Shrimp

Student Materials

- Decided by Appellate Body of the World Trade Organization (WTO) in October 1998
- Key topics: trade (major obligations, major exception), environmental protection (interaction with other areas of law)

Learning Objectives

- Understand and apply:
  - WTO rules on market access
  - WTO rules on protecting competing values

- Analyze and evaluate:
  - why the WTO agreed with the US that shrimp are an "exhaustible natural resources"
  - why the US justified its domestic rules using this strategy, rather than invoking rules about "animal or plant life or health"
  - the broader implications of defining animals as "exhaustible natural resources"

Background Information

At the time of this case, all sea turtles were protected under US law as endangered or threatened species. One major threat to sea turtles came from shrimp boats, which would sometimes capture turtles in the fine mesh nets used to harvest shrimp from the ocean. In the 1980s, researchers developed a new technology called turtle excluder devices ("TEDs"). These TEDs could be installed in shrimp nets, allowing turtles to escape from nets with a minimal loss of shrimp. The US government passed a series of laws that required the use of TEDs for shrimp harvesting domestically, and then restricted imported shrimp. As described by the WTO in May 1998:

> In 1989, the United States enacted Section 609[, which] calls upon the US Secretary of State … to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries

> which are engaged in commercial fishing operations likely to affect adversely sea turtles. Section 609 further provides that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless … the harvesting nation has a regulatory programme … comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.[1]

In 1996, a group of countries that exported shrimp—including India, Malaysia, Pakistan, and Thailand—filed a dispute at the WTO, alleging that the US had violated numerous provisions of the General Agreement on Tariffs and Trade (GATT). The US argued that its laws fell under the WTO's general exceptions, contained in Article XX of the GATT, and hence complied with WTO rules. This case became an important test of how the newly formed WTO would balance free trade against other competing values, like environmental protection. It also became an important statement of international environmental law for living resources.

Relevant Legal Texts

General Agreement on Tariffs and Trade (1947)

Article XX

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …:

(b) necessary to protect human, animal or plant life or health; …

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

WTO Agreement (1994)

Preamble

[1] WTO, *US—Shrimps*, Panel Report of 15 May 1998, para. 2.7.

The Parties to this Agreement [seek to expand] … the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns …

Report[2]

Step I—Is the US policy justified under Article XX(g)?

The Appellate Body (AB) began by asking whether the US policy was justified under GATT Article XX(g). This required the AB to interpret and apply three key phrases. First, the AB examined the phrase "exhaustible natural resources."

> We begin with the threshold question of whether Section 609 is a measure concerned with the conservation of "exhaustible natural resources" within the meaning of Article XX(g) ... India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources." In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed." Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous. They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources ...
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> We are not convinced by these arguments. Textually, Article XX(g) is not limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and

[2] As mentioned in chapter 6, legal rulings by the WTO's Dispute Settlement System are referred to as "reports."

extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.

The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment ... The WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement ... explicitly acknowledges "the objective of sustainable development" ...

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources ...

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources ... measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).

We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed [by] the Convention on International Trade in Endangered Species of Wild Fauna and Flora [as] "threatened with extinction" ... The sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

Second, the AB examined the phrase "relating to."

> Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources ...
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> In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles. Section [609] imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen ... There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of conserving sea turtles. First, Section 609 ... excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as pandalid shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries. The harvesting of such shrimp clearly does not affect sea turtles. Second, [Section 609] exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.
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> There are two types of certification for countries under Section [609]. First, ... a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.
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> The second type of certification [requires that] a country wishing to export shrimp to the United States [must] adopt a regulatory program that is comparable to that of the United States program and [have] a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. This is, essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles. This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is undisputed among the participants, and recognized

by the experts consulted by the Panel, that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality. Moreover, the Panel did "not question ... the fact generally acknowledged by the experts that TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles."

In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp ... [It] is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. 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 ...

In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994 ...

Third, the AB examined the phrase "restrictions on domestic production or consumption."

In this case, we need to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught by United States shrimp trawl vessels ... Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations ... requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls. These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles", with certain limited exceptions. Penalties ... include civil and criminal sanctions. The United States government currently relies on monetary sanctions and civil penalties for enforcement. The government has the ability to seize shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations. We believe that, in principle, Section 609 is an even-handed measure.

Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g) ...

By interpreting and applying these key phrases, the Appellate Body concluded that the US policy met the requirements of Article XX(g).

Step II—Is the US policy justified under the Article XX chapeau?

The AB then examined whether the US policy met the requirements of the GATT Article XX *chapeau*, which is the introductory text of the treaty provision. The AB began by describing key phrases from the *chapeau*.

> Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses—the "*chapeau*"—of Article XX ... We turn, hence, to the task of appraising Section 609, and specifically the manner in which it is applied under the *chapeau* of Article XX ...
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> We [begin] with an examination of the ordinary meaning of the words of the *chapeau*. The precise language of the *chapeau* requires that a measure not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade". There are three standards contained in the *chapeau*: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination* ... Second, the discrimination must be *arbitrary* or *unjustifiable* in character ... Third, this discrimination must occur *between countries where the same conditions prevail* ...

The Appellate Body then noted that when interpreting GATT Article XX, the WTO must balance the competing interests of states. The AB has historically interpreted the Article XX *chapeau* as a way to limit the possible abuse of Article XX.

> A balance must be struck between the right of a member to invoke an exception under Article XX and the duty of that same member to respect the treaty rights of the other members. To permit one

> member to abuse or misuse its right to invoke an exception would be effectively to allow that member to degrade its own treaty obligations as well as to devalue the treaty rights of other members. If the abuse or misuse is sufficiently grave or extensive, the member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other members. The *chapeau* was installed at the head of the list of ... Article XX to prevent such far-reaching consequences ...
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> The task of interpreting and applying the *chapeau* is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of the other members under varying substantive provisions ... so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the members themselves in that Agreement. The location of the line of equilibrium, as expressed in the *chapeau*, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

The Appellate Body then indicated that it had concerns about how the US applied its domestic law. That is, the AB looked not only at the law passed by the US Congress, but also how that law was implemented by government agencies (including the 1996 Guidelines). The AB notes that if a law "is actually applied in an arbitrary or unjustifiable manner" then a state's trade restriction is not excused under Article XX.

> With these general considerations in mind, we address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g). We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX ... [when] a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner ...

The Appellate Body highlighted several reasons why it believed that the US policy was "unjustifiable discrimination between countries where the same conditions prevail."

We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting members*, if they wish to exercise their GATT rights, to adopt *essentially the same policy* (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers ... Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries. However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy ...

According to the 1996 Guidelines [for Section 609], certification "shall be made" ... if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States. Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States program. Furthermore, the harvesting country must have in place a "credible enforcement effort". The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an exclusive manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the only way that a harvesting nation can be certified ... Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles", in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.

The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be

certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account ...

The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO member to use an economic embargo to require other members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that member's territory, without taking into consideration different conditions which may occur in the territories of those other members.

Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those members may be differently situated. We believe 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.

Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is 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 ...

The application of Section 609 ... also resulted in other differential treatment among various countries desiring certification ... Fourteen countries in the wider Caribbean/western Atlantic region ... had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs ... All countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs ...

The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban ...

Differing treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries. Far greater efforts to transfer that technology successfully were made to certain exporting countries---basically the fourteen wider Caribbean/western Atlantic countries cited earlier---than to other exporting countries ... The level of these efforts is probably related to the length of the "phase-in" periods granted---the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries ...

The Appellate Body then highlighted several reasons why it believed that the US policy was "arbitrary discrimination between countries where the same conditions prevail."

> We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification ... adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the *chapeau* ...
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> [There is no] transparent, predictable certification process that is followed by the competent United States government officials ... There is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on [certification] applications ...
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> The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of members. There appears to be no way that exporting members can be certain whether the terms of Section 609 ... are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, 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 which are granted certification ...

Because of these concerns, the Appellate Body concluded that the US policy is not justified under the Article XX *chapeau.*

> We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between

> countries where the same conditions prevail, contrary to the requirements of the *chapeau* of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the *chapeau* of Article XX.
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Finally, the Appellate Body briefly summarized its findings. Note that the AB emphasized what was "not decided" in its Report.

> 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 no 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.
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> 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, ... 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 ... affords to measures which serve certain recognized, legitimate environmental purposes ...