

US—Shrimp Case

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A. Introduction

- 1 The *US—Shrimp* case was the first dispute adjudicated under the → *World Trade Organization (WTO)* dispute resolution system in which the complex relationship between international trade regulation and the protection of the environment was at issue (→ *Environment, International Protection*; → *Trade and Environment*; → *World Trade Organization, Dispute Settlement*). The Appellate Body report substantially clarified a number of controversial issues and stands out as a landmark decision.

B. Facts

- 2 In 1987, the United States ('US') adopted regulations requiring all US shrimp trawl vessels to use turtle excluder devices ('TEDs') in areas where there is a likelihood that shrimp trawling interacts with sea turtles. This legislation was motivated by the fact that modern techniques of harvesting shrimp tend incidentally to catch sea turtles, some species of which are classified as endangered in the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'; → *Endangered Species, International Protection*). In 1989, the scope of the regulations was extended, by Sec. 609 US Public Law 101–62, to all shrimp harvested with commercial fishing technology irrespective of its origin. Foreign shrimp could only be imported into the US if its harvesting did not adversely affect sea turtles. The use of TEDs was generally mandated, and the exporting country needed to have in place a regulatory programme virtually identical to that of the US aimed at controlling incidental turtle deaths. Only those countries which met the US requirements were granted certificates permitting the importation of shrimp. After legal proceedings in the US and amendments to the regulations, this regulatory scheme was made effective, eventually, by 1 May 1996.
- 3 India, Malaysia, Pakistan and Thailand—which did not comply with the US requirements and hence were not granted import certificates—initiated formal dispute settlement proceedings before the WTO. They claimed that the US violated Art. XI General Agreement on Tariffs and Trade (1947) ('GATT'; → *General Agreement on Tariffs and Trade [1947 and 1994]*). The US defended its regulatory scheme on the basis that it was applied in a non-discriminatory way and legitimately intended to protect an endangered species (→ *National Treatment, Principle*; → *States, Equal Treatment and Non-Discrimination*). Moreover, it argued that, even if its regulations violated Art. XI GATT, they were justified under Art. XX GATT. Seven WTO members participated as third parties, and both the panel and the Appellate Body received various amicus curiae briefs (→ *International Courts and Tribunals, Amicus Curiae*).

C. Findings

- 4 The panel concluded, in its report of 15 May 1998, that the US import ban on shrimp and shrimp products was not consistent with Art. XI GATT and could not be justified under Art. XX GATT. Upon appeal, the Appellate Body subsequently confirmed, in its report of 12 October 1998, the panel's overall finding but significantly altered its reasoning (→ *International Courts and Tribunals, Appeals*). The reports were duly adopted by the WTO Dispute Settlement Body on 6 November 1998.
- 5 At the outset, the Appellate Body concurred with the panel that the US measure violated Art. XI GATT. With respect to its alleged justification under Art. XX GATT, the Appellate Body confirmed consistent GATT 1947 and WTO practice according to which a three-step examination is required. First, it is to be determined whether the policy pursued with the disputed measure falls within the range of policies and motives enumerated in Art. XX (a) to (j) GATT. In assessing whether the US measure concerned the conservation of 'exhaustible natural resources' (WTO *US—Shrimp* [12 October 1998] para. 126) within the meaning of Art. XX (g) (→ *Conservation of Natural Resources*), the Appellate Body took a generous view and held that this generic term is 'not "static" in its content or reference but is rather "by definition, evolutionary"' (ibid para. 130). It took note of the reference in the Preamble Agreement Establishing the World Trade

Organization to 'the objective of sustainable development'. Furthermore, it looked for guidance in modern international conventions which make frequent references to natural resources as embracing both living and non-living resources—inter alia CITES, the United Nations Convention on the Law of the Sea (→ *Law of the Sea*), the Convention on Biological Diversity (→ *Biological Diversity, International Protection*) and the → *Agenda 21*. After stating that a resource may be living or non-living, and it need not necessarily be rare or endangered to be potentially exhaustible, the Appellate Body concluded that sea turtles constituted exhaustible natural resources pursuant to Art. XX (g) GATT. Second, the subparagraphs of Art. XX GATT require that the measure at issue needs to be either 'necessary' for, or 'relating to', the pursuit of the specific policy. The Appellate Body determined, based on the observation that 'the means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one' (WTO *US—Shrimp* [12 October 1998] para. 141), that the US regulatory scheme satisfied this test under Art. XX (g) GATT. Moreover, the Appellate Body held that the US requirement to use TEDs for vessels irrespective of their nationality was made effective in conjunction with the restrictions on domestic harvesting of shrimp, as is further required by Art. XX (g) GATT. Third, the measure needs to be applied in conformity with the chapeau of Art. XX GATT which is intended to prevent the abuse of the 'limited and conditional' exceptions under which a measure might be preliminarily justified under the subparagraphs (ibid para. 157). The chapeau is, according to the Appellate Body, a balancing principle to mediate between the right of a member to invoke an exception and its obligation to respect the rights of other members; it is an 'expression of the principle of good faith' (ibid para. 158; → *Good Faith [Bona fide]*). Although the Appellate Body agreed with the panel that the application of the US measure was indeed arbitrary and unjustifiable, it arrived at this conclusion on much narrower grounds than did the panel. The Appellate Body did not explicitly condemn per se the US regulatory scheme authorizing unilateral bans under certain circumstances (→ *Unilateral Acts of States in International Law*; → *Unilateral Trade Measures*). Rather, it criticized the actual application of the measure, mainly provided for in administrative guidelines and established through practice, which 'requires other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the US shrimp trawl vessels' (ibid para. 163). According to the Appellate Body, the US failed to take 'into consideration different conditions which may occur in the territories' of other members (ibid para. 164). Moreover, the Appellate Body pointed to another aspect 'that bears heavily in any appraisal of justifiable or unjustifiable discrimination' (ibid para. 166), namely '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' (ibid). According to the Appellate Body, the subject matter—protection of sea turtles—necessarily demanded international co-operation to the greatest extent possible, and serious negotiation efforts were, in the present case, a precondition to the application of unilateral trade measures (see also → *Co-operation, International Law of*).

- 6 In conclusion, the Appellate Body determined, essentially based on the rigidity of the manner in which the US measure was applied and on the absence of basic standards of fairness and due process in the certification procedures, that the US regulatory scheme, while qualifying for provisional justification under Art. XX (g) GATT, failed to meet the requirements of the chapeau of Art. XX GATT. The US measure therefore was not justified under Art. XX GATT (see also → *Fair Trial, Right to, International Protection*).

D. Commentary

- 7 The Appellate Body's reasoning in the *US—Shrimp* case has had significant implications for WTO law and practice. The following three are most often cited in case law and in academic writings.
- 8 First, the Appellate Body settled the controversial issue of whether WTO panels have the discretionary power either to accept and consider or reject unsolicited amicus curiae briefs. The Appellate Body approved of such a right, basing its finding on the wording of Art. 13 Understanding on Rules and Procedures Governing the Settlement of Disputes. However, the Appellate Body refused substantially to take into account the briefs which the panel received from three groups of → *non-governmental organizations* in the present case, as it did not consider them to contribute relevant information in addition to the parties' submissions. Ever since the *US—Shrimp* case, the issue of amicus curiae briefs has remained highly controversial, and the WTO membership is deeply divided over the status of → *non-state actors* in panel and Appellate Body proceedings. In the *US—Lead and Bismuth II* case, the Appellate Body not only confirmed the right to receive amicus curiae briefs on the part of panels but also approved of such a right for itself. This decision set the stage for the *EC—Asbestos* case, in which the Appellate Body set up a formal request for leave procedure in order to handle the anticipated amicus curiae briefs. The matter has been further complicated by the Appellate Body's decision in the *EC—Sardines* case to allow an unsolicited brief submitted by Morocco which did not participate as a

third party but requested to be heard through an amicus curiae brief. Overall, however, such briefs have so far only very seldom been formally accepted and substantially taken into account. They are usually rejected on the grounds that they do not contain a substantial contribution in addition to the parties' submissions.

- 9 Second, the *US—Shrimp* case established that unilateral measures by a WTO member for the protection of the environment are not per se inconsistent with the GATT (→ *Environment, International Protection*). WTO members are permitted to condition access to their domestic markets on whether other members comply with, or adopt, a policy unilaterally prescribed by the importing country if such a measure is capable of justification under Art. XX GATT. This leaves room for unilateral measures to protect the environment beyond national jurisdictions. At the same time, the Appellate Body cautioned that unilateral measures could only be justified under Art. XX GATT if they were tailored carefully to meet basic due process concerns, if they took into consideration the conditions in other members and—in particular—if the importing member sought, in good faith, a multilateral solution before it resorted to unilateral action (→ *Unilateralism/Multilateralism*). The US failed to meet these requirements in the present case. In the aftermath of the Appellate Body ruling, the US adapted its regulatory scheme and took serious good faith efforts to reach a multilateral agreement for the protection of sea turtles. Consequently, a further Appellate Body report confirmed compliance with the prior ruling of the US implementation measures (*US—Shrimp [Art. 21.5]*). Thus, the *US—Shrimp* case put an end to the uncertainty about the potential legality of unilateral trade measures and their extraterritorial application (→ *Extraterritoriality*). This uncertainty had mainly stemmed from two ambiguous and contradictory General Agreement on Tariffs and Trade (1947) ('GATT 1947') panel reports on a unilateral US ban on imports of tuna which was caught by methods incidentally killing dolphins (WTO *US—Tuna I* [1991]; WTO *US—Tuna II* [1994]; both reports were not adopted).
- 10 Third, the present case confirmed the relevance of other international agreements for the interpretation of WTO law (→ *Interpretation in International Law*). The Appellate Body took into consideration a set of multilateral environmental agreements ('MEAs') in order to ascertain the meaning of the term exhaustible natural resources. Although it did not formally invoke Art. 31 (3) (c) → *Vienna Convention on the Law of Treaties (1969)* ('VCLT'), it considered those agreements to be of relevant evidentiary assistance in interpreting WTO law. By doing so, the Appellate Body set an important precedent for WTO dispute resolution panels not to interpret WTO law in isolation but to acknowledge the close and, in most cases, mutually beneficial relationship between the WTO legal framework and MEAs. In this regard, the *US—Shrimp* case marks a distinct departure from inconsistent GATT 1947 law and practice. In particular, it differs from the approach taken by the panel in the unadopted *US—Tuna II* (1994) case in which the relevance of a number of MEAs was explicitly rejected on the grounds that they 'were not concluded among the contracting parties to the General Agreement' (WTO *US—Tuna II* (16 June 1994) DS29/R para 5.19). Still, clear guidelines are yet to be developed, and controversial debates on this complex issue continue in academic writings. The Appellate Body has not yet determined unequivocally under which circumstances WTO adjudication bodies are under an *obligation* to take into account other rules of international law. In some cases subsequent to the *US—Shrimp* dispute, WTO adjudication bodies did look at a variety of bilateral and multilateral international agreements in order to interpret WTO law (see, eg, WTO *EC—Computer Equipment*; WTO *US—FSC [Art. 21.5]*). In other cases, they adopted a more conservative approach and refused to interpret WTO law in light of other rules of international law (see, eg, WTO *EC—Approval and Marketing of Biotech Products*, in which the panel rejected the argument that Art. 31 (3) (c) VCLT obliged the panel to take into account the Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity [→ *Biological Diversity, International Protection*; → *Biological Safety*]).

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