

**COMMENTS TO THE APPELLATE BODY
OF THE
WORLD TRADE ORGANIZATION**

CONCERNING

United States -- Import Prohibition of Certain Shrimp and Shrimp Products

Submitted on Behalf of

**Earth Island Institute
Humane Society of the United States
Sierra Club**

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In the Panel Report on *United States -- Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO dispute settlement panel considered challenges that certain US measures implemented to protect endangered sea turtles violated trade rules established in GATT 1994. The US measures conditioned US importation of shrimp on the adoption by the exporting country of comprehensive measures to protect sea turtles from being killed in shrimp nets. In conjunction with these restrictions, the United States required US shrimpers to employ turtle excluder devices (“TEDs”), which allow turtles caught in shrimp nets to escape without drowning. The specific question before the Panel was whether GATT 1994 permitted the US measure despite the measure’s effect on trade.

The Panel did not, however, limit its role to resolving the narrow question before it. Instead, the Panel found that any country is prohibited from conditioning access to its market on the exporting country’s adoption of comprehensive conservation measures. The Panel claimed that its findings were supported by the overall purpose of the WTO Agreements, which the Panel found to be the promotion of the multilateral trading system and the maintenance of market predictability. The Panel’s report reflects numerous serious errors, both in the Panel’s analysis and in its decision to go beyond its legitimate dispute resolution role into the realm of rule creation that is more appropriately reserved to governments.

The agreements establishing the World Trade Organization, while promoting a multilateral trading system, were intended to preserve the ability of countries to protect the environment and human welfare. In particular, Article XX of GATT 1994, which sets forth “exceptions” to the general rules of trade promotion established in the rest of the agreement, protects such interests. In ten paragraphs, Article XX sets forth a number of specific issues -- including the conservation of natural resources and the protection of human, animal or plant life and health -- that the WTO system specifically recognizes as being legitimate subjects for governmental action, even if such action interferes with the international trade.

Article XX does not authorize every trade-restrictive measure with the alleged purpose of protecting the environment or other interests. The chapeau to Article XX prevents abuse of that

article -- that is, it prevents claims of protection of the environment or human health from being used to achieve protectionist goals. However, because of the importance of the concerns addressed by Article XX, dispute resolution panels must apply the article with extreme care.

Decisions concerning the public welfare are legitimate only when made by governments that are directly responsible to the people affected. For this reason, any new rules concerning the application of Article XX, especially rules limiting the ability of countries to address the concerns recognized in that article, must be made by the WTO Member governments. WTO dispute panels considering Article XX must be especially careful to apply the article's provisions as they are written. If dispute panels go beyond their authority and create new rules under Article XX, or new limitations on the ability of countries to protect the public welfare, public confidence in the WTO will be severely undermined. The report of the Panel in this case presents just such a risk.

In reaching its conclusion, the Panel made several significant errors. First, the Panel's determination of the overall purpose and context of the WTO Agreement, on which much of its subsequent analysis depended, was incomplete and therefore inaccurate. Second, the test created by the Panel to apply the Article XX chapeau, contrary to the Panel's purported goal of giving meaning to the entire WTO Agreement, threatens to seriously erode Article XX and possibly render it meaningless. In addition, the Panel's test undermines the clear purpose of Article XX. Third, the Panel exceeded its authority by applying its test on the basis of speculation about a hypothetical conflict that may never occur, rather than applying the test directly to the US measure at issue in this challenge. The Panel's test and its reliance on speculation in applying the test leave dispute panels with unfettered discretion in applying Article XX. Fourth, by asserting that its finding of a violation of Article XX was supported by the absence of a multilateral agreement requiring the use of the turtle-protective devices required by the US measures, the Panel inappropriately elevated the requirement for multinational consensus and trade promotion over all other legitimate goals.

Together, these errors indicate that the Panel went beyond its legitimate dispute settlement role and authority to create new rules concerning the application of Article XX and the legitimacy under the WTO Agreements of a broad category of conservation measures. Such a task is inappropriate for a dispute resolution panel. Rather, the creation of new rules is a legislative function legitimate only to governments directly responsible to the people affected. Unless the Appellate Body corrects these mistakes, the Panel's report in this case will severely weaken public confidence in the legitimacy of the WTO and undermine the ability of countries to protect the welfare of their citizens.

**The Panel's Determination of the Overall Purpose
and Context of the WTO Agreement Fails to Give Proper Weight
to Legitimate Non-Trade Concerns**

There is nothing in the chapeau of Article XX -- or indeed any of the WTO Agreements - that speaks directly to whether an importing country may condition access to its market on the exporting country's adoption of comprehensive conservation measures. Nevertheless, the Panel resolved this challenge by finding that the US measures constituted "unjustifiable discrimination between countries where the same conditions prevail." After acknowledging that the word "unjustifiable" "does not explicitly address" the issue of comprehensive conservation measures, the Panel recited the proposition that the term must be construed to achieve the object and purpose of the agreement to which it belongs. The Panel found the overall object and purpose of the WTO Agreement to be the promotion of multilateral trade and the need for predictability in markets.

Much of the Panel's resolution of the shrimp challenge depends on its findings concerning the overall purpose of the WTO Agreement. However, in determining the "context" and "purpose" of the WTO Agreement, the Panel interpreted Article XX out of context and failed to consider the *entire* Agreement. In particular, the Panel failed to consider Article XX as part of the Agreement and therefore relevant to a determination of the purpose of the agreement. Paragraphs (a) through (j) of Article XX set forth ten concerns that the WTO Agreement recognizes are often legitimate reasons to take action that interferes with the promotion of trade. The Panel also gave inadequate weight to the statement in the preamble to the WTO Agreement that the parties should conduct their trade relations in a manner that "allows 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." This statement and the exceptions recognized in Article XX indicate that the overall purpose of the Agreement is more complex than that described by the Panel. A more accurate characterization of that purpose -- truly taking into account the entire agreement -- could be stated as follows: *The WTO Agreement is intended to promote international trade without interfering in the ability of countries to take action legitimately addressing certain other important concerns, listed in paragraphs (a) through (j) of Article XX.* The analysis of the language and purpose of Article XX presented below supports this conclusion.

The Test Created by the Panel for Applying the Article XX Exceptions Threatens to Seriously Erode the Exceptions and Undermines the Purpose of Article XX

The Panel noted that the Appellate Body has explained that the purpose of the chapeau of Article XX is to avoid “abuse of the exceptions of . . . [Article XX].”¹ The Panel then stated that abuse of the Article XX exceptions occurs when the multilateral trading system is undermined through the application of a trade restrictive measure that makes it impossible to assure guaranteed market access and nondiscriminatory treatment within a multilateral framework, which the Panel had determined to be the primary objectives of the Agreement.

The Appellate Body has held that the Article XX exceptions are intended to recognize situations in which “inconsistencies” with the substantive rules of the WTO Agreement are “nevertheless justified.”² (This is obvious from the title of the article alone -- “Exceptions” -- which the dictionary defines as “case[s] to which a rule, general principle, etc. does not apply.”³) In other words, Article XX recognizes that there are some situations in which measures that do not promote multilateral trade will nevertheless be permitted.

In the *Reformulated Gasoline* case, the Appellate Body explicitly rejected reasoning analogous to that used by the Panel in this case, noting that it is contrary to common sense and generally accepted principles of international law:

The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.⁴

This same logical error is the foundation of the test created by the shrimp Panel. Because the WTO Agreements promote multilateral trade by requiring compliance with the substantive rules of the Agreements, the Panel’s test for whether discrimination is “unjustifiable” is the same as the test for whether the substantive rules have been met. The *Reformulated Gasoline* appellate report continues by explaining the ramifications of an approach like that taken by the shrimp Panel:

To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the “general rule of

¹ Panel Report on *United States -- Import Prohibition of Certain Shrimp and Shrimp Products*, Final Report (hereafter *Shrimp Panel Report*), WT/SD58/R, 6 Apr. 1998, para. 7.40 (quoting Appellate Body Report on *United States -- Standards for Reformulated and Conventional Gasoline* (hereafter *Reformulated Gasoline Appellate Report*), WT/DS2/AB/R, adopted on 20 May 1996, at p. 22).

² *Reformulated Gasoline Appellate Report* at 23.

³ Webster’s Deluxe Unabridged Dictionary, p. 636 (2d ed. 1979).

⁴ *Reformulated Gasoline Appellate Report* at 23-24.

interpretation” in the *Vienna Convention [on the Law of Treaties]* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. . . . The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well.⁵

On the basis of the preceding reasoning, the *Reformulated Gasoline* appellate panel found that application of the Article XX exceptions “was not negated by the inconsistency, found by the [initial] Panel, of the [measure in question] with the terms of” the substantive rules of the WTO Agreement.⁶ The shrimp Panel, however, found that Article XX could not apply because the US law might, in conjunction with other (hypothetical) trade restrictions, be inconsistent with the system promoted by the substantive rules. As the *Reformulated Gasoline* appellate panel warned, the shrimp Panel’s test would “empty the chapeau of its contents and . . . deprive the exceptions . . . of meaning.”

In addition to threatening to nullify Article XX, the Panel’s interpretation is inconsistent with the obvious purpose of that article and leads to an illogical result. As noted above, Article XX is intended to allow countries to implement measures that are inconsistent with the substantive trade rules to address certain situations in which the Members agreed that it was justified to place other concerns above the promotion of trade. Those situations are specified in paragraphs (a) through (j). For example, as the Thai cigarette panel stated, Article XX(b) “clearly allowed contracting parties to *give priority to human health over trade liberalization.*”⁷

In the present case, the United States did not dispute that its turtle-protective law is a restriction on trade within the meaning of Article XI:1 of GATT 1994.⁸ By invoking Article XX, however, the United States raised the issue whether its measure addressed one of the concerns set forth in paragraphs (a) to (j) with respect to which interference with trade is justified.

The exception most pertinent to the US measures is Article XX(g), which allows 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.” The findings of the shrimp Panel support the conclusion that the US measure satisfies this provision. The Panel and the parties agreed that the sea turtles affected by the US measures are endangered,⁹ and the need to protect them is recognized by international norms.¹⁰ In addition,

⁵ *Id.*

⁶ *Id.* at 19.

⁷ *Thailand -- Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200, 222-223, DS10/R, para. 73 (adopted 7 Nov. 1990).

⁸ *Shrimp Panel Report*, para. 7.14.

⁹ The Panel itself noted that “[t]he endangered nature of the species of sea turtles [protected by the US measures] as well as the need to protect them are . . . not contested by the parties to the dispute.” *Id.*, para. 9.1. See also *id.* at para. 7.1 (“[M]ost populations of sea turtles are considered to be endangered or

there is no dispute that TEDs are an effective means of conserving the turtles,¹¹ and therefore that the US law requiring the use of TEDs or other equivalent protections is related to their conservation. Finally, because US regulations require US shrimp fishermen to use TEDs,¹² the measure is made effective in conjunction with restrictions on domestic production. For these reasons, the US measure satisfies the requirements of Article XX(g).

As the shrimp Panel noted, the Members recognized the potential for abuse of the exceptions, and so included the Article XX chapeau to protect against that abuse. Because the

threatened.”). The experts that the Panel consulted agreed. *See id.* at 5.19 (Dr. Eckert stating that “all species [of sea turtle] are in danger of extinction”); 5.26 (outlook for leatherback turtle extremely poor, especially in the Pacific); 5.42 (Dr. Frazier); 5.60 (Mr. Guinea); 5.68 (Mr. Liew); 5.71 (Dr. Poiner).

¹⁰ All seven species of sea turtles affected by the US measures are included on Appendix I of CITES as species “threatened with extinction which are or may be affected by trade.” *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, App. I, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243. Although CITES imposes obligations only with respect to trade in these species, their listing is a clear indication of international acknowledgment of the need to take action to protect them. In addition to CITES, all but one of the species addressed by the US measures (the flatback turtle) are listed in Appendix I of the *Convention on the Conservation of Migratory Species of Wild Animals*, and all species are listed on Appendix II of that agreement. *Convention on the Conservation of Migratory Species of Wild Animals*, June 3, 1979, reprinted in 19 I.L.M. 15 (entered into force 1983), with appendices as amended 1985, 1988. The 56 nations, including India and Pakistan, that have signed the CMS agreed that they would prohibit the “taking, hunting, fishing, capturing, harassing [or] deliberate killing” of species listed on Appendix I, and would endeavor to “prevent, reduce or control factors that are endangering or are likely to further endanger the species.” *Id.* Art. III(4), (5).

International norms also recognize the need to reduce bycatch resulting from unnecessarily broad fishing practices. Agenda 21 recognizes the need to “promote the development and use of selective fishing gear and practices that minimize . . . by-catch of non-target species.” *UN Conference on Environment and Development, Agenda 21: Programme of Action for Sustainable Development*, Rio De Janeiro (June 3-14, 1992), UN Doc.A/CONF.151/26, para. 17.46(c). In the opinion of the over 178 nations that unanimously adopted Agenda 21, the document “reflects a global consensus and political commitment at the highest level on development and environmental cooperation.” *Id.* Preamble, para. 1.3. In addition, UNCLOS requires States to ensure through proper conservation and management measures that the maintenance of living resources is not endangered by over-exploitation. *U.N. Convention on the Law of the Sea (UNCLOS)*, U.N. Doc.A.CONF.62/122, reprinted in 21 I.L.M. 1261 (1982), Art. 61(2), (4). In taking such measures, States must “take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.” *Id.* Art. 119(1)(b).

¹¹ The Panel and the experts that it consulted recognized that “TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles.” *Shrimp Panel Report*, para. 7.59, n.674. *See also id.*, paras. 5.186 (Dr. Eckert, stating that any recovery of sea turtle populations “is likely due to the required use of TED’s in the United States and Mexico and to the protection afforded nesting females.”), 5.223 (“TEDs provide the best opportunity to reduce turtle bycatch with the greatest efficiency and lowest cost to the fishing industry [and are] the most easily enforced conservation method available.”).

¹² *Id.*, para. 7.2.

chapeau only becomes relevant once it has been found that a measure interferes with international trade and addresses a concern with respect to which such interference is justified, the chapeau's inquiry is very simple. An appropriate test under the chapeau -- one that would be consistent with the language of the chapeau and the Appellate Body's understanding of it as a protection against abuse of the exceptions -- would focus on *whether Article XX is being used as a false justification for a measure that is actually intended to gain trade advantages*. Such a test would protect against abuse of the exceptions, without interfering with the ability of countries to use the exceptions take action to address the important concerns recognized by the Members in paragraphs (a) through (j).

Applying this test to the US measure at issue would allow for consideration of any claims of abuse raised by the challenging countries. For example, the Panel could address whether the alleged fact that the challengers were given less notice and shorter phase-in periods than other countries or domestic shrimpers before being required to comply with TEDs use constituted unjustifiable discrimination and therefore was an abuse of the Article XX(g) exception.¹³ The Panel could also consider the claim that statements of US legislators indicate that the US measure's overriding purpose is to protect US shrimp production rather than sea turtles, making the measure a disguised restriction on trade.¹⁴

Applying the chapeau in this narrow manner -- focusing on whether the measures at issue constitute an abuse of the Article XX exceptions -- is consistent with the language of the chapeau. The chapeau prohibits measures applied in a manner that constitutes "*arbitrary or unjustifiable discrimination*" or a "*disguised restriction*" on trade. The use of the emphasized adjectives indicates that discrimination or restrictions on trade alone are not enough to violate the chapeau. Nor does this language suggest that the *effect* of the discrimination or restriction is determinative. Rather, it is only when the evidence indicates that the real purpose of a measure is something other than those purposes set forth in paragraphs (a) through (j) that a measure violates the chapeau's prohibitions.

Rather than limiting its analysis under the chapeau as suggested above, the shrimp Panel went out of its way to fabricate a new test, pursuant to which the US measures violated the chapeau for the simple reason that the measures, when combined with other hypothetical measures, might interfere with the objectives of the WTO Agreements. In addition to being inconsistent with the purpose and language of Article XX, this test leads to an illogical result.

Under the guise of protecting against abuse of the exceptions, the Panel's test would invalidate some measures obviously intended to be permitted under Article XX. For example,

¹³ See, e.g., *id.*, paras. 3.268, 3.282, 3.291. In considering this claim, the Panel would have to balance any evidence of harm presented by the challengers against the competitive advantage they obtained during the three years in which other nations' shrimp exports were subject to TEDs requirements while the challengers' exports were not. See *id.*, para. 3.290.

¹⁴ See, e.g., *id.*, paras. 3.272, 3.292. With respect to such assertions, the Panel would have to take into account the conclusion of the Appellate Body in the *Hormones* case that legislative statements recognizing multiple objectives and effects of measures do not support a finding that the measure constitute discrimination or disguised restrictions on trade. *Hormones Appellate Report*, paras. 243-245.

assume that a country has identified a situation that clearly raises one of the concerns recognized under paragraphs (a) through (j). Under the shrimp Panel’s test, that country could implement a trade-restrictive measure to address that concern as long as the measure did not present too great an interference with the multilateral trading system. On the other hand, the country would be prohibited from addressing the *same concern* if the only measure available to do so might, in the opinion of a dispute resolution panel, cause too great an interference with the system. In other words, by focusing on the impact of the measure, rather than whether the measure legitimately addresses concerns recognized in Article XX, the shrimp Panel’s test threatens to prohibit countries from addressing concerns that Article XX is intended to allow them to address. In fact, the shrimp Panel explicitly reached this result, stating that “in the present case, *even though the situation of turtles is a serious one*, we consider that the United States adopted measures which, *irrespective of their environmental purpose*, were clearly a threat to the multilateral trading system.”¹⁵

The Appellate Body should protect the ability of countries to implement measures that address “serious” concerns recognized under Article XX as legitimate subjects for trade-restrictive measures. Limiting the analysis under the chapeau to a determination of whether a measure is a false justification for achieving protectionist goals (and therefor an abuse of the Article XX exceptions), rather than being a *bona fide* measure to address legitimate Article XX concerns, would be consistent with the overall purpose of the WTO Agreements, and with the language and purpose of Article XX.

The Panel Exceeded its Authority by Basing its Findings on Speculation About Hypothetical Conflicting Requirements that May Never Emerge

Having created a test that prohibits trade-restrictive measures (no matter how legitimate their purpose) that interfere with the promotion of multilateral trade, the Panel’s next step should have been to apply its test to the US measures at issue in this dispute. Instead, the Panel applied its test to an imagined conflict that might arise if multiple countries were to insist on different and conflicting policies, which, according to the Panel, would make it impossible for the producing country to comply with all the importing countries’ requirements.¹⁶ Thus, the Panel seemed to fear a situation in which a country would be unable to comply with conflicting requirements of several countries. On the basis of this hypothetical problem, the Panel announced an absolute prohibition on predicating market access on a country’s adoption of conservation measures.

By resolving the challenge on the basis of a hypothetical, the Panel went far beyond its appropriate role in resolving this dispute. As the Panel itself recognized, the question before it was whether the *US measures* violated GATT 1994,¹⁷ not the abstract issue of whether countries

¹⁵ *Shrimp Panel Report*, para. 7.61 (emphasis added).

¹⁶ The Panel found that “when considering a measure under Article XX, we 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 to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.” *Id.*, para. 7.44 (emphasis in original).

¹⁷ *Id.*, para. 3.1.

may predicate market access on another country's adoption of conservation measures. Nevertheless, the Panel subsequently concluded that it "must determine not only whether the [US] 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."¹⁸

In fact, the Panel's speculation was not even limited to potential conflicts concerning conservation measures such as the one at issue in this challenge. In the paragraph in which it detailed the conflict that it imagined, the Panel took its analysis to the most abstract level, considering the theoretical legitimacy of *any* measure predicating market access on the adoption of *any* comprehensive policy. Although the Panel noted that such policy requirements could "includ[e] conservation policies," nothing in the Panel's analysis was limited to such measures.¹⁹ At the level of abstraction on which the Panel applied its test, any outcome is imaginable. It was therefore easy for the Panel to envision the possibility that Members might condition access to their markets for unspecified products on the adoption by exporting Members of conflicting, but similarly unspecified, policies.

In the *Hormone* case, the Appellate Body noted that "panels are prohibited from addressing legal claims falling outside their terms of reference."²⁰ This statement is an expression of the general principle of judicial restraint, pursuant to which courts should refrain from offering advisory opinions on hypothetical issues, particularly controversial ones, because the need for the courts to intervene in and resolve the dispute may never materialize. The principle protects against unconsidered development of legal rules by avoiding addressing issues that are not essential to resolving the dispute. When a judicial body reaches out to decide issues that are not essential, it risks developing rules without the benefit of full and vigorous presentation of all relevant arguments for and against the rules. Such a cautious jurisprudential approach is warranted here.

Not only was it inappropriate for the Panel to base its conclusions on speculation, it is far from clear that conflicting standards such as those imagined by the Panel are likely to emerge with respect to the measures at issue here. Currently, there is no dispute that TEDs are an effective conservation measure,²¹ and countries generally face two options -- either require the use of TEDs or not. If any conflicts emerge in the future, they may focus on some particular detail of the TEDs program, such as the type of TEDs used, rather than on the requirement to use TEDs in the first place. It may be possible for a dispute panel to resolve such a conflict based on the effectiveness of the alternatives in achieving the conservation objective, rather than by prohibiting conservation requirements altogether. Because dispute panels reviewing conservation measures are entering uncharted territory, they should be cautious in pronouncing absolute principles. Instead, they should search for narrow grounds for resolving disputes until

¹⁸ *Id.*, para. 7.44 (second emphasis added).

¹⁹ *See id.*, para. 7.45.

²⁰ Appellate Body Report in *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, para. 156.

²¹ *See* note 11 *supra*.

broader rules are developed through processes that accord them political legitimacy. The Appellate Body should protect the credibility of the WTO dispute resolution process by deciding this case on such narrow grounds.

The Panel's Article XX Test and Method of Applying it Leave WTO Dispute Panels with Nearly Unfettered Discretion

The Panel's resort to hypothetical problems to resolve this challenge points out another serious problem with its Article XX test. The Panel's new test is vague and open-ended. If Article XX generally allows for some restrictions on international trade, but the chapeau, under the Panel's test, prohibits measures that place too great a restraint on trade, it is left to the discretion of each dispute resolution panel to determine where to draw the line.²² Furthermore, if panels are allowed to use pure speculation to determine the possible effect of a measure, their discretion is left largely unfettered.

Speculation such as the shrimp Panel used in resolving this dispute means that the legitimacy of a measure will not depend on the rules of the GATT 1994, but on the particular concerns and imagination of the panel considering the measure. One panel could find a measure to violate the GATT while another could find the same measure to be permitted under Article XX.

If dispute panels are free to resolve challenges unrestrained by clear rules, public distrust in the trade system will likely mount. The Appellate Body should protect the credibility of the WTO dispute resolution system by deciding this appeal purely on the basis of an application of the rules established in the GATT 1994 to the US measure at issue in this case.

The Importance that the Panel Placed on Pursuing International Arrangements Is Not Consistent with Article XX and Inappropriately Elevates Trade Concerns Over Other Goals

The Panel supported its decision by noting that there was no international cooperative agreement among the parties concerning the use of TEDs. The Panel acknowledged that the United States made overtures to the Asian countries to enter into negotiations for an international agreement concerning the use of TEDs. However, those overtures did not come until September 1996 -- six months after the US restrictions were imposed -- and the Panel determined that the

²² The Panel's response to precisely this concern, raised by the United States in comments concerning the Panel's interim report, makes clear that the fundamental element of the Panel's test is left to the discretion of dispute resolution panels. The Panel explained that its test would allow Members to implement environmental policies through trade measures "as long as those trade measures do not affect the multilateral system *to the point where* the WTO Agreement is deprived of its object and purpose." *Shrimp Panel Report*, para. 6.6 (emphasis added). The Panel's statement recognizes that the question is not whether the measures are really a false justification for protectionist measures, or even whether they affect the trade system, but whether cause such an effect to an unacceptable degree. As demonstrated by the Panel's analysis of the US turtle protection measures, "the point where" such effect occurs can only be determined through considerable speculation.

United States did not try hard enough.²³ The importance that the Panel placed on the absence of such an international agreement is not supported by Article XX and threatens to give trade promotion precedence over legitimate environmental concerns in a manner not intended by the international community.

Article XX allows for environmentally protective trade restrictions that are “necessary” or “related” to the environmentally protective goal the restrictions are intended to achieve. Neither requirement implies a need for international acceptance or a duty to comply with international standards. Likewise, even if it were true, as the Panel suggests, that it would be “better” or “desirable” to elaborate international standards through separate international agreements,²⁴ the Panel’s search for an international agreement that explicitly authorizes the conservation measure and trade restrictions at issue requires too much. By using its own judgments concerning the best way to develop standards, the Panel moved from its appropriate role of settling a dispute by strictly applying the WTO Agreements to the measures at issue, to that of legislating new rules about the development of international standards.

The Panel’s emphasis on cooperative international solutions threatens to place trade above all other goals, even those supported by international agreements or consensus. The shrimp-turtle dispute is remarkable in the extent to which consensus values underlie the conservation measure at issue. The Panel and the parties agree as to the compelling plight of the turtles,²⁵ and international norms recognize the importance of protecting such imperiled species²⁶ and acknowledge the need to reduce bycatch in fishing practices.²⁷ Moreover, there is no dispute that TEDs are an effective means of protecting endangered sea turtles and of reducing bycatch in shrimp fishing.²⁸

Where existing international agreements establish a goal of protecting an imperiled species, including by reducing bycatch, WTO panels should refrain from erecting barriers to achieving that goal. Instead, WTO panels should leave room for countries and international environmental institutions to develop means of achieving those goals. Just because no extant international agreement explicitly authorizes the trade restrictions at issue does not mean that countries and international institutions would reject the particular conservation measure if they had sufficient time to address the matter. WTO panels must allow emerging international environmental law to develop, rather than hasten to fill a void with a prohibition based on a trade panel’s value judgments.

²³ The Panel did not discuss what a country should do if its efforts to initiate international negotiations are unsuccessful.

²⁴ *Shrimp Panel Report*, paras. 7.53 and 7.55.

²⁵ *See note 9 supra*.

²⁶ *See note 10 supra*.

²⁷ *See id.*

²⁸ *See note 11 supra*.

Furthermore, if a country determines that an activity threatens the environment, it should not be prohibited from regulating that activity to protect the environment simply because it has failed to obtain worldwide agreement concerning the existence of the threat or the appropriate solution. If the inability to obtain agreement is based on differences of opinion concerning the scientific bases for the threat or the solution, the right of a country to take action to prevent the harm is protected by the precautionary principle. Pursuant to that principle, countries have the right to regulate activities that may be harmful to human health or the environment even if the scientific evidence concerning the harm is inadequate or inconclusive -- that is, even if scientists (or other countries) do not agree or cannot explain exactly whether, how or to what degree the harm is caused.²⁹ This principle has been a part of domestic and international law for several decades and has become a “broadly accepted basis for international action.”³⁰ If the reason for disagreement is political, rather than scientific, there is even less justification for prohibiting a country from acting to prevent the harm.

For these reasons, the Appellate Body should make clear that the absence of an international agreement or international standard concerning the use of TEDs is irrelevant to whether a trade-restrictive measure addressing an environmental threat is justified on the basis of Article XX.

The Panel Exceeded Its Authority by Legislating New Rules Concerning Article XX and the Legitimacy of Comprehensive Conservation Measures

²⁹ The precautionary principle has been included in numerous multilateral international treaties and declarations. Examples of these include the *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992) (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”); the *Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992), reprinted in 31 I.L.M. 849 (“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures”); the *Ministerial Declaration of the Second World Climate Conference*, Nov. 7, 1990, reprinted in 1 Y.B. Int'l Env'l L. 473 (1990) (ministers and representatives of 137 countries agree to “protect the ozone layer by taking precautionary measures to control . . . emission of substances that deplete it”); the *Second International Conference on the Protection of the North Sea, Ministerial Declaration 1* (1987) (ministers of the EEC and eight countries agree that the North Sea ecosystem should be protected through the reduction of pollution “even where there is no scientific evidence to prove a causal link between emissions and effects (‘the principle of precautionary action’)”); the *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/Res/37/7 (1982), reprinted in 22 I.L.M. 455 (1983) (“Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed.”).

³⁰ Philippe Sands, *The Greening of International Law: Emerging Principles and Rules*, 1 *Global Legal Studies J.* 293, 301 (1994). *See generally* *Interpreting the Precautionary Principle* 262 (Tim O’Riordan & James Cameron eds. 1994).

The Panel initially developed its analysis of the chapeau of Article XX without reference to any particular terms of GATT 1994.³¹ The Panel's willingness to go beyond the text of the WTO Agreements and devise its own constraints on permissible conservation measures -- tying those restraints to the text only after the fact -- undermines the contention that its ruling stems from the text of the Agreements. Instead of applying the rules established by the WTO Agreements, the Panel created new rules.

As demonstrated above, the Panel went beyond the language of the chapeau to fabricate a new test for determining a measure's compliance with Article XX that is inconsistent with the language and purpose of the article. Moreover, by using its new test to analyze a broad category of measures and speculating about abstract hypothetical conflicts that such measures might cause, the Panel stepped out of its dispute settlement role (in accordance with which it should have applied Article XX only to the challenged US measures) and took on the legislative role of creating a new rule concerning the legitimacy of comprehensive conservation measures, an issue that the Panel acknowledged is not "explicitly address[ed]" in the WTO Agreements. Finally, the importance that the Panel placed on the absence of a multilateral agreement requiring the use of TEDs constituted the Panel's attempt to incorporate its own preferences into Article XX, rather than to apply that rule as it was intended.

³¹ See *Shrimp Panel Report*, para. 6.4 (explaining US concern that the Panel "never identified or analysed the particular terms of the chapeau" and the Panel's "response" of "expand[ing] the discussion of the terms of the chapeau" in two paragraphs of its findings).

Conclusion

Article XX provides an extremely important guarantee that the environment and human welfare will not be harmed in the course of promoting international trade. The article reflects the considered judgment of the WTO Member governments that, in the circumstances described in paragraphs (a) through (j), it is permissible to take action that does not promote trade to achieve goals considered equally, if not more, important. Changing the rules established in Article XX is a task for governments, not dispute settlement panels.

The shrimp-turtle Panel's report is based on several serious errors and threatens to render Article XX meaningless. In addition, the Panel's report goes beyond the Panel's legitimate dispute settlement role to create new rules concerning the application of Article XX and the legitimacy under the WTO Agreements of a broad category of conservation measures. Unless the Appellate Body corrects these mistakes, the shrimp-turtle Panel's report will severely weaken public confidence in the legitimacy of the WTO and undermine the ability of countries to protect the welfare of their citizens.