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GATT Article XX Exceptions

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GATT Article XX Exceptions - Purpose

- **Allow WTO members to adopt and maintain measures that aim to promote or protect important societal values and interests**
- **Even if the measures are inconsistent with other rules of the GATT (and are hence trade restrictive)**
- **Allow WTO members, under specific conditions, to give priority to certain societal values and interests over trade liberalisation, market access and / or discrimination rules**

GATT Article XX Exceptions - Text

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:

- (a) **necessary to protect public morals;**
- (b) **necessary to protect human, animal or plant life or health;**
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement [...]
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) **relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;**
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement [...]
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials [...]
- (j) essential to the acquisition or distribution of products in general or local short supply [...]

GATS Article XIV Exceptions - Text

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Application of GATT Article XX - Nature

- Defense: to be invoked ONLY when a measure has been found to be inconsistent with any provision of the GATT (e.g. Articles I, III, XI)
- Seeks a balance between affirmative commitments and the exceptions (as opposed to narrow interpretation of Article XX)

Application of GATT Article XX - Scope

- Limited application - Exhaustive list of Article XX
- Applicable to any measure inconsistent with the GATT
- Jurisdictional limitation (extra-territorial) - Sufficient nexus (US-Shrimp);
- What kind of measures – unilaterally prescribed policies? (US-Shrimp)

Application of GATT Article XX - Scope

- Can it be invoked to justify breaches of other WTO Agreements?
- In China – Publications, China invoked Article XX(a) to justify an exception to a violation of China's accession protocol. AB held that it was possible to apply Article XX to an agreement other than the GATT if it is incorporated (see China Accession Protocol, Article 5.1)
- In China – Raw Materials, Panel held that GATT exceptions can only be applied to violations of the GATT unless specifically incorporated into a non-GATT instrument.

Application of GATT Article XX - Scope

- What about the TBT Agreement?

‘Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement).’ (AB, China – Raw Materials, citing Clove Cigarettes).

Here is what Clove Cigarettes held:

‘The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.’

‘Finally, we observe that the TBT Agreement does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.’

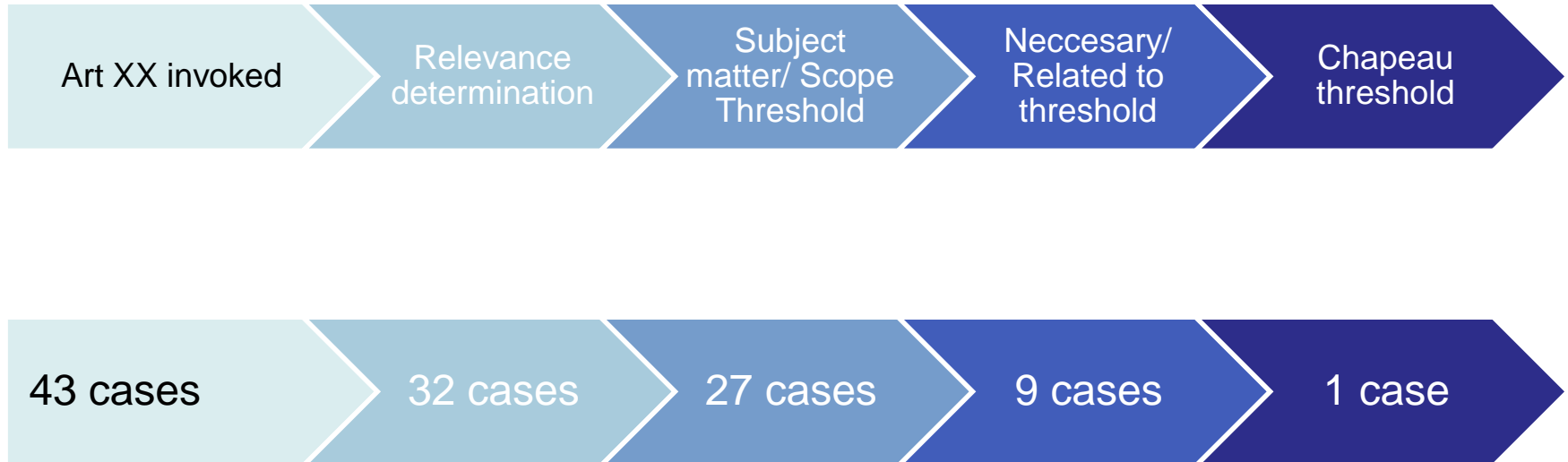
Application of GATT Article XX

TWO-TIER TEST

1. Provisional justification – Article XX (a) to (j)
 - A. Policy objective of the measure
 - B. Necessary for or related to

2. Chapeau of Article XX – the manner in which the measure is applied must not be in a: ‘a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’

Application of GATT Article XX



Important Cases

EC - Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)

United States - Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)

United States - Standards for Reformulated and Conventional Gasoline (US-Gasoline)

Brazil - Measures Affecting Imports of Retreaded Tyres (Brazil-Retreaded Tyres)

United States - Measures Affecting the Production and Sale of Clove Cigarettes (US-Clove Cigarettes)

EC - Measures Prohibiting the Importation and Marketing of Seal Products (EC-Seals)

China - Measures Related to the Exportation of Various Raw Materials (China-Raw Materials)

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)

China – Publications and Audiovisual Products (China-Publications)

Provisional justification – Article XX(b)

‘necessary to protect human, animal or plant life or health’

Policy objective of the measure

= protection of health/life of animals or plants

a specific risk to life/health must be established (Panel, Brazil – Retreaded Tyres) ‘accumulation of waste tyres creates a risk of mosquito-borne diseases such as dengue and yellow fever’

In China – Raw Materials, Panel held that China was unable to show that restrictions on exports were part of a comprehensive environmental protection framework

Provisional justification – Article XX(b)

‘necessary to protect human, animal or plant life or health’

Necessary to fulfil the policy objective

= weighing and balancing process of relevant factors

- importance of interests/values at stake
- extent of contribution to the achievement of the measure’s objective
- trade restrictiveness

If found to be necessary preliminarily, then

- are there reasonably available alternatives that are less trade restrictive – complainant to identify (AB Brazil – Retreaded Tyres)

Provisional justification – Article XX(g)

‘relating to the conservation of exhaustible natural resources’

Policy objectives

- Evolutionary interpretation of ‘exhaustible natural resources’

Relating to the conservation of exhaustible natural resources

= close and genuine relationship of ends and means (AB, US-Shrimp)

= ‘reasonably related’ to the ends

‘if such measures are made effective in conjunction with restrictions on domestic production or consumption’

- Even handedness requirements = no need for identical conservation measures applying to imported/domestic products

Provisional justification – Article XX(a)

‘necessary to protect public morals’

Policy objective of measure = protection of public morals

- **Ordinary meaning of term** "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."
(Panel, US-Gambling)
- **Deferential interpretation** - can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values ... [WTO members] have the right to determine the level of protection that they consider appropriate ... Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values. (Panel, US – Gambling)

Provisional justification – Article XX(a)

‘necessary to protect public morals’

Necessary to protect public morals?

- Measure is necessary to fulfil that policy objective = ‘weighing and balancing’ process of relevant factors:
 - Relative importance of values/interests pursued by the challenged measure (Panel, US – Gambling; AB, China – Publications)
 - Extent of contribution of the challenged measure to the realisation of the ends pursued
 - Restrictive impact of the challenged measure on international commerce

If preliminary conclusion that measure is ‘necessary’:

- Comparison with (less trade-restrictive) ‘reasonably available alternatives’
- Complainant to identify (AB, US-Gambling)
- CHOSEN LEVEL OF PROTECTION cannot be challenged – only whether measure is necessary to achieve that level of protection
- Alternative measure is not reasonably available if: (i) would not achieve desired level of protection; (ii) merely theoretical in nature; (iii) imposes undue burden (AB, US-Gambling)

The Chapeau – Brazil-Retreaded Tyres

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

Source of discrimination = MERCOSUR exemption

Discrimination = ‘arbitrary or unjustifiable’ when explained by a rationale that bears no relationship to the objective of the measure or even goes against that objective (AB, Brazil – Retreaded Tyres)

Distinction between ‘effects’ of discrimination and ‘cause or rationale’ of discrimination.

The Chapeau – US-Shrimp

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

Different from Article I/III GATT – does not prohibit discrimination per se, but only ‘arbitrary’ and/or ‘unjustifiable’ discrimination (AB, US-Shrimp)

Source of discrimination = rigidity and inflexibility in the application of a measure without any regard for differences in conditions among WTO members qualifies as arbitrary and unjustifiable

Expanded notion of discrimination – not only in countries where the same conditions prevail are treated differently, but also when the same measure is applied to countries where different conditions prevail (AB, US-Shrimp)

The Chapeau – EU-Seals

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

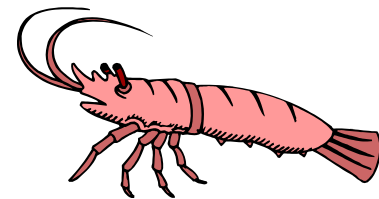
The IC, MRM and travelers exception in the EU seals regime ‘undermine the objectives of the measure.’

the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from ‘commercial’ hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare

The Shrimp-Turtle Dispute

OVERVIEW

- US measure obligated an import ban on shrimp from countries failing to adopt a regulatory program protecting against the incidental taking of sea turtles in shrimping nets.
- Developing countries challenged the US measure under the WTO DSU, *inter alia*, as a quantitative restriction on imports in violation of Article XI of the GATT 1994.
- The complaining country must demonstrate that there is a violation of the GATT 1994, then the burden shifts to the respondent to prove that the violation is permitted under the GATT 1994 exceptions.



The Shrimp-Turtle Dispute

PROCEDURAL HISTORY

Oct 1996: India, Malaysia, Pakistan and Thailand request consultations with US under DSU.

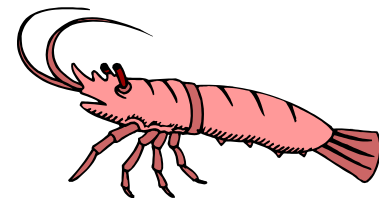
Apr 1998: Panel Report issued against US measure.

Oct 1998: Appellate Body (AB) reverses in part and orders US measure must be made compliant with AB Report.

Oct 2000: Malaysia request a Panel on compliance issues.

Jun 2001: Panel Report issued against Malaysia.

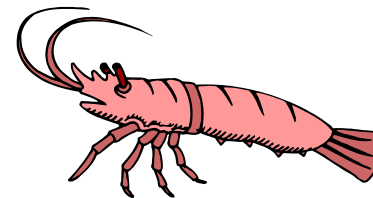
Oct 2001: AB upholds the Panel decision.



The Shrimp-Turtle Dispute

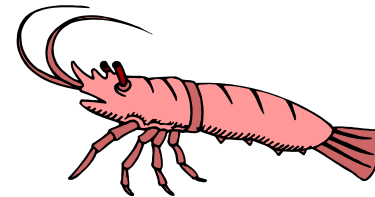
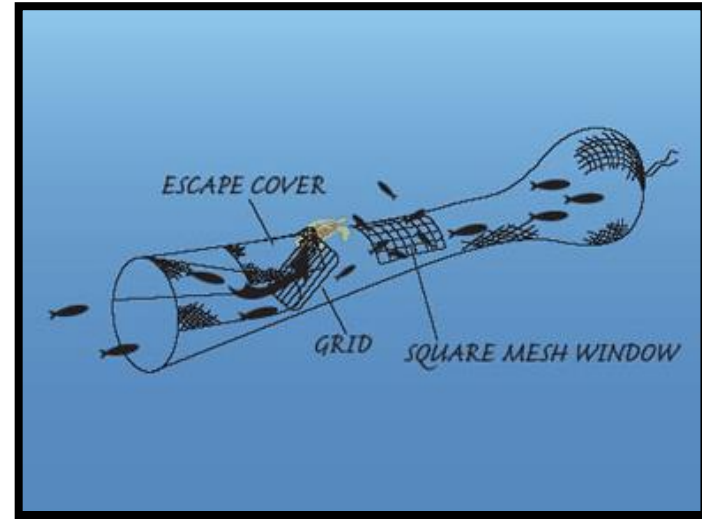
FACTUAL BACKGROUND

- In 1973, the US adopted the Endangered Species Act, which declared all sea turtles as endangered or threatened.
- Regulations developed in order achieve the objectives of this Act.
- Regulation 609 was interpreted by the US Court of International Trade as requiring a ban on shrimp from countries not certified by the US as having a regulatory program in place that was comparable to that of the US.
- The US regulations required all shrimp trawlers to both restrict tow times, and install turtle excluder devices (TEDs), on their nets when shrimping in waters where sea turtles live.



The Shrimp-Turtle Dispute

TURTLE-EXCLUDER DEVICES



The Shrimp-Turtle Dispute

WTO RULES UNDER THE GATT 1994

Article XI: Prohibition on quantitative restrictions on imports

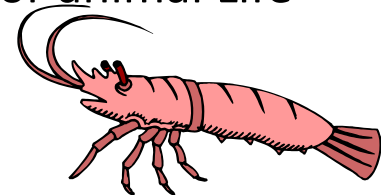
Article I : Most-favored nation principle – “like” products and production and processing methods (PPMs)

Article XIII: Non-discrimination on quantitative restrictions on imports

Article XX “chapeau”: Exception must not be based on arbitrary or unjustified measures

Article XX(g): Exception to violations based on protection of exhaustible natural resources

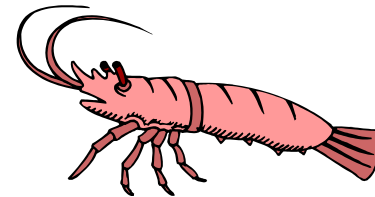
Article XX(b): Exception based on protection of human or animal Life



The Shrimp-Turtle Dispute

SYSTEMIC ISSUES

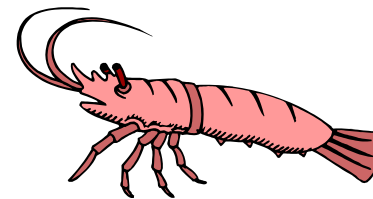
- Can one country tell another what its environmental regulations should be (are unilateral trade measures permissible to protect the environment)?
- Do trade rules permit action to be taken against the method used to produce goods (rather than the quality of the goods themselves)?
- Can the DSU accept and consider unsolicited amicus briefs from non-parties?



The Shrimp-Turtle Dispute

LEGAL PRECEDENT – TUNA-DOLPHIN

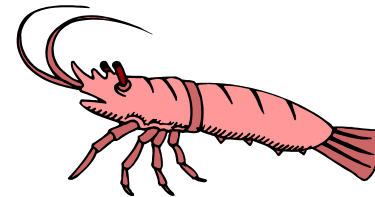
- In 1991 and 1994, Mexico brought an action against the US under the pre-WTO GATT 1947.
- The US had regulations requiring the government to embargo all imports of tuna from countries that could not prove to US authorities that it meets the dolphin protection standards set out in US law.
- In a report not adopted, the body held that the US could not embargo imports of tuna from Mexico simply because the methods of production did not satisfy US regulations.



The Shrimp-Turtle Dispute

CLAIMANTS POSITION

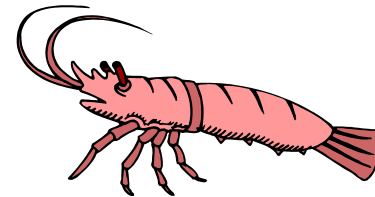
- Claimed that Regulation 609 was an import ban and a clear violation of Article XI that negatively impacted the domestic shrimp industry of the claimant countries.
- Claimed that the US program was not the only way to protect sea turtles and that each claimant country had their own measures in place to protect sea turtles (US imposing ban for non-conservation reasons – masked protectionism).



The Shrimp-Turtle Dispute

CLAIMANTS POSITION

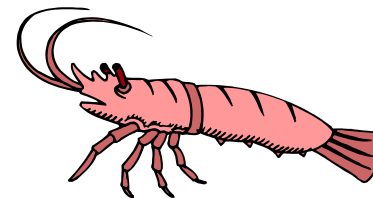
- Claimed that the US was unilaterally and illegally imposing their environmental laws upon them (Not a shared global resource because limited migration and hence no jurisdiction).
- Claimed that the Regulation 609 import ban was applied in a discriminatory manner with different phase-in and certification periods (Article XIII violation because of country-by-country certification process).
- Claimed that MFN status requires that “like” products be treated equally and that the US program impermissible tried to claim “non-like” products based on PPMs (Shrimp are shrimp).



The Shrimp-Turtle Dispute

RESPONDANTS POSITION

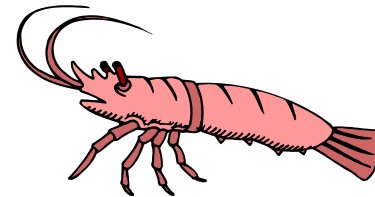
- US did not refute the claim that the import ban was a violation of XI, but argued that the ban was justified by the Article XX exceptions.
- US argued that sea turtles were an exhaustible natural resource, or alternatively, that the measure was for the purpose of protecting animal life (Article XX(g) and (b)).



The Shrimp-Turtle Dispute

RESPONDANTS POSITION

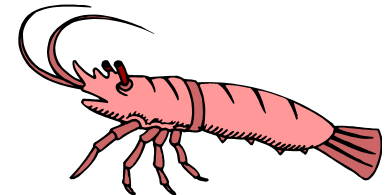
- US claimed that they were not applying their law extraterritorially, but applying their law domestically (At the same time, they claimed that sea turtles are a shared global resource and that they had the right to help protect them).
- Thus, the US felt it could take unilateral action to protect sea turtles by banning imports of shrimp from countries that the US felt did not adequately protect the turtles.
- US argued that the ban was not a violation of the MFN principle because the shrimp were “not-like” products due to different PPMs.



The Shrimp-Turtle Dispute

FIRST PANEL REPORT

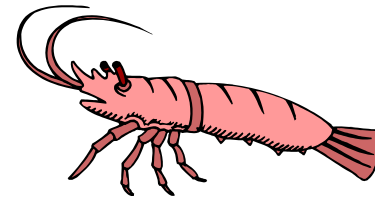
- The panel held that the US had violated its obligations under Article XI of the GATT 1994 (Judicial economy prevented the panel's need to address the Article I and Article XIII claims).
- The US claimed, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US unless the harvesting nation was certified to have a regulatory programme and an incidental turtle mortality rate comparable to that of US.
- The panel rejected the US defense that its import ban could be justified under Article XX(g) or XX(b) of the GATT 1994.



The Shrimp-Turtle Dispute

FIRST PANEL REPORT

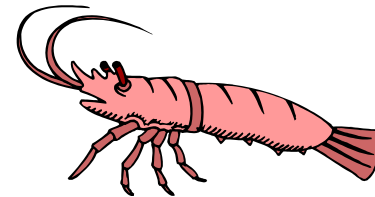
- In a **top-down** analysis of Article XX, the panel held that the specific exceptions under Article XX did not apply because **ANY** measure that does not embrace the multilateral approach to the WTO trading system would be invalid under the “chapeau” of Article XX.
- The panel further held that US imposed a regulatory system in an unjustifiable manner by requiring countries to implement a program, in fact, that was “essentially the same” as that of the US even though the regulation says “comparable.”



The Shrimp-Turtle Dispute

FIRST APPELLATE REPORT

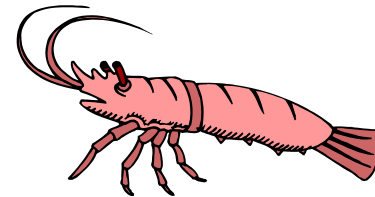
- The AB reversed the panel decision in part, and rejected the panels top-down analysis of Article XX and held that trade restrictive measures could be valid under the specific exceptions of Article XX.
- Held that sea turtles could be considered an exhaustible natural resource



The Shrimp-Turtle Dispute

FIRST APPELLATE REPORT

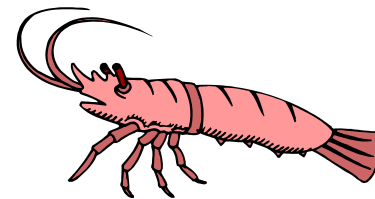
- However, the AB held that even though the US measure satisfied the Article XX(g) exception, it could not be justified under the “chapeau” of Article XX because the requirements of US regulatory system was arbitrary and unjustifiable.
- AB found that US had discriminated between WTO members (Article XIII violation). It provided longer transition periods, financial and technical assistance to some Countries in the Western Hemisphere. India, Malaysia, Pakistan and Thailand were denied this benefit.



The Shrimp-Turtle Dispute

AMICUS CURIAE ISSUE

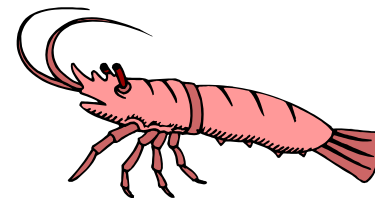
- The first Panel report held that they did not have the legal authority to accept unsolicited amicus briefs.
- However, the expert opinions of such briefs could be included in the submissions of the parties.
- The AB decision held that the DSU **DOES** have the legal authority to accept unsolicited amicus briefs, but that it has no obligation to consider them.
- The AB agreed with the Panel in permitting parties to include amicus briefs as an integral part of their submissions.



The Shrimp-Turtle Dispute

COMPLIANCE

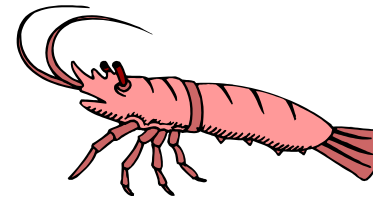
- The AB report held that the US must bring its regulations into conformity with its obligations under the WTO.
- The AB report required the US to:
 - Make good faith efforts to negotiate a multilateral treaty on the protection of sea turtles.
 - Modify Regulation 609 so that there was increased flexibility in the implementation of conservation measures.
 - Provide technical assistance if requested.



The Shrimp-Turtle Dispute

SECOND PANEL AND APPELLATE REPORT

- Malaysia complained that the US had not adequately complied with the AB decision.
- Specifically, that the US had a duty to sign a treaty, not merely attempt to negotiate a treaty.
- US argued that the 1998 AB report provisionally permitted the import ban so long as there was increased flexibility in the implementation.
- The compliance Panel held that the US had satisfactorily brought its regulations into conformity with its WTO obligations.
- The AB report upheld the Panel's decision (Specifically holding that a duty to negotiate was not a duty to sign a treaty).



The Shrimp-Turtle Dispute

TRADE AND THE ENVIRONMENT

- Until the first AB report, the WTO/GATT system endorsed a view that any unilateral measure that impacted the multilateral trading system were *per se* invalid.
- The Shrimp-Turtle dispute created the possibility that:
 - **Unilateral measures could be possible if justified under Article XX.**
 - Environmental measures, even if trade-restrictive, may be permissible.

