

US – SHRIMP¹ (DS58)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	India, Malaysia, Pakistan, Thailand	GATT Arts. XI and XX	Establishment of Panel	25 February 1997
			Circulation of Panel Report	15 May 1998
Respondent	United States		Circulation of AB Report	12 October 1998
			Adoption	6 November 1998

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US import prohibition of shrimp and shrimp products from non-certified countries (i.e. countries that had not used a certain net in catching shrimp).
- Products at issue: Shrimp and shrimp products from the complainant countries.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XI (quantitative restrictions): The Panel found that the US prohibition, based on Section 609, on imported shrimp and shrimp products violated GATT Art. XI. The United States apparently conceded this violation of Art. XI because it did not put forward any defending arguments in this regard.
- GATT Art. XX (exceptions): The Appellate Body held that although the US import ban was related to the conservation of exhaustible natural resources and, thus, covered by Art. XX(g) exception, it could not be justified under Art. XX because the ban constituted "arbitrary and unjustifiable" discrimination under the chapeau of Art. XX. In reaching this conclusion, the Appellate Body reasoned, *inter alia*, that in its application the measure was "unjustifiably" discriminatory because of its intended and actual coercive effect on the specific policy decisions made by foreign governments that were Members of the WTO, also the measure constituted "arbitrary" discrimination because of the rigidity and inflexibility in its application, and the lack of transparency and procedural fairness in the administration of trade regulations.

While ultimately reaching the same finding on Art. XX as the Panel, the Appellate Body, however, reversed the Panel's legal interpretation of Art. XX with respect to the proper sequence of steps in analysing Art. XX. The proper sequence of steps is to first assess whether a measure can be provisionally justified as one of the categories under paragraphs (a)-(j), and, then, to further appraise the same measure under the Art. XX chapeau.

3. OTHER ISSUES²

- Amicus curiae briefs: The Appellate Body held that it could consider *amicus curiae* briefs attached to a party's submission since the attachment of a brief or other material to either party's submission renders that material at least prima facie an integral part of that party's submission. Based on the same rationale, the Appellate Body reversed the Panel and ruled that a panel has the "discretion either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not" under DSU Arts. 12 and 13.

¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*

² Other issues addressed: adequacy of the notice of appeal (Working Procedures for Appellate Review, Rule 20(2)(d)).

US – SHRIMP (ARTICLE 21.5)¹
(DS58)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Malaysia	GATT Arts. XI and XX	Referred to the Original Panel	23 October 2000
			Circulation of Panel Report	15 June 2001
Respondent	United States		Circulation of AB Report	22 October 2001
			Adoption	21 November 2001

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Revised Guidelines for the Implementation of Section 609, under which certain countries were exempt from the import prohibition on shrimp pursuant to the criteria provided therein.²

2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XI (quantitative restrictions): The Panel concluded that, as with the measure at issue in the original proceedings, the US import prohibition on shrimp and shrimp products under Section 609 was inconsistent with Art. XI:1.
- GATT Art. XX(g) (exceptions): The Appellate Body upheld the Panel's finding that Section 609, as implemented by the revised guidelines and as applied by the United States, was justified under Art. XX(g), as (i) it related to the conservation of exhaustible natural resources as set out in Art. XX(g) and (ii) it now met the conditions of the chapeau of Art. XX when applied in a manner that no longer constituted a means of arbitrary discrimination as a result of (i) the serious, good faith efforts made by the United States to negotiate an international agreement and (ii) the new measure allowing "sufficient flexibility" by requiring that other Members' programmes simply be "comparable in effectiveness" to the US programme, as opposed to the previous standard that they be "essentially the same". In this regard, the Appellate Body rejected Malaysia's contention and agreed with the Panel that the United States had only an obligation to make best efforts to negotiate an international agreement regarding the protection of sea turtles, not an obligation to actually conclude such an agreement because all that was required of the United States to avoid "arbitrary or unjustifiable discrimination" under the chapeau was to provide all exporting countries "similar opportunities to negotiate" an international agreement. The Appellate Body noted that "so long as such comparable efforts are made, it is more likely that 'arbitrary or unjustifiable discrimination' will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries".

3. OTHER ISSUES

- Terms of reference (DSU Art. 21.5 panels): Having concluded that when the issue concerns the consistency of a new measure "taken to comply", the task of a DSU Art. 21.5 panel "is to consider that new measure in its totality", which requires a consideration of both the measure itself and its application, [...] the Appellate Body stated that "the task of the Panel was to determine whether Section 609 has been applied by the United States, through the Revised Guidelines, either on their face, or in their application, in a manner that constitutes 'arbitrary or unjustifiable discrimination'". The Appellate Body found that the Panel correctly fulfilled its mandate by examining the measure in the light of the relevant provisions of the GATT and by correctly using and relying on the reasoning in the original Appellate Body report.

¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*

² The Appellate Body noted that the measure at issue in this dispute consists of three elements: (1) Section 609; (2) the Revised Guidelines for the Implementation of Section 609; and (3) the application of both Section 609 and the Revised Guidelines in the practice of the United States.