

Shrimp-Turtle Case, World Trade Organisation

Summary of Proceedings

These cases illustrated how the WTO Appellate Body decided between the competing imperatives of free trade and environmental protection measures to address the incidental killing of sea turtles in shrimp fishing.

On **15 May 1998** the World Trade Organisation in a **first Panel Report** in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (12 October 1998) determined a complaint by WTO Members- India, Malaysia, the Philippines and Thailand -about a United States prohibition (by Section 609 of the Public Law 101-162) on the importation of certain shrimp and shrimp products .The prohibition arose from US concern that shrimp were caught in an environmentally harmful way due the incidental killing of sea turtles, which were viewed internationally as endangered or threatened (see Appendix 1, *CITES*; and United States *Endangered Species Act* 1973, for example). The complaint relied upon free trade grounds under WTO rules and in particular Article XI of the *General Agreement on Tariffs and Trade* 1994 , providing:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The Panel found that the United States ban on shrimp importation was inconsistent with GATT Article XI.1, and could not be justified as within the scope of permissible measures under GATT Article XX.

The United States appealed to the Appellate Body. On **12 October 1998** the Appellate Body ruled that the US measures were “ provisionally justified” as measures “ *relating to the conservation of exhaustible natural resources*” as provided for under a conservation exception (to free trade rules) in GATT Article XX(g). However, the Appellate Body ruled in addition that the prohibition breached GATT Article XX because it constituted unjustifiable discrimination between countries, although on different grounds from those stated in the first Panel Report.: see *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (“**the Appellate Body Report**”). The Appellate Body required measures to be implemented by the US so that the prohibition could be fully justified.

It also determined that *amicus curiae* briefs from non-governmental organisations were admissible.

Thereafter Malaysia subsequently requested the WTO Disputes Settlement Board to establish a second Panel , before which Malaysia contended that the United States had failed to implement the measures required by the Appellate Body Report. This second WTO Panel Report was delivered on 15 June 2001 in *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5* WT/DS58RW. In this second report, the Panel concluded in brief summary that, whilst the US had taken steps to address the restrictions of its Section 609

prohibition in breach of Article XI.1, the US remained nonetheless in breach of Article XI.1. However, notwithstanding that, the second Panel Report determined that the US had made serious good faith efforts to implement measures which met the requirements of the conservation exception in Article XX(g), including efforts to secure an international agreement for the protection and conservation of sea turtles, and so came within the Article XX(g) exception.

Malaysia then appealed this second Panel Report to the Appellate Body. **The Appellate Body on 22 October 2001** in *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 WT/DS58/AB/RW* (“**Article 21.5 Appeal**”) determined the appeal in favour of the US.

This case note now turns to address in more detail the Appellate Body Report and the Article 21.5 Appeal.

As to the Appellate Body Report, this note summarises:

- the Appellate Body’s ruling that the Panel is permitted to accept *amicus curiae* briefs, submitted by parties to the proceedings, comprising information from NGOs;
- the Appellate Body’s ruling that although the measure of the United States to protect sea turtles by banning certain shrimp imports served a legitimate environmental objective under Article XX(g), the measure was applied in a way that constituted arbitrary and unjustifiable discrimination between WTO Members.

As to the Article 21.5 Appeal, this note summarises:

- the Appellate Body’s ruling that Section 609 as implemented by the Revised Guidelines was justified under Article XX.

Facts

In 1987, the United States issued regulations pursuant to the *Endangered Species Act of 1973* requiring all United States shrimp trawl vessels to use approved Turtle Detector Devices (“TEDs”).

In 1989, Section 609 was enacted. It required that the United States Secretary of State initiate negotiations with all relevant foreign governments for the development of bilateral or multilateral agreements to protect and conserve species of sea turtles.

By no later than 1 May 1991, Section 609 imposed an import ban on shrimp harvested with commercial fishing technology that may adversely affect sea turtles. The import ban did not, however, apply to certified harvesting nations. Certification could have been granted on the basis that a country’s fishing environment did not impose a threat of the incidental taking of sea turtles in shrimp harvesting. Alternatively, certification could have been granted where a country adopted a comparable harvesting program to that of the United States.

After the Appellate Body Report, the United States issued Revised Guidelines for the implementation of Section 609. The Revised Guidelines allowed a country to apply for certification even if they did not require the use of TEDs. In these cases, the country had to demonstrate that it was enforcing a ‘comparably effective’ regulatory program. The Department

of State had to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and other countries, as well as information from other sources.

Summary of Appellate Body Report

1. *Admissibility of Amicus Curiae Briefs from NGOs*

The Appellate Body held that *amicus curiae* briefs from NGOs were admissible in proceedings before the Panel.¹ The Appellate Body held that the Panel had wide powers to admit material into evidence.² The Panel had the power to admit material that it had not requested in the first instance; whereby such material may have been submitted by a party to the proceedings on its own initiative.³ The decision to admit such material would be an exercise of the Panel's discretion and should reasonably include consultation with the parties to the dispute.

The Appellate Body further held that the attaching of an *amicus curiae* brief or other material to a party's submission renders that material *prima facie* an integral part of that participant's submission.⁴ The party would be at liberty to indicate what portions or sections of the brief would and would not form part of its formal submission.⁵

2. *Arbitrary and Unjustifiable Discrimination*

The Appellate Body ultimately held that Section 609 constituted arbitrary and unjustifiable discrimination between WTO Members. After finding that the Panel had erred in its approach to the interpretation of Article XX, the Appellate Body undertook the task of determining whether Section 609 contravened Article XX.

First, the Appellate Body found that measures to protect and conserve species of sea turtles fell within the exception stated in paragraph (g) of Article XX that provided for the "conservation of exhaustible natural resources".⁶ This exception covered not only 'mineral' or 'non-living' resources but extended to living species.⁷ Living species, although capable of reproduction, are in certain circumstances just as susceptible of depletion, exhaustion and extinction particularly as

¹ Appellate Body Report, pgs 34-9 [99]-[110].

² Appellate Body Report, pg 37 [104].

³ Appellate Body Report, pg 38 [108].

⁴ Appellate Body Report, pg 31 [89].

⁵ Appellate Body Report, pgs 38-9 [109].

⁶ Appellate Body Report, pgs 49 [125]-[134].

a result of human activities.⁸ Therefore, sea turtles in this instance constituted ‘exhaustible natural resources’.⁹

Second, the Appellate Body held that the measures effected by Section 609 *related to* the conservation of sea turtles. Section 609 did not constitute a blanket prohibition on the importation of shrimp that was unconnected to the consequences to sea turtles; the means were closely related to the ends.¹⁰

Third, the Appellate Body held that the measures were even-handed: they applied equally within the United States as well as to importing countries.¹¹

Lastly, although Section 609 satisfied all the requirements of the exception, the Appellate Body held that it contravened the over-arching principle against ‘unjustifiable and arbitrary discrimination’. The Appellate Body found that the *application* of Section 609 essentially required WTO Members to adopt a regulatory program that was practically the same as that applied in the United States.¹² As a result, it was not acceptable for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same regulatory program *without* taking into consideration the different conditions of the other Member states.¹³ The certification requirement was single, rigid and unbending.¹⁴ There was little or no flexibility in how an official made the determination for certification.¹⁵ Additionally, there was lack of transparency and procedural fairness in the process of certification.¹⁶ The Appellate Body therefore held that the certification process constituted ‘arbitrary discrimination’.

7th Appellate Body Report, pgs 47-50 [128]-[131].

8th Appellate Body Report, pg 47 [128].

9th Appellate Body Report, pg 51 [134].

10th Appellate Body Report, pg 53 [141].

11th Appellate Body Report, pg 55 [144].

12th Appellate Body Report, pg 64 [163].

13th Appellate Body Report, pg 65 [164].

14th Appellate Body Report, pg 72 [177].

15th Appellate Body Report, pg 72 [177].

16th Appellate Body Report, pgs 74-5 [180]-[183].

The Appellate Body was also concerned that the ban extended to shrimp caught in waters of countries not certified by the United States, even where such shrimp were caught by commercial shrimp trawl vessels using TEDs comparable to the United States.¹⁷ This application of Section 609 suggested that the measure was more concerned with effectively influencing WTO Members to adopt the same regulatory program as the United States.¹⁸

The Appellate Body further held that the failure of the United States to seriously negotiate with all relevant WTO Members was plainly discriminatory and unjustifiable.¹⁹ The fact that all the policies that supported the enactment of Section 609 were made without any consultation with WTO Members heightened the disruptive and discriminatory influence of the import prohibition.²⁰ Moreover, the implementation of Section 609 resulted in differential treatment between various countries desiring certification.²¹ Fourteen countries in the Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels, with a ‘phase-in’ period of three years. By contrast, all other countries importing shrimp to the United States only had a four-month phase-in period.²² The shortened phase-in period placed heavier burdens of compliance on certain countries. The differing treatment was also observed in the technological support provided by the United States to some countries and not others.²³

The Appellate Body stressed that it had *not* determined that the preservation of the environment is of no significance to WTO Members. It supported the right of sovereign nations to adopt effective measures to protect endangered species. Moreover, it supported any measures for WTO Members to act together to protect such species. The Appellate Body stated that it had simply decided that the measure of the United States, although recognised as a legitimate environmental objective, had been applied in a way that constituted arbitrary and unjustifiable discrimination against other WTO Members.²⁴

17th Appellate Body Report, pg 65 [165].

18th Appellate Body Report, pg 65 [165].

19th Appellate Body Report, pg 70 [172].

20th Appellate Body Report, pg 70 [172].

21st Appellate Body Report, pg 70 [173].

22nd Appellate Body Report, pg 71 [173].

23rd Appellate Body Report, pg 72 [175].

24th Appellate Body Report, pg 75 [186].

Summary of Article 21.5 Appeal

3. *Revised Guidelines Justified*

The Appellate Body held that the Revised Guidelines for the implementation of Section 609 issued by the United States as a result of the Appellate Body Report effectively remedied the breaches of Article XX identified in the Appellate Body Report.

First, the Appellate Body found that the United States had since engaged in serious, good faith negotiations with all relevant WTO Members.²⁵ The fact that only some negotiations resulted in agreement did not detract from the effort of the United States to provide WTO Members with the opportunity to reach comparable international agreements.²⁶ The Appellate Body held that the United States had not engaged in ‘arbitrary or unjustifiable discrimination’ solely on the basis that some negotiations concluded and others did not.²⁷

Second, the Appellate Body found that the Revised Guidelines provided an adequate level of flexibility.²⁸ The fact the Revised Guidelines allowed certification where the exporting Member had in place a regulatory program *comparable in effectiveness* gave ‘sufficient latitude’ for the exporting Member to tailor its regulatory program to the specific conditions prevailing in its territory.²⁹ The Revised Guidelines also specifically provided that the Department of State would take fully into account any difference between the conditions in the United States and those in other nations.³⁰ Furthermore, the Revised Guidelines provided that the import ban did not apply to shrimp or shrimp products harvested in a manner that did not pose a threat of the incidental taking of sea turtles.³¹ The Revised Guidelines also provided for notification of reasons why certification may have been denied along with an invitation to provide further information for review.³²

²⁵ Article 21.5 Appeal, pgs 33-43 [115]-[134].

²⁶ Article 21.5 Appeal, pg 36-7 [122]-[123].

²⁷ Article 21.5 Appeal, pg 37 [123].

²⁸ Article 21.5 Appeal, pgs 43-8 [135]-[148].

²⁹ Article 21.5 Appeal, pg 46 [144].

³⁰ Article 21.5 Appeal, pg 47 [146].

³¹ Article 21.5 Appeal, pg 47 [147].

³² Article 21.5 Appeal, pg 48 [147].

Prepared by: Lisa Tan, December 2012