

U.S. Prohibition of Certain Shrimp Products

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From World Trade Organization Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4 (1998)

The Problem: Turtle Mortality

- Sea turtles, an endangered species, were dying in great numbers due to vessels harvesting shrimp
- The nets used in harvesting shrimp are very fine, and sea turtles would get caught and die
- Because the turtles reproduce so infrequently, over time, populations began to diminish dramatically

The U.S. actions

- In 1987, the U.S. issued regulations requiring all U.S. shrimp trawl vessels to use approved Turtle Excluder Devices (“TEDs”) at all times, in specified areas where there was a likelihood that shrimp trawling would interact with sea turtles
- These regulations became fully effective in 1990

A Call for Global Guidelines

- In 1989, section 609 was enacted, which:
 - Called upon the U.S. Secretary of State to initiate negotiations as soon as possible with foreign governments to develop agreements for the protection of sea turtles
 - Imposed a ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles

Strict Standards

- All shrimp imported into the U.S. had to be accompanied by a Shrimp Exporter’s Declaration form, attesting that the shrimp was harvested under conditions that do not adversely affect sea turtles
 - Shrimp harvested in an aquaculture facility, in which the shrimp spend 30 days in ponds prior to harvest
 - Shrimp harvested by commercial vessels using TEDs comparable to those used in the U.S.
 - Shrimp harvested exclusively by means that do not require retrieval of fishing nets by mechanical devices, or by vessels that would not require TEDS
 - Shrimp harvested in areas where sea turtles are not present

The Countries Affected

- India, Pakistan, Thailand, and Malaysia (direct parties involved)
- Australia, Ecuador, European Community, Hong Kong, China, Nigeria (third parties)

The Legal Issue Raised

- Did the U.S. place unfairly strict regulations on importing shrimp, violating the General Agreement on Tariffs and Trade, and unfairly discriminating against trade with certain countries?
- Did the U.S. apply sea turtle conservation rules differently to the U.S. and to foreign shrimp fishermen

Rebuttal from Foreign Countries

- The U.S. abused trade law by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down a multilateral, cooperative path
- If every WTO country were free to pursue its own trade policy solutions to what it perceived to be environmental concerns, the multilateral trade system would cease to exist

Result

- The Appellate Board of the WTO decided that although the U.S.'s intention to preserve the sea turtle population is legitimate, the measure was applied in an unlawfully arbitrary and unjustifiably discriminatory manner

Rationale

- WTO members are free to adopt their own policies aimed at protecting the environment, as long as in doing so they respect the rights of other members under the WTO Agreement
- Countries with similar conditions should be treated similarly

From the appellate body decision

"In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do."

From the appellate body decision

- What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States – Gasoline, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement. .