

Editor's Note

On 12 October 2000, Malaysia requested the initiation of a 21:5 Panel procedure to review the implementation of the Shrimp-Turtle ruling by the United States. In order to implement the original report, the United States had revised its guidelines to introduce greater flexibility in considering the comparability of foreign programs with the US system and to elaborate a timetable and procedures for the certification process, in order to increase the transparency and predictability of the procedures and to afford due process. The U.S. was also engaged in efforts to negotiate an international agreement regarding the protection of sea turtles and had offered and was providing technical assistance to foreign countries. Malaysia argued that the measures were still not in compliance with the GATT and still imposed U.S. policy extrajurisdictionally on other countries, and that pending the conclusion of an international agreement the U.S. was not entitled to impose any import restrictions but that they had to be removed completely. The United States does not contest that the current measures fall under Art. XI, but argues that they are justified under Art. XX(g) GATT and are in compliance with the original recommendations of the Appellate Body.

The Panel observes that, since the US system was in itself not substantially modified it was still, like the system analysed by the original Appellate Body report, “provisionally justified” under Art. XX(g). The question therefore again becomes whether the tests of the chapeau of Art. XX can be passed. The Panel states that the U.S. has to show a *prima facie* case that its measures are justified under Art. XX, then the burden of proof would shift to Malaysia to show that the measure is not justified.

The panel interprets the Appellate Body's report as requiring that the U.S. had to engage in negotiations with the countries concerned, and that, in doing so, it had to take into account the particular circumstances of every exporting country. What is required by the AB, says the panel, can be formulated as follows:

“(a) *the United States had to take the initiative of negotiations with the appellees, having already negotiated with other harvesting countries (Caribbean and Western Atlantic countries);*

- (b) *the negotiations had to be with all interested parties ("across-the-board") and aimed at establishing consensual means of protection and conservation of endangered seaturtles;*
- (c) *the United States had to make serious efforts in good faith to negotiate; and*
- (d) *serious efforts in good faith had to take place before the enforcement of a unilaterally designed import prohibition.” (at 5.66)*

The Panel analyses the efforts undertaken by the US and notes that negotiations have led to a “South East Asian Memorandum Of Understanding.” A “Conservation and Management Plan” must still be negotiated in this context to bring actual conservation measures in effect. “(A)t least until the Conservation and Management Plan to be attached to the MOU is completed,” says the panel, “the United States' efforts should be judged on the basis of its active participation and its financial support to the negotiations, as well as on the basis of its previous efforts since 1998, having regard to the likelihood of a conclusion of the negotiations in the course of 2001.”

Even though the negotiations may not necessarily lead to the conclusion of an agreement, the panel concludes that the US had, at the time of its report, undertaken serious, good faith, across-the-board efforts to come to an international agreement, and that it had therefore made a *prima facie* case that its current system was justified under Art. XX. Malaysia had not provided sufficient evidence to rebut this.

Malaysia also complained about some other aspects of the current US policy. Here too, the panel found that the US had shown *prima facie* justifications and that these had not been sufficiently rebutted by Malaysia.

At the time of writing of this note (July 2001) it remains unclear whether either of the parties will appeal the panel’s decision to the Appellate Body.