails to provide an explanation for the finding that the United States engaged in "unjustifiable discrimination" within the meaning of the Article XX chapeau. By default, the Appellate Body's rationale in these instances seems to be that of the Panel, namely that the measures taken by the United States were not in conformity with the chapeau because they were unilateral measures undermining the multilateral trading system. More specifically, these are instances where the Appellate Body seems to have lost sight of its own statement concerning legitimate environmental policy—of its observation that there is a reasonable relationship between the US rules requiring shrimp-trawl vessels to use sea-turtle-excluder devices "and the legitimate policy of conserving an exhaustible, and, in fact, endangered species".[32]

This analytical lapse is most striking in finding "second". From an environmental perspective, the issue here would seem to call for more than the conclusory language used by the Appellate Body in its finding of "unjustifiable discrimination". The issue turns on two quite different ways in which the United States might regulate the importation of shrimp. Under one approach, the United States permits shrimp to be imported from a foreign country only if that country has adopted a general programme for the use of sea-turtle-exclusion devices. Under the other approach, the United States

[30] See note 9, above, at paras 115–116; 121–122.
[31] See the discussion of findings "first" to "fifth" above under section II, above.
[32] See the text at note 10, above.

takes account of the specific vessels of that country that caught the shrimp being exported and, if those particular vessels used such devices, permits the importation of the shrimp. Without explaining how it reached its conclusion, the Appellate Body indicated that the first approach constitutes "unjustifiable discrimination" whereas the second approach does not.[33]

The environmental implications of this distinction—implications that have been the subject of litigation in US courts between environmental organizations and the federal government[34]—were not examined by the Appellate Body in the context of its finding "second". In particular, the Appellate Body ignored the difficult question of whether vessel-specific (as opposed to country-by-country) enforcement of the US regulations would be too limited to achieve "the legitimate policy of conserving [sea turtles]". To this extent, the Appellate Body's exercise in "completing the analysis" of the Panel was in turn in need of analysis-completion.

Finding "third" is also framed in conclusory terms. It finds "unjustifiable discrimination" because the United States, in evaluating other countries' sea-turtle-protection programmes, measured them against its own programme. Analytically, a step is missing, that is to explain why, on the facts, the US programme is not an acceptable standard against which to measure other programmes in the context of achieving "the legitimate policy of conserving [sea turtles]".[35] Here again, the Appellate Body's technique of analysis-completion added little to the Panel's rationale that US unilateralism threatened the multilateral trading system.

Even so, the Appellate Body was hardly at pains to treat the Panel's Report as a fundament for its own. The Panel's Report became a mere ingredient to be skinned and skimmed and then skewered into the Appellate Body's Report.[36] Thus, the *Shrimp/Sea Turtles* case may prove to have been more than a major step toward the ultimate exercise in analysis-completion. It may turn out to be a jurisprudential milestone marking the WTO's seeming tendency to move away from the original DSU design for dispute settlement through panels with occasional, limited appellate review,[37] and to move toward a dispute-settlement system in which the Appellate Body acts as the WTO's judicial suzerain.

## IV. Implications for Multilateral Dispute Settlement

The *Shrimp/Sea Turtles* case embodied a collision between national environmental law and multilateral trade law. US regulations which had been adopted for the purposes

[33] See note 9, above, at para. 165.

[34] See note 15, above.

[35] The issue of employing the US programme as the standard for other nations has arisen in the litigation mentioned in notes 2 and 15, above. See *Earth Island Institute v. Christopher*, 913 F.Supp. 559, 578–579 (U.S. Ct. Int'l Trade 1995), 942 F.Supp. 597, 604–606 (U.S. Ct. Int'l Trade 1996).

[36] This treatment of the Panel Report is manifest in the Appellate Body Report, at paras 114–122.

[37] The functioning of Panels and the adoption of Panel Reports are dealt with extensively in the DSU as though appellate review would be infrequent. See the DSU, Arts 6–16, and Appendix 3.

of environmental protection collided with the WTO legal regime. The Appellate Body that dealt with this collision functions within the WTO and has a mandate conceived primarily in terms of world trade, and only incidentally to take account of environmental matters.

Reports by the Appellate Body (such as its Report in the *Shrimp/Sea Turtles* case) must be prepared in conformity with a strict procedural timetable found in the DSU.[38] Under the DSU, moreover, an Appellate Body Report must be adopted by the member countries of the WTO, sitting as the Dispute Settlement Body (DSB), unless, by *unanimous* vote, the DSB decides *not* to adopt the Report.[39] As (at the least) the prevailing parties to a dispute can be expected to vote to adopt a Report issued in their favour, the DSB (a rather cumbersome body of well over 100 countries) has no effective way of modifying or rejecting an Appellate Body Report. In sum, Reports by the Appellate Body are prepared by it under strict time constraints, and are then adopted by the DSB in a process that is virtually automatic.

The process is efficient. It spares the Appellate Body any serious concerns about plenary debates or contentious review within the unwieldy DSB. The Appellate Body need not burden itself with jurisdictional issues other than the pertinent terms of reference of the cases before it, as prescribed under the DSU. Parallel proceedings are unlikely to arise outside the WTO, and no authority exists outside the WTO to review Appellate Body Reports. On the other hand, as in the *Shrimp/Sea Turtles* case, this efficient process runs the risk of taking the Appellate Body and, through it, the WTO into areas where world trade policies conflict with policies or programmes whose primary focus is not world trade.

In the *Shrimp/Sea Turtles* case, the Appellate Body was quite mindful that the dispute before it involved a clash between national environmental policy and multilateral trade policy.[40] To moderate this clash, it had at hand the technique of "analysis completion," and it applied the technique with considerable boldness. At times, however, particularly in its findings "second" and "third", the Appellate Body seems to have lost sight of the environmental complexities of the case.[41] It seems fair to say that the Appellate Body did not provide the parties with a formula for resolving their differences, but in effect called on them to attempt to resolve those differences through "serious" negotiations looking toward a WTO-compatible agreement on the environmental issues presented by the endangered species of sea turtles.[42]

Thus far in the WTO proceedings in this case, the essential principles of free trade have not been prejudiced. At the same time, legitimate national interests relating to the environment have been recognized. Normally, under the DSU, the complainant nations

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[38] "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report ... . In no case shall the proceedings exceed 90 days." (DSU, Art. 17(5).)

[39] DSU, Art. 17(14).

[40] See note 9, above, at paras 152–155 and 185.

[41] See the seventh and eighth paras of section III, above.

[42] See note 17, above.

can insist on US compliance with the Appellate Body's Report within 15 months.[43] Thus, they and the United States may have been given an opportunity promptly to resolve the conflict to their mutual satisfaction.

If the result is a negotiated solution serving both free trade in shrimp and the protection and conservation of sea turtles, then the Appellate Body's bold use of "analysis completion" will have been rewarded. If, however, negotiations founder (on, for example, the issue of worldwide adoption of sea-turtle-exclusion devices), the WTO may be called upon to decide whether "serious" negotiations have in fact been undertaken. In this event, one can hypothesize that the complainant nations will assert that the United States is "serious" only about protecting its shrimp market from their exports through unreasonable environmental regulations; and that the United States will protest that the complainant nations are environmental "free riders", seeking access to the US market while avoiding the burden of a meaningful environmental programme to protect sea turtles from drowning in shrimp-trawl nets. Rival claims along these lines might prove intractable.

## V. Conclusion

In the *Shrimp/Sea Turtles* case, the Appellate Body has taken the technique of "analysis completion" to a new level of judicial activism. Robust resort to this technique may have been necessary in order to give the parties an opportunity to settle their differences. It is difficult to see how the Appellate Body could itself have fashioned a satisfactory resolution of a conflict that so starkly opposes the forces of free trade and the environment. Inherent in the conflict is the risk that the parties will eventually reach an impasse, in which case the skill and authority of the Appellate Body could be of little avail.

The authority of the Appellate Body rests on the somewhat fortuitous circumstance that it is a multilateral judicial tribunal untrammelled by effective review from within or outside of the WTO. Consequently, even if the Appellate Body technically confines itself to applying the WTO agreements, it is in a position to bring those agreements to bear on the national environmental laws of sovereign nations. Thus empowered, the Appellate Body is both the beneficiary and the victim of its own lopsided power. It acts in the absence of a legislative counterpart. When there is no multilateral legislature to address environmental problems, timely multilateral solutions to those problems may not be available. National legislatures may feel called upon to attempt to cope with the problems in the absence of multilateral agreement. Meanwhile, the negotiation of a multilateral agreement on a given environmental measure may have to wait until, following protracted discussions and the exaction of a multitude of concessions, every potential national dissent of consequence has been eliminated and a consensus has been reached on how to reconcile particular trade and environmental objectives.

Given these realities, it would have been imprudent for the Appellate Body to adopt

[43] DSU, Art. 21(3)(c).

an approach other than that taken in its Report in the *Shrimp/Sea Turtles* case. It is for the WTO member countries themselves to appreciate that, in such a case, the Appellate Body, even acting as the judicial suzerain of the WTO, may be able to do little more than give them an opportunity to resolve their disputes through "serious" negotiations.