UNITEDSTATES-IMPORTPROHIBITIONOFCERTAIN SHRIMPANDSHRIMPPRODUCTS

ReportoftheAppellateBody
WT/DS58/AB/R

Adopted by the Dispute Settlement Body on 6 November 1998

UnitedStates, *Appellant*
India,Malaysia,Pakistan,Thailand, *Appellees*
Australia,Ecuador,theEuropean Communities,HongKong,China, MexicoandNigeria, *Third Participants*

Present:
Feliciano,Presiding Member
Bacchus,Member
Lacarte-Muró,Member

TABLEOFCONTENTS

I. INTRODUCTION:STATEMENTOFTHEAPPEAL

1. This is an appeal by the United States from certain issues of law and legal interpretations in the Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*.[1] Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8October 1996 [2], Malaysia and Thailand requested in a communication dated 9January1997 [3], and Pakistan asked in a communication dated 30January 1997 [4], that the Dispute Settlem ent Body (the "DSB") establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section

1 WT/DS58/R,15May1998.
2 WT/DS58/1,14October1996.
3 WT/DS58/6,10January1997.
4 WT/DS58/7,7February1997.

609 of Public Law 101-162 [5] ("Section 609") and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), with standard terms of reference. [6] On 10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997[7], and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997. [8] The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

2. The relevant factual and regulatory aspects of this dispute are set out in the Panel Report, in particular at paragraphs 2.1-2.16. Here, we outline the United States measure at stake before the Panel and in these appellate proceedings. The United States issued regulations in 1987 pursuant to the Endangered Species Act of 1973 [9] requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. [10] These regulations, which became fully effective in 1990, were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions.

3. Section 609 was enacted on 21 November 1989. Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia*, to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles; … ." Section 609(b)(1) imposed, not later than 1 May 1991, an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations that are certified. Two kinds of annual certifications are required for harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993 and 1996 [11]: First, certifications shall be granted to countries with a

[5] 16 United States Code (U.S.C.) §1537.
[6] WT/DSB/M/29, 26 March 1997.
[7] WT/DS58/8, 4 March 1997.
[8] WT/DSB/M/31, 12 May 1997.
[9] Public Law 93-205, 16 U.S.C. 1531 *et seq.*
[10] 52 Fed. Reg. 24244, 29 June 1987 (the "1987 Regulations"). Five species of sea turtles fell under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).
[11] Hereinafter referred to as the "1991 Guidelines" (56 Federal Register 1051, 10 January 1991), the "1993 Guidelines" (58 Federal Register 9015, 18 February 1993) and the "1996 Guidelines" (61 Federal Register 17342, 19 April 1996), respectively.

fishing environment which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting. [12] According to the 1996 Guidelines, the Department of State "shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation: (a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, *e.g.*, any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur." [13]

4. Second, certification shall be granted to harvesting nations that provide documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of United States vessels. [14] According to the 1996 Guidelines, the Department of State assesses the regulatory program of the harvesting nation and certification shall be made if the program includes: (i) there requires use of TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program…"; and (ii) "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions." [15] The regulatory program may be in the form of regulations, or may, in certain circumstances, take the form of a voluntary arrangement between industry and government. [16] Other measures that the harvesting nation undertakes for the protection of sea turtles will also be taken into account in making the comparability determination. [17] The average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program…." [18]

5. The 1996 Guidelines provide that all shrimp imported into the United States must be accompanied by a Shrimp Exporter's Declaration form attesting that the shrimp was harvested either in the waters of a nation currently certified under Section 609 or "under conditions that do not adversely affect sea turtles", that is: (a) "Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested"; (b) "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States"; (c) "Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program …, would not require TEDs"; and (d) "Species of shrimp, such as the pandalid species, harvested in areas where sea turtles do not occur." [19] On

[12] Section 609(b)(2)(C).
[13] 1996 Guidelines, p. 17343.
[14] Section 609(b)(2)(A) and (B).
[15] 1996 Guidelines, p. 17344.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] 1996 Guidelines, p. 17343.

8 October 1996, the United States Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 in allowing the import of shrimp from non-certified countries if accompanied by a Shrimp Exporter's Declaration attesting that they were caught with commercial fishing technology that did not adversely affect sea turtles. [20] A 25 November 1996 ruling of the United States Court of International Trade clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported from non-certified countries. [21] On 4 June 1998, the United States Court of Appeals for the Federal Circuit vacated the decisions of the United States Court of International Trade of 8 October and 25 November 1996. [22] In practice, however, exemption from the import ban for TED-caught shrimp from non-certified countries remained unavailable while this dispute was before the Panel and before us. [23]

6. The 1991 Guidelines limited the geographical scope of the import ban imposed by Section 609 to countries in the wider Caribbean/western Atlantic region [24], and granted these countries a three-year phase-in period. The 1993 Guidelines maintained this geographical limitation. On 29 December 1995, the United States Court of International Trade held that the 1991 and 1993 Guidelines violated Section 609 by limiting its geographical scope to shrimp harvested in the wider Caribbean/western Atlantic region, and directed the Department of State to extend the ban worldwide not later than 1 May 1996. [25] On 10 April 1996, the United States Court of International Trade refused a subsequent request by the Department of State to postpone the 1 May 1996 deadline. [26] On 19 April 1996, the United States issued the 1996 Guidelines, extending Section 609 to shrimp harvested in *all* foreign countries effective 1 May 1996.

7. In the Panel Report, the Panel reached the following conclusions:

> In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994. [27]

and made this recommendation:

> The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement. [28]

8. On 13 July 1998, the United States notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations

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20 *Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).
21 *Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).
22 1998 U.S. App. Lexis 11789.
23 Response by the United States to questioning at the oral hearing.
24 Specifically, Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana and Brazil.
25 *Earth Island Institute v. Warren Christopher*, 913 Fed. Supp. 559 (CIT 1995).
26 *Earth Island Institute v. Warren Christopher*, 922 Fed. Supp. 616 (CIT 1996).
27 Panel Report, para. 8.1.
28 Panel Report, para. 8.2.

developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a notice of appeal [29] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review*. On 23 July 1998, the United States filed an appellant's submission.[30] On 7 August 1998, India, Pakistan and Thailand ("Joint Appellees") filed a joint appellees' submission and Malaysia filed a separate appellee's submission.[31] On the same day, Australia, Ecuador, the European Communities, Hong Kong, China, and Nigeria each filed separate third participants' submissions.[32] At the invitation of the Appellate Body, the United States, India, Pakistan, Thailand and Malaysia filed additional submissions on certain issues arising under Article XX(b) and Article XX(g) of the GATT 1994 on 17 August 1998. The oral hearing in the appeal was held on 19-20 August 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

A. *Claims of Error by the United States - Appellant*

1. *Non-requested Information from Non-governmental Organizations*

9. The United States claims that the Panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to the United States, there is nothing in the DSU that prohibits panels from considering information just because the information was unsolicited. The language of Article 13.2 of the DSU is broadly drafted to provide a panel with discretion in choosing its sources of information. When a non-governmental organization makes a submission to a panel, Article 13.2 of the DSU authorizes the panel to "seek" such information. To find otherwise would unnecessarily limit the discretion that the DSU affords panels in choosing the sources of information to consider.

2. *Article XX of the GATT 1994*

10. In the view of the United States, the Panel erred in finding that Section 609 was outside the scope of Article XX. The United States stresses that under the Panel's factual findings and undisputed facts on the record, Section 609 is within the scope of the Article XX chapeau and Article XX(g) and, in the alternative, Article XX(b), of the GATT 1994. The Panel was also incorrect in finding that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". The Panel interprets the chapeau of Article XX as requiring panels to determine whether a measure constitutes a "threat to the multilateral trading system". This interpretation of Article XX has no basis in the text of the GATT 1994, has

[29] WT/DS58/11, 13 July 1998.
[30] Pursuant to Rule 21(1) of the *Working Procedures for Appellate Review*.
[31] Pursuant to Rule 22(1) of the *Working Procedures for Appellate Review*.
[32] Pursuant to Rule 24 of the *Working Procedures for Appellate Review*.

never been adopted by any previous panel or Appellate Body Report, and would impermissibly diminish the rights that WTO Members reserved under Article XX.

11. The United States contends that the Panel's findings are not based on the ordinary meaning and context of the term "unjustifiable discrimination". That term raises the issue of whether a particular discrimination is "justifiable". During the Panel proceeding, the United States presented the rationale of Section 609 for restricting imports of shrimp from some countries and not from others: sea turtles are threatened with extinction worldwide; most nations, including the appellees, recognize the importance of conserving sea turtles; and shrimp trawling without the use of TEDs contributes greatly to the endangerment of sea turtles. In these circumstances, it is reasonable and justifiable for Section 609 to differentiate between countries whose shrimp industries operate without TEDs, and thereby endanger sea turtles, and those countries whose shrimp industries do employ TEDs in the course of harvesting shrimp.

12. The Panel, the United States believes, did not address the rationale of the United States for differentiating between shrimp harvesting countries. Rather, the Panel asked a different question: would the United States measure and similar measures taken by other countries "undermine the multilateral trading system"? The distinction between "unjustifiable discrimination" - the actual term used in the GATT 1994 - and the Panel's "threat to the multilateral trading system" test is crucial, in the view of the United States, and is posed sharply in paragraph 7.61 of the Panel Report, where the Panel states: "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 ...." An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*[33] (the "*WTO Agreement*") acknowledges that the rules of trade should be "in accordance with the objective of sustainable development", and should seek to "protect and preserve the environment". Moreover, Article XX neither defines nor mentions the "multilateral trading system", nor conditions a Member's right to adopt a trade-restricting measure on the basis of hypothetical effects on that system.

13. In adopting its "threat to the multilateral trading system" analysis, the Panel fails to apply the ordinary meaning of the text: whether a justification can be presented for applying a measure in a manner which constitutes discrimination. Instead, the Panel expands the ordinary meaning of the text to encompass a much broader and more subjective inquiry. As a result, the Panel would add an entirely new obligation under Article XX of the GATT 1994: namely that Members may not adopt measures that would result in certain effects on the trading system. Under the ordinary meaning of the text, there is sufficient justification for an environmental conservation measure if a conservation purpose justifies a difference in treatment between Members. Further inquiry into effects on the trading system is uncalled for and incorrect.

14. In the view of the United States, the Panel also fails to take account of the context of the term "unjustifiable discrimination". The language of the Article XX

[33] Done at Marrakesh, 15 April 1994.

chapeau indicates that the chapeau was intended to prevent the abusive application of the exceptions for protectionist or other discriminatory aims. This is consistent with the approach of the Appellate Body in *United States - Standards for Reformulated and Conventional Gasoline*[34] ("*United States - Gasoline*") and with the preparatory work of the GATT 1947. In context, an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.

15. In the context of the GATT/WTO dispute settlement system, measures within the scope of Article XX can be expected to result in reduced market access or discriminatory treatment. To interpret the prohibition of "unjustifiable discrimination" in the Article XX chapeau as excluding measures which result in "reduced market access" or "discriminatory treatment" would, in effect, erase Article XX from the GATT 1994. The Panel's "threat to the multilateral trading system" analysis erroneously confuses th e question of whether a measure reduces market access with the further and separate question arising under the chapeau as to whether that measure is nevertheless "justifiable" under one of the general exceptions in Article XX. The proper inquiry under the Article XX chapeau is whether an non-protectionist rationale, such as a rationale based on the policy goal of the applicable Article XX exception, could justify any discrimination resulting from the measur e. Here, any "discrimination" resulting from the measure is based on, and in support of, the goal of sea turtle conservation.

16. The United States also argues that the Panel incorrectly applies the object and purpose of the *WTO Agreement* in interpreting Article XX of the GATT 1994. It is legal error to jump from the observation that the GATT 1994 is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules. The very language of Article XX indicates that the state interests protected in that article are, in a sense, "pre-eminent" to the GATT's goals of promoting market access.

17. Furthermore, the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for "optimal use of the world's resources in accordance with the objective of sustainable development", and should seek "to protect and preserve the environment". The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.

18. The additional bases, the United States continues, invoked by the Panel to support its "threat to the multilateral trading system" analysis - i.e. the protection of expectations of Members as to the competitive relationship between their products and the products of other Members; the application of the international law principle

[34] Adopted 20 May 1996, WT/DS2/AB/R.

according to which international agreements must be applied in good faith; and the *Belgian Family Allowances*[35] panel report are without merit.

19. The United States submits that Section 609 does not threaten the multilateral trading system. The Panel did not find Section 609 to be an *actual* threat to the multilateral trading system. Rather, the Panel found that if other countries in other circumstances were to adopt the same type of measure here adopted by the United States *potentially* a threat to the system might arise. The United States urges that in engaging in hypothetical speculations regarding the effects of other measures which might be adopted in differing situations, while ignoring the compelling circumstances of this case, the Panel violated the Appellate Body's prescription in *United States - Gasoline*[36] that Article XX must be applied on a "case-by-case basis", with careful scrutiny of the specific facts of the case at hand. The Panel's "threat to the multilateral trading system" analysis adds a new obligation under Article XX of the GATT 1994 and is inconsistent with the proper role of the Panel under the DSU, in particular Articles 3.2 and 19.2 thereof.

20. To the United States, Section 609 reasonably differentiates between countries on the basis of the risk posed to endangered sea turtles by their shrimp trawling industries. Considering the aim of the Article XX chapeau to prevent abuse of the Article XX exceptions, an evaluation of whether a measure constitutes "unjustifiable discrimination where the same conditions prevail" should take account of whether the differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries on a basis "legitimately connected" with the policy of an Article XX exception, rather than for protectionist reasons, that measure does not amount to an abuse of the applicable Article XX exception.

21. The contention of the United States is that its measure does not treat differently those countries whose shrimp trawling industries pose similar risks to sea turtles. Only nations with shrimp trawling industries that harvest shrimp in waters where there is a likelihood of intercepting sea turtles, and that employ mechanical equipment which harms sea turtles, are subject to the import restrictions. The Panel properly recognized that certain naturally-occurring conditions relating to sea turtle conservation (namely, whether sea turtles and shrimp occur concurrently in a Member's waters) and at least certain conditions relating to how shrimp are caught (namely, whether shrimp nets are retrieved mechanically or by hand) are relevant factors in applying the Article XX chapeau. However, the Panel found that another condition relating to how shrimp are caught - namely, whether a country requires its shrimp fishermen to use TEDs - did not provide a basis under the chapeau for treating countries differently. Differing treatment based on whether a country had adopted a TEDs requirement was, in the Panel's view, "unjustifiable".

22. The United States believes that the analysis employed by the Appellate Body in *United States - Gasoline*[37] leads to the conclusion that Section 609 does not constitute "unjustifiable discrimination". Section 609 is applied narrowly and fairly. The United States does not apply sea turtle conservation rules differently to United States

[35] Adopted 7 November 1952, BISD 1S/59.
[36] Adopted 20 May 1996, WT/DS2/AB/R.
[37] Adopted 20 May 1996, WT/DS2/AB/R.

and foreign shrimp fishermen. Moreover, the United States has taken steps to assist foreign shrimp fishermen in adopting conservation measures and has undertaken efforts to transfer TED technology to governments and industries in other countries, including the appellees. In addition, Section 609 is limited in coverage and focuses on sea turtle conservation.

23. During the Panel proceeding, the United States presented "compelling evidence", reaffirmed by five independent experts, that Section 609 was a *bona fide* conservation measure under Article XX, imbued with the purpose of conserving a species facing the threat of extinction. To uphold the findings of the Panel would impermissibly change the basic terms of the bargain agreed to by WTO Members in agreeing to the GATT 1994. Further, to condone the Panel's adoption of a vague and subjective "threat to the multilateral trading system" test would fundamentally alter the intended role of panels under the DSU, and could call into question the legitimacy of the WTO dispute settlement process.

24. The United States states that neither it nor the appellees have appealed the decisions of the Panel to address first the Article XX chapeau and not to reach the issues regarding Article XX(b) and Article XX(g). Because the Panel made no findings regarding the applicability of Article XX(b) and XX(g), there are no findings in respect thereof that could even be the subject of appeal. Accordingly, issues regarding the applicability of Article XX(b) and Article XX(g) are not initially presented to the Appellate Body. However, the United States concurs with Joint Appellees that the Appellate Body may address Article XX(b) or Article XX(g) if it finds that Section 609 meets the criteria of the Article XX chapeau. In that case, the United States asserts that Article XX(g) should be applied first as it is the "most pertinent" of the Article XX exceptions, and that issues relating to Article XX(b) need be reached only if Article XX(g) were found to be inapplicable. The United States incorporates by reference and briefly summarizes the submissions that it made to the Panel regarding Article XX(b) and Article XX(g).

25. The essential claim of the United States is that Section 609 meets each element required under Article XX(g). Sea turtles are important natural resources. They are also an exhaustible natural resource since all species of sea turtles, including those found in the appellees' waters, face the danger of extinction. All species of sea turtles have been included in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna [38] (the "CITES") since 1975, and other international agreements also recognize the endangered status of sea turtles. [39] In paragraph 7.58 of the Panel Report, the Panel noted: "The endangered nature of the species of sea turtles mentioned in [CITES] Annex I as well as the need to protect them are consequently not contested by the parties to the dispute."

26. The United States maintains Section 609 "relates to" the conservation of sea turtles. A "substantial relationship" exists between Section 609 and the conservation

[38] Done at Washington, 3 March 1973, 993 U.N.T.S. 243, 12 International Legal Materials 1085.

[39] The United States states that all species of sea turtle except the flatback are listed in Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 15; and in Appendix II of the Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 29 March 1983, T.I.A.S. No. 11085.