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An Analysis of Shrimp/Turtle II: The WTO Makes Room for Environmental Trade Restrictions Chris Wold, Associate Professor & Randi Black, IELP Law Clerk August 15, 2005 In Shrimp/Turtle I, ¹ the WTO's Appellate Body declared U. S. shrimp/turtle regulations in violation of its GATT obligations, because the U. S. required all foreign nations to have sea turtle conservation programs that were "essentially the same" as the U. S. regulations, including mandatory use of Turtle Excluder Devices (TEDs). The United States also failed to make good faith efforts to negotiate an international agreement to protect sea turtles with Southeast Asian countries, as the U. S. Congress had directed, although it concluded such an agreement with countries in the Western Hemisphere. ² Under those earlier regulations ("Original Guidelines"), the United States imposed import restrictions on shrimp caught without using TEDs. In light of this ruling, the United States revised its regulations (the "Revised Guidelines") to require sea turtle conservation programs that were "comparable in effectiveness" to the U. S. program. It also entered into negotiations to protect sea turtles with Southeast Asian countries. When Malaysia challenged these efforts as inadequate in Shrimp/Turtle II, ³ the Appellate Body upheld the Revised Guidelines. In so ruling, the Appellate Body opened the door for trade restrictions to protect natural resources. Background The United States adopted Section 609 of Public Law 101-162, an amendment to the Endangered Species Act, to effectuate the country's policy to protect sea turtles from incidental mortality during shrimp harvesting. Section 609 requires shrimp harvesting nations to apply for and receive "certification" consistent with guidelines promulgated by the U. S. State Department prior

to importing shrimp to the United States. Section 609 bans the importation of shrimp until the State Department, on behalf of the President, certifies that a (1) harvesting nation has a regulatory program governing the incidental taking of sea turtles in the course of shrimp harvesting that is comparable to that of the United States, and (2) the average rate of incidental taking of sea turtles by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by U. S. shrimp vessels. In the alternative, a harvesting nation could show that its particular fishing environment does not pose a threat to the incidental taking of such sea turtles in the course of such harvesting. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (decided Oct. 12, 1998) (adopted Nov. 6, 1998), reprinted in 38 I. L. M. 121 (1999). Report of the Panel, WT/DS58/R (decided May 15, 1998) (adopted as modified by the Appellate Body Nov. 6, 1998), reprinted in 37 I. L. M. 834 (1998) (Shrimp/Turtle I).² See Chris Wold & Glenn Fullilove, Analysis of the WTO Appellate Body's Decision in Shrimp/Turtle (February 24, 2000), at: <http://www.iclark.edu/org/ielp/turtlebriefing.html>.³ United States—Import Prohibition of Certain Shrimp and Shrimp Products, Resource to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (decided Oct. 22, 2001) (adopted Nov. 21, 2001), reprinted in 41 I. L. M. 149 (2002). Report of the Panel, WT/DS58/RW (decided June 15, 2001) (adopted as modified by the Appellate Body Nov. 21, 2001) (Shrimp/Turtle II).¹ The Original Guidelines adopted by the State Department for implementing Section 609 allowed a harvesting nation to show it had a regulatory program comparable to that of the United States

only if it required the use of TEDs approved by the U. S. National Marine Fisheries Service (NMFS) and proved that it had a credible enforcement effort that includes monitoring for compliance and appropriate sanctions. In practice, however, the U. S. State Department certified harvesting nations - and permitted those nations to export shrimp to the United States - only after they proved that they required the use of TEDs. In *Shrimp/Turtle I*, a dispute resolution panel and the Appellate Body ruled that Section 609 and the Original Guidelines violated Article XI of the GATT because they barred the importation of goods. Article XI prohibits restrictions on the importation of goods. They also ruled that the Original Guidelines could not be justified under the environmental exceptions of Article XX of the GATT. To meet the requirements of Article XX, a measure must be consistent with Article XX's two parts. The first part of Article XX includes a number of specific types of measures that may be exempted from the requirements of the GATT. These include measures necessary to protect human, animal, and plant life or health and measures relating to the conservation of exhaustible natural resources. The second part of Article XX, known as the preamble or chapeau, states that a measure inconsistent with the GATT may be permissible, provided that the measure does not constitute (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or (2) a disguised restriction on international trade. The Appellate Body in *Shrimp/Turtle I* found the Original Guidelines to Section 609 inconsistent with the preamble to Article XX, because the State Department imposed an inflexible requirement that all countries adopt "essentially the same" regulations. According to the Appellate Body, such an inflexible

requirement constituted "arbitrary and unjustifiable discrimination" inconsistent with Article XX, because Article XX requires that differing conditions among countries be accounted for. In so ruling, the Appellate Body suggested that trade restrictions could be found consistent with Article XX if they were more flexible and took into account conditions prevailing in various exporting countries. However, a rule that treats all countries the same would constitute arbitrary and unjustifiable discrimination within the meaning of Article XX. Moreover, Section 609 directs the Department of State to initiate negotiations with all shrimp harvesting nations to develop treaties to protect sea turtles. Whereas the United States completed an international agreement with Caribbean and Latin American countries, it failed to make good faith efforts to negotiate an agreement with Asian countries. The panel and Appellate Body found the U. S. application of Section 609 (but not Section 609 itself) to constitute arbitrary and unjustifiable discrimination within the meaning of Article XX. Accordingly, the United States amended the Original Guidelines. The Revised Guidelines still require the use of TEDs and demonstration of a credible enforcement effort. However, the Revised Guidelines differ from the Original Guidelines by requiring the State Department to "take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations."⁴ The Revised Guidelines also require the State Department to take into account other efforts that harvesting nations employ to protect sea turtles, such as national enforcement and compliance programs and national programs for conservation of turtle habitat. Despite these changes, Malaysia challenged

the Revised Guidelines as inconsistent with the GATT Article XX and the Appellate Body's interpretation of Article XX in Shrimp/Turtle I. Malaysia appealed under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), which permits expedited proceedings to determine the consistency of actions taken pursuant to a previous ruling. Flexibility of the Revised Guidelines Both the panel and the Appellate Body in Shrimp/Turtle II agreed that the Revised Guidelines permitted sufficient flexibility to meet the requirements of the chapeau of Article XX (that Section 609 and the guidelines fell within the specific exception for measures relating to the conservation of exhaustible natural resources was never in serious question). The Revised Guidelines allow programs and enforcement mechanisms that are "comparable in effectiveness" because they take into account the specific conditions in different shrimp harvesting nations. For example, the Revised Guidelines do not require every shrimp harvesting nation, as a condition of export to the United States, to use the same TEDs and enforcement measures used in the United States. The Appellate Body emphasized the important difference between conditioning market access on the adoption of essentially the same program, as was the case under the Original Guidelines, and conditioning market access on the adoption of a program comparable in effectiveness to the domestic regulatory program, as under the Revised Guidelines:

Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve

the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid “ arbitrary or unjustifiable discrimination. ”⁵ Malaysia insisted, nonetheless, that the Revised Guidelines were not flexible enough because they did not explicitly provide for the specific conditions prevailing in Malaysia. The Appellate Body rejected Malaysia’s argument, because the Revised Guidelines permitted the State Department to take into account any differences that may occur in Malaysia and any other shrimp harvesting nation. The Guidelines themselves did not need to incorporate any and all differences in all countries; they only need to permit the relevant agency to take those differences ^{4 5 61} Federal Register 36946 (July 8, 1999).

Shrimp/Turtle II, para. 144 (emphasis in original). ³ into account so that decisions are based on the conditions in each individual harvesting nation/exporting Member. ⁶ International Negotiations The Appellate Body in Shrimp/Turtle II also clarified that countries imposing unilateral trade sanctions “ are expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. ”⁷ Thus, the United States could not expend significant resources on negotiations with some countries and few resources on negotiations with others. According to the Appellate Body, “ negotiations must be comparable in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international

agreement. "8 Moreover, the United States was not required, as Malaysia insisted, to conclude an agreement with countries exporting shrimp to the United States. Accepting Malaysia's argument would give the other party to the negotiation a " veto" power. 9 Because the United States had, among other things, contributed to negotiations that led to the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, the Panel and Appellate Body concluded that the United States had indeed undertaken comparable negotiations to those concluded with countries of the western hemisphere. 10 These U. S. efforts differed significantly from those undertaken prior to Shrimp/Turtle I, where U. S. efforts were found to constitute " arbitrary or unjustifiable discrimination. " There, the United States failed even to pursue negotiations with Southeast Asian countries while successfully concluding an agreement with countries from the Caribbean/Western Atlantic Region. Implications of the Decision Although Shrimp/Turtle I appeared to create overwhelmingly difficult hurdles for imposing trade restrictions to protect the environment, Shrimp/Turtle II shows that such hurdles are not insurmountable. A country may impose trade sanctions and avoid a finding of " arbitrary or unjustifiable discrimination" under the chapeau of Article XX if it (1) first engages in comparable, good faith efforts to negotiate an agreement relating to the conduct leading to trade sanctions and (2) designs and applies its laws and regulations to be flexible enough to account for the specific conditions within individual exporting nations. Of course, the country imposing such unilateral measures must also show that the measure fits within the range of policies

enumerated in the specific exceptions of Article XX. In the case of the Section 609 and the Revised Guidelines, the United States was able to show that these measures related to the conservation of exhaustible natural resources and required its own shrimpers to comply with rules similar to those required of foreign shrimpers. 6 7 Id. at paras. 146-149. Id. at para. 122. 8 Id. at para. 122 (emphasis in original). 9 Id. at para. 123. 10 Id. at paras. 131-132. 4 Beyond articulating a test for achieving consistency with Article XX, the decision in Shrimp/Turtle II is also important for specifically permitting unilateral trade restrictions and trade restrictions based on processes and production methods (PPMs). With respect to unilateral measures, Malaysia argued that even flexible measures could not be consistent with the chapeau of Article XX if they required exporting nations to meet unilaterally prescribed standards and conditions. The Appellate Body emphasized that “ conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions . . . of Article XX. ”¹¹ In addition, environmentalists and academics have vigorously debated whether or not the WTO would or should permit importing countries to distinguish products based on the way they are produced. Environmentalists believe that distinctions based on PPMs, such as harvesting methods or emission standards for pollutants, are particularly effective strategies for environmental protection. The Tuna/Dolphin¹² decisions and Shrimp/Turtle I, cases in which the United States imposed trade restrictions based on the way tuna and shrimp were harvested, made

clear that distinctions based on PPMs violated Article XI of the GATT. These and other rulings require distinctions to be based on the product itself, not the way the product is produced. For example, asbestos fibers could be taxed or regulated differently from cellulose fibers, even if the fibers are used for the same purposes, because the products have different physical characteristics. Shrimp caught using TEDs, however, would exhibit the same physical characteristics as shrimp caught using other harvesting techniques and thus could not be taxed or regulated differently. These cases also seemed to suggest that PPM-based distinctions may not be justifiable under the exceptions to the GATT in Article XX. Shrimp/Turtle II makes clear that PPM-based distinctions are permissible under the exceptions to the GATT in Article XX, provided that the conditions of the enumerated exception and the chapeau are met. 11 12 *Id.* at para. 137. United States—Restrictions on Imports of Tuna, GATT Panel Report, DS21/R (Sept. 3, 1991) (unadopted), reprinted in 30 *I. L. M.* 1594 (1991) (Tuna/Dolphin I); United States—Restrictions on Imports of Tuna, GATT Panel Report, DS29/R (June 16, 1994) (unadopted), reprinted in 33 *I. L. M.* 839 (1994) (Tuna/Dolphin II). 5