
Summary: Nathalie Bernasconi-Osterwalder (Lead Author) with Daniel Magraw, Maria Julia Oliva, Marcos Orellana, Elisabeth Tuerk, Environment and Trade, London 2006, 110-112

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Short summary and commentary

US – Shrimp/Turtle I presents another case in which environmental measures were found unjustified under Article XX. Four countries – India, Malaysia, Pakistan and Thailand – complained that a US import ban on shrimp and shrimp products harvested
with technology that posed risks to sea turtles was inconsistent with Article XI of the GATT.

The US defended the import ban as justified under Article XX(g). Enacted under the Endangered Species Act of 1973 (ESA), the import ban was coupled with a requirement that all US shrimp trawl vessels use turtle excluder devices (TEDs) in times and areas where interaction with sea turtles was likely. The regulations under the Act also exempted from the ban ‘certified’ nations who adopted a comparable regulatory programme governing the incidental taking of sea turtles, and who achieved an average rate of incidental taking comparable to that of US vessels.

After a panel report concluded that the US measure was inconsistent with GATT Article XI as well as unjustified under Article XX, the US appealed the Article XX finding. In reviewing this finding, the Appellate Body found the panel had erred in its Article XX appraisal by reversing the sequence of the two-tiered analysis set out in US–Gasoline (AB report, paragraphs 117–119). The Appellate Body opined that by examining the validity of the measure in the context of the chapeau before considering whether it fell within any particular exception, the panel had rendered ‘the task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions . . . very difficult, if . . . possible at all . . .’ (Id. at paragraph 120). The Appellate Body accordingly reversed the panel’s finding that the US measure did not fall ‘within the scope of measures permitted under the chapeau’, and proceeded with an analysis of the measure under Article XX(g) (Id. at paragraphs 122–123).

In following with the US–Gasoline approach, the Appellate Body first sought to determine whether the measure was provisionally justified under Article XX(g). Beginning with the term ‘exhaustible natural resources’, the Appellate Body found that Article XX(g) referred not only to the conservation of exhaustible mineral or other non-living natural resources but also to living resources, and concluded that sea turtles were both a ‘natural resource’ and ‘exhaustible’ within the meaning of Article XX(g) (Id. at paragraph 134).

The Appellate Body next considered whether the US measure was ‘related to’ the conservation of sea turtles. Finding the US measure not a ‘simple, blanket prohibition’, but instead ‘narrowly focused’, the Appellate Body declared that the relationship between the US measure and its conservation goal was ‘every bit as substantial as that which we found in US–Gasoline . . .’ (Id. at paragraph 141). The Appellate Body thus found the measure fulfilled the ‘related to’ requirement (Id. at paragraph 142).

Finally, the Appellate Body cited its US–Gasoline interpretation of the ‘made effective in conjunction with restrictions on domestic production or consumption’ element as a requirement of ‘even-handedness’ (Id. at paragraph 143). As the measure’s restrictions applied domestically as well as abroad, the Appellate Body determined that the US measure therefore qualified as ‘even-handed’ and met this final requirement of Article XX(g) (Id. at paragraph 144).

As the Appellate Body found the measure provisionally justified under Article XX(g), it then proceeded with a secondary analysis under the Article XX chapeau to determine whether the particular application of the measure constituted ‘an abuse or misuse of the provisional justification made available by Article XX(g)’ (Id. at paragraph 160). In so doing, the Appellate Body examined whether the measure’s application resulted in ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, as specified by the chapeau. First addressing the element of ‘discrimination’,
the Appellate Body recalled its findings in *US – Gasoline* that discrimination could occur not only between exporting members, but also between exporting and importing members, and also that discrimination under the Article XX chapeau necessarily differed from that which might have already been found under other GATT provisions (*Id.* at paragraph 150).

The Appellate Body found that the US measure, although itself justified under Article XX(g), was applied in a manner that constituted unjustifiable discrimination (*Id.* at paragraph 176). Finding that the measure had an ‘intended and actual coercive effect on . . . foreign governments’ to adopt ‘essentially the same policies and enforcement practices as the US’, the Appellate Body held that ‘discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries’ (*Id.* at paragraphs 161, 165).

The Appellate Body found that the US’ failure to pursue the conservation of sea turtles through bilateral or multilateral agreements with the complaining countries before resorting to a unilateral import ban constituted an additional incident of unjustifiable discrimination (*Id.* at paragraph 166). Several factors contributed to this finding, but perhaps weighing heaviest among them was the US’ collaboration with certain countries from the Caribbean/Western Atlantic region in the Interc-American Convention for the Protection and Conservation of Sea Turtles (*Id.* at paragraph 169). The US’ participation in this convention demonstrated not only ‘that an alternative course of action was reasonably open to the US for securing the legitimate policy goal of its measure’, but also that the US had pursued such alternative means with certain countries, but not with the complainants (*Id.* at paragraphs 171–172). The Appellate Body characterized these uneven negotiation efforts, as well as differential treatment in terms of technical assistance and lengths of ‘phase-in’ periods, as unjustifiable discrimination (*Id.* at paragraphs 172–176).

The Appellate Body also found that the application of the US measure constituted arbitrary discrimination. In the Appellate Body’s view, the measure’s ‘rigidity and inflexibility’ allowed for ‘little or no flexibility in how officials make the determination for certification pursuant to these provisions’ (*Id.* at paragraph 177). Furthermore, finding the US certification process to be informal and casual, and neither transparent nor predictable, the Appellate Body declared that ‘exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members that are granted certification’ (*Id.* at paragraph 181).

Ultimately, although the US measure was provisionally justified under Article XX(g) as serving a legitimate environmental goal, its application was found to constitute arbitrary and unjustifiable discrimination between Members of the WTO under the chapeau, thus failing to be justified under Article XX (*Id.* at paragraph 186).