

UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MALAYSIA

Report of the Appellate Body WT/DS58/AB/RW

*Adopted by the Dispute Settlement Body
on 21 November 2001*

Malaysia, *Appellant*
 United States, *Appellee*
 Australia, *Third Participant*
 European Communities, *Third Participant*
 Hong Kong, China, *Third Participant*
 India, *Third Participant*
 Japan, *Third Participant*
 Mexico, *Third Participant*
 Thailand, *Third Participant*

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

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I. INTRODUCTION

1. Malaysia appeals from certain issues of law and legal interpretations in the Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (the "Panel Report").¹ In accordance with Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Malaysia requested that the Dispute Settlement Body (the "DSB") refer to a panel its complaint with respect to whether the United States had complied with the recommendations and rulings of the DSB in *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States - Shrimp*").

2. The background to this dispute is set out in detail in the Panel Report.² On 6 November 1998, the DSB adopted the reports of the original panel and the Appellate Body in *United States - Shrimp*.³ The DSB recommended that the United States bring its import prohibition into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). On 6 December 1999, the period of time for implementation estab-

¹ WT/DS58/RW, 15 June 2001, DSR 2001:XIII, 6539.

² Panel Report, paras. 1.1-1.5 and 2.12-2.21.

³ Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; original panel report, WT/DS58/R and Corr.1, as modified by the Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.

lished by the parties under Article 21.3(b) of the DSU expired.⁴ At the DSB meeting of 23 October 2000, Malaysia informed the DSB that it was not satisfied that the United States had complied with the recommendations and rulings of the DSB, and announced that it wished to seek recourse to a panel under Article 21.5 of the DSU.⁵ The DSB referred the matter to the original panel.

3. Malaysia's complaint relates to a measure taken by the United States in the form of an import prohibition to protect and conserve certain species of sea turtles, considered to be an endangered species. This original measure, Section 609 of the United States Public Law 101-162 ("Section 609"), and its application are described in detail in the Appellate Body Report in *United States - Shrimp*.⁶ The Appellate Body found that Section 609 was provisionally justified under Article XX(g) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In implementing the recommendations and rulings of the DSB, the United States did not amend Section 609, with the result that the import prohibition is still in effect. However, the United States Department of State issued the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines").⁷ These Revised Guidelines replace the guidelines issued in April 1996 that were part of the original measure. This dispute between Malaysia and the United States arises in relation to the import prohibition of shrimp and shrimp products provided for by Section 609, and its application by the United States.

4. Section 609, the Revised Guidelines, and their application, are described in the Panel Report.⁸ In the following paragraphs, we set out those aspects of the Revised Guidelines that are pertinent to the consideration of the issues raised in this appeal.

5. Section 609(b)(2) provides that the import prohibition on shrimp does not apply to harvesting nations that are "certified" according to criteria set by the United States. The Revised Guidelines set forth the criteria for certification. The stated goal of the programme set out in the Revised Guidelines is the same as that set out in the programme of the original guidelines, namely, to protect endangered sea turtle populations from further decline by reducing their incidental mortality in commercial shrimp trawling. A central element of the United States programme is that commercial shrimp trawlers are required to use Turtle Excluder Devices ("TEDs") approved in accordance with standards established by

⁴ WT/DS58/15, 15 July 1999.

⁵ Malaysia's recourse to a panel was also in accordance with a bilateral agreement it had concluded with the United States in respect of the procedures to be followed under Articles 21.5 and 22 of the DSU. *See*, WT/DS58/16, 12 January 2000.

⁶ *Supra*, footnote 3, paras. 3-6.

⁷ United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 - 36952. The Revised Guidelines are attached to the Panel Report.

⁸ Panel Report, paras. 2.5 - 2.11 and 2.22 - 2.32.

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the United States National Marine Fisheries Service. Where the government of a harvesting country seeks certification on the basis of having adopted a programme that is based on TEDs, certification will be granted if this government's programme includes a requirement that commercial shrimp trawlers use TEDs that are "*comparable in effectiveness*" to those used in the United States, and a credible enforcement effort that includes monitoring for compliance.⁹

6. Under the original guidelines, the practice of the Department of State was to certify countries *only after* they had shown that they required the use of TEDs. Under the Revised Guidelines, countries may apply for certification even if they do not require the use of TEDs. In such cases, a harvesting country has to demonstrate that it has implemented, and is enforcing, a "*comparably effective*" regulatory programme to protect sea turtles without the use of TEDs. The Department of State is required "to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources."¹⁰

7. An exporting country may also be certified if its shrimp fishing environment does not pose a threat of incidental capture of sea turtles. The Revised Guidelines provide that the Department of State shall certify a harvesting country pursuant to Section 609 if it meets any of the following criteria: the relevant species of sea turtles do not occur in waters subject to that country's jurisdiction; in that country's waters, shrimp is harvested exclusively by means that do not pose a threat to sea turtles, for example, any country that harvests shrimp exclusively by artisanal means; or, commercial shrimp trawling operations take place exclusively in waters in which sea turtles do not occur.¹¹

8. Before the Panel, Malaysia argued that the United States had failed to comply with the recommendations and rulings of the DSB, and that, consequently, the United States continued to violate its obligations under the GATT 1994. In its Report circulated on 15 June 2001, the Panel found as follows:

- (a) [t]he measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994;
- (b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular

⁹ Panel Report, para. 2.25.

¹⁰ *Ibid.*, para. 2.28.

¹¹ *Ibid.*, para. 2.29.

the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.¹²

9. The Panel urged "Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment."¹³ (footnote omitted)

10. On 23 July 2001, Malaysia notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 2 August 2001, Malaysia filed its appellant's submission.¹⁴ On 17 August 2001, the United States filed an appellee's submission.¹⁵ On the same day, Australia, the European Communities, Hong Kong, China, India, Japan, Mexico and Thailand each filed a third participant's submission.¹⁶

11. On 13 August 2001, the United States requested that the Division hearing this appeal change the date of the oral hearing set out in the working schedule for this appeal. After inviting the participants to make their views known with respect to this request, the Division ruled that it would not change the date of the oral hearing. Accordingly, the oral hearing in the appeal was held on 4 September 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division.

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by Malaysia - Appellant*

1. *Terms of Reference*

12. Malaysia submits that the Panel erred in its examination of the new measure taken by the United States to comply with the recommendations and rulings of the DSB in *United States - Shrimp*.

¹² *Ibid.*, para. 6.1.

¹³ Panel Report, para. 7.2.

¹⁴ Pursuant to Rule 21 of the *Working Procedures*.

¹⁵ Pursuant to Rule 22 of the *Working Procedures*.

¹⁶ Pursuant to Rule 24 of the *Working Procedures*. Ecuador, a third party in the proceedings before the Panel, did not file a third participant's submission, but requested permission to attend the oral hearing as a "passive observer". After consulting the participants and third participants, the Division hearing this appeal granted Ecuador permission to attend the oral hearing in this capacity.

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13. Malaysia submits that it is a legal principle that an implementing measure must be examined for conformity with the covered agreements rather than for conformity with the recommendations and rulings of the DSB. This principle is borne out in the case in *Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU* ("*Canada - Aircraft (21.5)*")¹⁷, where the Appellate Body held that the scope of Article 21.5 dispute settlement proceedings is not limited to the issue of whether or not a WTO Member has implemented the recommendations and rulings of the DSB. The Appellate Body ruled that the task of the panel was to determine whether the new measure is consistent with the disputed provisions of the *WTO Agreement*.

14. Malaysia submits that, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measure taken to comply" only from the perspective of the claims, arguments and factual circumstances that relate to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Malaysia submits that Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure that was not before the original panel. In Malaysia's view, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure.

15. Malaysia argues that the Panel erred in its treatment of the Appellate Body Report in *United States - Shrimp*. First, Malaysia asserts that in relying solely on the reasoning of the Appellate Body, the Panel has in fact relied on the claims and arguments brought by the parties that related to the original measure. Second, Malaysia argues that the Panel erred in treating the Appellate Body Report in *United States - Shrimp* as having proposed alternative courses of conduct or alternative measures as *conditions* which, if fulfilled, would necessarily render the implementing measure consistent with the relevant covered agreement. In Malaysia's view, the alternative courses of conduct or alternative measures referred to by the Appellate Body were *dicta*, and, therefore, the Panel erred in interpreting these *dicta* as positive conditions for determining GATT-consistency.

2. *The Chapeau of Article XX of the GATT 1994*

16. Malaysia appeals certain of the Panel's conclusions under the chapeau of Article XX of the GATT 1994. In particular, Malaysia submits that the Panel erred in considering the obligation of the United States as an obligation to *negotiate*, as opposed to an obligation to *conclude* an international agreement.

¹⁷ Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299.

17. Malaysia notes that the Appellate Body made pertinent observations and comments in its analysis of the chapeau of Article XX of the GATT 1994 with respect to "arbitrary or unjustifiable discrimination". In its treatment of "unjustifiable discrimination" the Appellate Body stated "[a]nother aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members".¹⁸ In Malaysia's view, these remarks of the Appellate Body emphasize the need for the *conclusion* of an international agreement.

18. Malaysia submits that these remarks of the Appellate Body constitute *dicta*. The Panel misunderstood these remarks to mean that alternative actions, in particular a demonstration of prior good faith negotiation, would "insulate" a unilateral measure from being characterized as "unjustifiable discrimination". It is further submitted that in the context of the new measure, the Panel failed to examine whether, in the circumstances, the United States acted in a manner constituting "unjustifiable discrimination".

19. Malaysia further contends that if the conclusion of the Panel is allowed to stand, it will lead to the "incongruous" result that any WTO Member would be able to offer to negotiate in good faith an agreement incorporating its "unilaterally defined standards" before claiming that its measure is justified under the pertinent exceptions of Article XX of the GATT 1994. According to Malaysia, the conclusion of the Panel will thus lead to the result that if a WTO Member fails to *conclude* an agreement, it could still claim that its application of a unilateral measure does not constitute "unjustifiable discrimination".

20. In addition, Malaysia submits that the Panel erred in concluding that the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. The Panel did not provide any reasoning for taking this view. The Appellate Body cited the Inter-American Convention merely as an "example" of efforts made by the United States to reach a multilateral solution in relation to the conservation of sea turtles. In no sense was that convention considered as a "legal standard" by the Appellate Body. Moreover, the Appellate Body stated that one of the obligations which the United States had to fulfill in order to avoid "unjustifiable discrimination" was to engage in serious efforts to negotiate in good faith *before* the enforcement of a "unilateral" import prohibition.

¹⁸ Appellate Body Report, *United States - Shrimp*, *supra*, footnote 3, para. 166.

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21. Malaysia submits that the Panel's legal interpretation is erroneous because the United States had not proven that the unilateral and non-consensual procedures of the import prohibition had been eliminated. On the contrary, the ongoing negotiations on the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region (the "South-East Asian MOU") demonstrated that an alternative and less trade restrictive course of action for securing the legitimate goals of the United States measure, was available. The logical consequence of the above argument is that the negotiations are underway, and, therefore, the import prohibition should be lifted.

22. Malaysia also appeals the Panel's conclusions under the heading "[m]easures comparable in effectiveness to the United States measure". Malaysia submits that the Appellate Body spoke of measures comparable in effectiveness to the United States measures in the context of illustrating the difference between the design and the application of the original measure.¹⁹ The Appellate Body noted that while the design of the measure permitted certification of countries with measures comparable in effectiveness to United States measures, this was not the way in which the measure was applied in fact. The Panel misread this observation of the Appellate Body to mean that a measure requiring that exporting countries adopt regulatory programmes that are comparable in effectiveness to that of an importing country could not constitute "unjustifiable discrimination".

23. Malaysia contends that the Appellate Body did not accept the legitimacy of "comparable measures" - either implicitly or otherwise. Rather, it was merely describing the intended operation of the original measure. This is evident, *inter alia*, from the fact that the term "comparable in effectiveness" is the language of the 1996 Guidelines, which implemented the original measure. The Appellate Body was in no way authorizing importing Members to impose unilateral measures conditioning market access on an exporting Member having measures "comparable in effectiveness" to their own measures. The Panel, therefore, erred in assuming that the new measure, which imposed this requirement of measures "comparable in effectiveness to the United States regulatory programme", could not constitute unjustifiable discrimination.

24. Malaysia also submits that the Panel erred in finding that the Revised Guidelines allowed for *flexibility*, as they take account of situations where sea turtles are not endangered by shrimp trawling. Malaysia submits that the Revised Guidelines address only the incidental capture of sea turtles in the course of shrimp trawl harvesting. Close scrutiny of the Revised Guidelines discloses that they do not address the fact that the same conditions do not prevail in Malaysia. Malaysia does not practise shrimp trawling and the incidental capture of sea tur-

¹⁹ Appellate Body Report, *United States - Shrimp*, *supra*, footnote 3, para. 163.

ties in Malaysian waters is due to fish trawling and not shrimp trawling. Thus the Revised Guidelines fail to take into account the specific conditions prevailing in Malaysia and they, therefore, violate the chapeau of Article XX of the GATT 1994.

25. Malaysia appeals the Panel's treatment of the decision of the United States Court of International Trade (the "CIT") in *Turtle Island Restoration Network, et al. v. Robert L. Mallett, et al.*²⁰ (the "Turtle Island case"). Malaysia is of the view that, in declining to consider this decision, the Panel erred in taking the view that municipal law is insulated from scrutiny by panels. Malaysia submits that had the Panel scrutinized the decision in the *Turtle Island* case, and assessed the likelihood and consequences of the Revised Guidelines being modified in the future, it would have found that the "unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 has not been eliminated.

26. Finally, Malaysia requests that the Appellate Body recommend that the import prohibition be lifted so as to give effect to the recommendations and rulings of the DSB as per the Appellate Body Report.

B. Arguments of the United States - Appellee

1. Terms of Reference

27. The United States submits that Malaysia's argument that the Panel failed to apply the correct scope of review in accordance with Article 21.5 of the DSU is without merit. Malaysia's reliance in this regard on the Appellate Body Report in *Canada - Aircraft (21.5)* is misplaced. The issue in that appeal was whether the Panel's review was limited to issues considered in the original panel and Appellate Body proceedings. The Appellate Body found that the DSU imposed no such limitation. In the present case, however, the Panel's scope of review was fully consistent with the Appellate Body findings in *Canada - Aircraft (21.5)*.

28. The United States observes that the Panel in this case quoted at length from the Appellate Body Report in *Canada - Aircraft (21.5)*. The Panel then concluded that it was fully entitled to address *all* the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the original panel and the Appellate Body proceedings.

29. The United States argues that Malaysia's argument is based solely on the Panel's use of the phrase "recommendations and rulings of the DSB". In the view of the United States, the Panel's use of the phrase "complied with the recommendations and rulings of the DSB", is entirely appropriate, and indicates no limitation in its scope of review. In the context of this case, the recommendations and

²⁰ 110 Fed. Supp. 2d 1005 (CIT, 2000).

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rulings of the DSB are that the United States "bring its measure ... into conformity with the obligations of the United States under [the GATT 1994]". The GATT 1994 is the only covered agreement at issue in the dispute.

2. *The Chapeau of Article XX of the GATT 1994*

30. The United States submits that the Panel correctly found that the United States has remedied the aspect of discrimination relating to differences in efforts to negotiate a bilateral or multilateral agreement. In its previous ruling in *United States - Shrimp*, the Appellate Body found that certain aspects of the application of Section 609, in their "cumulative effect", amounted to unjustifiable discrimination between countries where the same conditions prevail. One of those aspects related to efforts to negotiate. The Appellate Body then cited, and relied upon, the factual findings of the original panel concerning the absence of serious efforts of the United States to negotiate a conservation agreement with the complaining WTO Members.

31. The United States contends that it has proceeded to remedy this aspect of unjustifiable discrimination identified by the Appellate Body. In particular, the United States has made substantial efforts to negotiate a sea turtle conservation agreement in the Indian Ocean and South-East Asia region. The Panel found that these efforts did remedy this aspect of unjustifiable discrimination.

32. The United States submits that Malaysia does not contest the core findings of the Panel, namely, that the United States has engaged in serious, good faith efforts to negotiate a sea turtle conservation agreement with the countries in the Indian Ocean and South-East Asia region. The Panel considered whether the United States had addressed the effort-to-negotiate aspect of "unjustifiable discrimination" identified by the Appellate Body, and properly found that the United States had indeed remedied this aspect of discrimination.

33. The United States submits that, instead of addressing the pertinent findings of the Panel, Malaysia makes a number of arguments that are either based on mischaracterization of the Panel Report, or that amount to a request for a reversal of the key findings of the Appellate Body Report in *United States - Shrimp*. Malaysia argues that the Panel found that "a demonstration of prior good faith negotiation would insulate a unilateral measure from being characterized as unjustifiable discrimination."²¹ In the United States view, this argument fails to take into account the context of the Panel's discussions of efforts to negotiate, and thus amounts to a mischaracterization of the findings of the Panel.

34. The United States submits that the discussions by the Appellate Body and the Panel concerning negotiations arise in the context of applying the Article XX chapeau to the specific facts of this case. The language of the chapeau of Article

²¹ Malaysia's appellant's submission, para. 3.11.