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UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

Recourse to article 21.5 by Malaysia

Report of the Panel

The report of the Panel on United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia – is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 15 June 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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I. INTRODUCTION

1.1 On 6 November 1998, the Dispute Settlement Body (DSB) adopted the Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) and the Panel Report (WT/DS58/R), as modified by the Appellate Body Report, requesting that the United States bring its measure found to be inconsistent with Article XI of the GATT 1994, and not justified under Article XX of the GATT 1994 into conformity with the obligations of the United States under that Agreement.

1.2 On 21 January 1999, the United States and the other parties to the dispute agreed to a 13-month reasonable period of time for the United States to comply with the recommendations and rulings of the DSB.[1]

1.3 In a communication dated 12 January 2000, Malaysia and the United States informed the DSB of the understanding reached between Malaysia and the United States regarding possible proceedings pursuant to Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning the implementation of the DSB recommendations and rulings in this case. This communication confirms the understanding reached between Malaysia and the United States, pursuant to an exchange of letters dated 22 December 1999, whereby they agreed that if Malaysia at some future date decided that it may wish to initiate proceedings under Article 21.5 and Article 22 of the DSU, Malaysia would initiate proceedings under Article 21.5 prior to any proceedings under Article 22; for this purpose Malaysia would provide the United States advance notice of any proposal to initiate proceedings under Article 21.5 and hold consultations with the United States before requesting the establishment of a panel under Article 21.5.[2]

1.4 On 12 October 2000, Malaysia requested the DSB, pursuant to Article 21.5 of the DSU, to establish a Panel to "find that by not lifting the import prohibition and not taking the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner, the United States has failed to comply with the 6 November 1998 recommendations and rulings of the Dispute Settlement Body." Malaysia further requested that "the Panel suggest that the United States should lift the import prohibition immediately and allow the importation of certain shrimp and shrimp products in an unrestrictive manner in order to comply with the said recommendations and rulings of the Dispute Settlement Body."[3]

1.5 At its meeting on 23 October 2000, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by Malaysia in WT/DS58/17. Australia, Canada, Ecuador, the European Communities, India, Japan, Mexico, Pakistan, Thailand and Hong Kong, China reserved their third-party rights.

A. TERMS OF REFERENCE

1.6 At the meeting of the DSB on 23 October 2000, it was agreed that the Panel should have standard terms of reference as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Malaysia in document WT/DS58/17, the matter referred to the DSB by Malaysia in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[4]

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[1] WT/DS58/15, 15 July 1999.
[2] WT/DS58/16, 12 January 2000.
[3] WT/DS58/17, 13 October 2000.
[4] WT/DS58/18, 8 November 2000.

B. PANEL COMPOSITION

1.7 The Panel was composed of the original panellists as follows:

Chairperson: Mr. Michael Cartland

Members: Mr. Carlos Márcio Cozendey
Mr. Kilian Delbrück

1.8 The Panel met with the parties on 23 January 2001 and with the parties and third parties on 24 January 2001. In a communication dated 15 February 2001, the Chairperson of the Panel informed the DSB that the Panel would not be able to issue its report within 90 days after the date of referral of the matter to it. The reasons for that delay are stated in WT/DS58/19. The Panel issued its report to the parties on 16 May 2001[5] and circulated the report to Members on 15 June 2001.

II. FACTUAL ASPECTS

A. CONSERVATION ISSUES

2.1 As described during the consultations of the Original Panel with scientific experts[6], most populations of sea turtles are considered to be threatened or endangered, due to human activity, either directly (sea turtles have been exploited for their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). Seven species of sea turtles have been identified[7] and are distributed mainly in subtropical or tropical areas of the world. Marine turtles are highly migratory animals, which make use of resources available in different parts of the globe only during part of the year or of their life cycles. Sea turtles migrate between their foraging and nesting grounds, but come ashore to lay their eggs. After approximately two to three months of incubation, the sea turtle hatchlings emerge and head for the sea. The survival rate of these hatchlings is low, with few reaching the age of reproduction (10-50 years, depending on the species). As confirmed by the scientific experts, during their lifetime, marine turtles migrate through a variety of habitats and across or outside national jurisdictional boundaries.

2.2 The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) recognizes all seven species of marine turtles as threatened with extinction and lists these species in Appendix I of CITES.[8] All species except the Australian flatback are listed in Appendices I and II of the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS or

[5] It was agreed between the parties that the Panel would not issue an interim report.

[6] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/R (hereafter the "Panel Report"), paras. 5.1-5.312 and Annex IV, Transcript of the Meeting with the Experts. In its consultation with scientific experts, the Panel focused its questions on: (i) approaches to sea turtle conservation in light of local conditions; and (ii) habitat and migratory patterns of sea turtles.

[7] Green turtle (*Chelonia mydas*), loggerhead (*Caretta caretta*), flatback (*Natator depressus*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), olive ridley (*Lepidochelys olivacea*), and Kemp's ridley (*Lepidochelys kempi*).

[8] Adopted on 3 March 1973 and entered into force on 1 July 1975, with 152 parties as of 15 May 2001. CITES regulates trade in endangered species by defining conditions under which import and export permits may be issued. The conditions are differentiated according to a classification system based on three appendices of protected species. Appendix I includes all species threatened with extinction which are or may be affected by trade. Trade in these species is subject to strict regulation through both import and export permits. *See* www.cites.org.

the Bonn Convention).[9] These species are also included in the World Conservation Union (IUCN) Red List of Threatened Species 2000.[10]

2.3 Given their highly migratory nature, the protection and conservation of threatened marine turtles requires the concerted action of all States within the national jurisdictions in which such species spend any part of their life cycle. An Inter-American Convention for the Protection and Conservation of Sea Turtles was negotiated between 1993 and 1996 with countries of the Caribbean and Western Atlantic region.[11] The Inter-American Convention entered into force on 2 May 2001, 90 days after the eighth instrument of ratification was deposited with the Government of Venezuela.[12]

2.4 Recent international cooperative efforts in the South-East Asian region include the following: the adoption of the Sabah Declaration at the 2nd ASEAN Symposium and Workshop on Sea Turtle Biology and Conservation in Sabah, Malaysia in July 1999[13]; a Resolution on Developing an Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and their Habitats at a workshop in Perth, Australia in October 1999[14]; and the adoption of a Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia at an intergovernmental meeting of 24 States in Kuantan, Malaysia in July 2000.[15] This Memorandum was concluded under the auspices of the Bonn Convention on the Conservation of Migratory Species of Wild Animals. Agreement was reached to work towards finalizing a Conservation and Management Plan at the next intergovernmental session scheduled to be held in 2001, at which time the Memorandum of Understanding will be open for signature.

B. HISTORY OF THE CASE

1. Section 609: the 1996 Guidelines

2.5 Pursuant to the United States Endangered Species Act (ESA) of 1973, all sea turtles that occur in US waters are listed as endangered or threatened species. In 1987, the United States issued regulations pursuant to the ESA that required all United States shrimp trawlers to use Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles associated with shrimp harvesting.[16] Developed over the past two decades in the southeast shrimp fisheries of the United States, TEDs are considered to be an effective way in which to exclude

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[9] Adopted on 23 June 1979 and entered into force on 1 November 1983, with 74 parties as of 1 March 2001. *See* www.unep-wcmc.org/cms.

[10] Scientific criteria are used to classify species into one of eight categories in this Red List system: Extinct, Extinct in the Wild, Critically Endangered, Endangered, Vulnerable, Lower Risk, Data Deficient and Not Evaluated. A species is classed as threatened if it falls in the Critically Endangered, Endangered or Vulnerable categories. *See* www.iucn.org/redlist/2000/species.html.

[11] Hereafter the "Inter-American Convention". The Latin American Fisheries Development Organization (*Oldepesca*), an intergovernmental regional fisheries body, acts as the provisional secretariat for the Convention. *See* the text of the Convention at www.seaturtle.org/iac/convention.shtml.

[12] As of 15 May 2001, the Convention has nine parties: Brazil, Costa Rica, Ecuador, Honduras, Mexico, The Netherlands, Peru, Venezuela, and the United States.

[13] Including concerned scientists and participants from the Indo-Pacific and Indian Ocean regions, including South-East Asian member nations. See www.arbec.com.my/turtle.htm.

[14] With participation from Australia, Bangladesh, Cambodia, Comoros, India, Iran, Kenya, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Reunion (France), Seychelles, Sri Lanka, Tanzania, Thailand, United Arab Emirates and Vietnam.

[15] With representation from Australia, Bangladesh, Comores, Egypt, Reunion (France), India, Indonesia, Iran, Kenya, Malaysia, Mauritius, Myanmar, Oman, Pakistan, Papua New Guinea, Philippines, South Africa, Sri Lanka, Thailand, United Arab Emirates, Tanzania, United States of America, Vietnam and Yemen. *See* www.unep-wcmc.org/cms.

[16] Hereafter the "1987 Regulations" (52 Federal Register 24244, 29 June 1987). TEDs are trapdoors installed inside shrimp trawling nets that allow sea turtles and other unintentional, large by-catch to escape.

by-catch during shrimp trawling. The 1987 Regulations became fully effective in 1990 and were modified to require the use of TEDs at all times and in all areas where shrimp trawling interacts in a significant way with sea turtles.

2.6 As described in our Original Panel Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*[17], this case concerns Section 609 of the United States Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations enacted in 1989 pursuant to the ESA and its implementing measures.[18] Section 609 calls upon the US Secretary of State, in consultation with the US Secretary of Commerce, *inter alia*, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with governments of countries engaged in commercial fishing operations likely to have a negative impact on sea turtles.

2.7 Section 609 further provides that shrimp harvested with technology that may adversely affect certain species of sea turtles protected under US law may not be imported into the United States, unless the President annually certifies to the Congress: (a) that the harvesting country concerned has a regulatory programme governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States, and that the average rate of that incidental taking by the vessels of the harvesting country is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or (b) that the fishing environment of the harvesting country does not pose a threat of incidental taking to sea turtles in the course of such harvesting.

2.8 The United States issued guidelines in 1991 and 1993 for the implementation of Section 609.[19] Pursuant to these guidelines, Section 609 was applied only to countries of the Caribbean/Western Atlantic. In September 1996, the United States concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles with a number of countries of that region. In December 1995, the US Court of International Trade ("CIT") found the 1991 and 1993 Guidelines inconsistent with Section 609 insofar as they limited the geographical scope of Section 609 to shrimp harvested in the wider Caribbean/Western Atlantic area. The CIT directed the US Department of State to prohibit, no later than 1 May 1996, the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations of the Secretary of Commerce.

2.9 In April 1996, the Department of State published revised guidelines to comply with the CIT order of December 1995. The new guidelines extended the scope of Section 609 to shrimp harvested in all countries. The Department of State further determined that, as of 1 May 1996, all shipments of shrimp and shrimp products into the United States must be accompanied by a declaration attesting that the shrimp or shrimp product in question has been harvested either under conditions that do not adversely affect sea turtles or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609.[20]

2.10 The 1996 Guidelines define shrimp or shrimp products harvested in conditions that do not affect sea turtles to include:

(a) Shrimp harvested in an aquaculture facility;

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[17] Panel Report, paras. 2.1–2.26.

[18] Hereafter "Section 609", 16 United States Code (U.S.C.) 1537.

[19] Hereafter the "1991 Guidelines" (56 Federal Register 1051, 10 January 1991); and the "1993 Guidelines" (58 Federal Register 9015, 18 February 1993).

[20] Hereafter the "1996 Guidelines" (61 Federal Register 17342, 19 April 1996), Section 609(b)(2).

(b) shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States;

(c) shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the US programme, would not require TEDs; and

(d) species of shrimp, such as the *pandalid* species, harvested in areas in which sea turtles do not occur.[21]

2.11 The 1996 Guidelines provided that certification could be granted by 1 May 1996, and annually thereafter to harvesting countries other than those where turtles do not occur or that exclusively use means that do not pose a threat to sea turtles "only if the government of [each of those countries] has provided documentary evidence of the adoption of a regulatory programme governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting." For the purpose of these certifications, a regulatory programme must include, *inter alia*, a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used by the United States. Moreover, the average incidental take rate will be deemed comparable to that of the United States if the harvesting country requires the use of TEDs in a manner comparable to that of the US programme.

2. Panel proceedings

2.12 Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8 October 1996[22], Malaysia and Thailand requested in a communication dated 9 January 1997[23], and Pakistan asked in a communication dated 30 January 1997[24], that the Dispute Settlement Body (DSB) establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the Dispute Settlement Understanding (DSU), with standard terms of reference.[25]

2.13 On 10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997[26], and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997.[27] The Report of the consolidated Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, was circulated to WTO Members on 15 May 1998.[28]

2.14 On 13 July 1998, the United States appealed certain issues of law and legal interpretations in the Original Panel Report.[29] The Appellate Body issued its Report on 12 October 1998.[30] The

[21] *Ibid*., p. 17343.
[22] WT/DS58/1, 14 October 1996.
[23] WT/DS58/6, 10 January 1997.
[24] WT/DS58/7, 7 February 1997.
[25] WT/DSB/M/29, 26 March 1997.
[26] WT/DS58/8, 4 March 1997.
[27] WT/DSB/M/31, 12 May 1997.
[28] Adopted on 6 November 1998, WT/DS58/R.
[29] WT/DS58/11, 13 July 1998.
[30] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R (hereafter the "Appellate Body Report").

Appellate Body Report found that the United States measure at issue, Section 609, qualified for provisional justification under Article XX(g), but that it failed to meet the requirements of the chapeau of Article XX, as it was applied in a manner that constituted arbitrary and unjustifiable discrimination.

2.15 On 8 October 1996, the US Court of International Trade ruled that the embargo on shrimp and shrimp products enacted by Section 609 applies to "all shrimp and shrimp products harvested in the wild by citizens or vessels of nations which have not been certified."[31] The CIT found the 1996 Guidelines to be contrary to Section 609 when allowing, with a Shrimp Exporter's Declaration form, imports of shrimp from non-certified countries, if the shrimp were harvested with commercial fishing technology that did not adversely affect sea turtles.

2.16 On 25 November 1996, the CIT clarified that shrimp harvested by manual methods which do not harm sea turtles, by aquaculture and in cold water, could continue to be imported from non-certified countries.[32]

2.17 On 4 June 1998, the US Court of Appeals for the Federal Circuit issued a ruling that vacated the CIT decision of 8 October 1996 and 25 November 1996. On 28 August 1998, the Department of State reinstated the policy of permitting importation of shrimp harvested with TEDs in countries not certified under Section 609.[33]

2.18 On 19 July 2000, the CIT issued a decision that found that the current policy of the Department of State to allow shipments of shrimp caught with TEDs from countries not formally certified pursuant to Section 609 to be imported into the United States, violates that statute on its face.[34] In its ruling, however, the CIT refused to issue an injunction to reverse that policy as it deemed that the evidence was insufficient to show that the policy was harming sea turtles. This CIT decision has been appealed and is currently under review by the US Court of Appeals of the Federal Circuit.

C. REASONABLE PERIOD OF TIME

2.19 On 25 November 1998, the United States informed the DSB of its intention to implement the recommendations and ruling of the DSB within a "reasonable period of time."

2.20 On 21 January 1999, the United States and the other parties to the original dispute agreed to a 13-month reasonable period of time for the United States to comply with the recommendations and rulings of the DSB.[35] This reasonable period of time expired on 6 December 1999.

D. IMPLEMENTATION

2.21 Pursuant to Article 21.6 of the DSU, the United States submitted regular status reports regarding the implementation of the recommendations and rulings of the DSB in this dispute, on 15 July 1999, 8 September 1999, 15 October 1999, 9 November 1999 and 17 January 2000.[36] These reports set out that the intention of the revision of the 1996 Guidelines pursuant to Section 609 was "to: (1) introduce greater flexibility in considering the comparability of foreign programs and the

[31] *Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).
[32] *Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).
[33] Notice of Proposed Revisions the Guidelines for the Implementation of Section 609 of Public Law 101-162, Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, US Department of State, Federal Register Vol. 64, No. 57, 25 March 1999, Public Notice 3013, pp. 14481-14485 (hereafter the "Proposed Revisions to the Guidelines").
[34] *Turtle Island Restoration Network v. Robert Mallett*, 110 Fed. Supp. 2d 1005 (CIT 2000).
[35] WT/DS58/16, 12 January 2000.
[36] WT/DS58/15, 15 July 1999 and Addenda 1–4.

US programme and (2) elaborate a timetable and procedures for certification decisions, including an expedited timetable to apply in 1999 only. These latter changes are designed to increase the transparency and predictability of the certification process and to afford foreign governments seeking certification a greater degree of due process." The reports also explained that the United States was engaged in efforts to negotiate an agreement on the conservation of sea turtles with the Governments of the Indian Ocean region, and that the United States had offered and was providing technical assistance on the design, construction, installation and operation of TEDs.

1. Section 609: the 1999 Revised Guidelines

2.22 On 25 March 1999, the United States Department of State published a notice in the US Federal Register that summarized the Appellate Body Report, proposed measures by which the United States would implement the recommendations and rulings of the DSB, and sought comments from interested parties.[37] On 8 July 1999, the United States Department of State issued Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations.[38] The Revised Guidelines summarize the comments received and set forth the measures that the United States would take to implement the recommendations and rulings of the DSB. For ease of reference, the Revised Guidelines in their entirety are attached as the Annex to this report.

2.23 The Revised Guidelines issued pursuant to Section 609 set forth the criteria for certification.[39] First, since certification decisions are based on comparability with the US regulatory programme governing the incidental taking of sea turtles in the course of shrimp harvesting, there is an explanation of the components of that programme. The stated goal of this programme is to protect sea turtles populations from further decline by reducing their incidental mortality in commercial shrimp trawling. The US programme requires that commercial shrimp trawlers use TEDs approved in accordance with standards established by the US National Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles, with very limited exceptions.[40]

2.24 Second, the Department of State determined that the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions in which harvesting does not adversely affect sea turtles:

(a) Shrimp harvested in aquaculture;

(b) shrimp harvested by trawlers using TEDs comparable in effectiveness to those required in the United States;

(c) shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, or by vessels using specified gear, in accordance with the US programme; or

(d) shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. In the latter case, the Department

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[37] Proposed Revisions to the Guidelines.

[38] Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, US Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946-36952 (hereafter the "Revised Guidelines"). The text of the Revised Guidelines (pp. 36949-36952) is reproduced as the Annex of this Report. For ease of reference, the paragraphs of the Revised Guidelines have been numbered in the attached Annex.

[39] Revised Guidelines, Annex to this Report: paras. 2-5.

[40] Revised Guidelines, Annex to this Report: para. 2.

of State is to publish these determinations in the Federal Register and notify the foreign governments and interested parties.[41]

2.25 Moreover, if the government of the harvesting nation seeks certification on the basis of having adopted a TEDs programme, certification pursuant to Section 609(b)(2)(A) or (B) shall be made if a programme includes:

(a) A requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the US programme described above; and

(b) a credible enforcement effort that includes monitoring for compliance.[42]

2.26 Third, the Revised Guidelines confirm the requirement, effective as of 1 May 1996, that all shipments of shrimp and shrimp products imported into the United States must be accompanied by an Exporter's/Importer's Declaration attesting that the shrimp accompanying the declaration were harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609.[43]

2.27 Fourth, provision is made for the government of any harvesting nation to request that the Department of State review information regarding the shrimp fishing environment and conditions in that nation in making decisions pursuant to Section 609. Information, based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the necessary information for a reliable determination, may be presented to demonstrate, *inter alia*:

(a) That some portion of the shrimp intended for export to the United States is harvested under one of the conditions identified above as not adversely affecting sea turtles;

(b) that the government of that nation has adopted a regulatory programme governing the incidental taking of sea turtles during shrimp fishing that is comparable to the US programme and, therefore, that the nation is eligible for certification; or

(c) that the fishing environment in that nation does not pose a threat of the incidental taking of sea turtles and, therefore, that the nation is eligible for certification.[44]

2.28 A country may be certified on the basis of having a regulatory programme not involving the use of TEDs. The criteria used in comparing such a programme are "[i]f the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification." Such a finding is to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information for a reliable determination. In reviewing this information, the Department of State is "to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources."[45]

2.29 As noted above, countries may seek to be certified on the basis of having a shrimp fishing environment that does not pose a threat of the incidental taking of sea turtles. The Revised Guidelines

[41] Revised Guidelines, Annex to this Report: para. 5
[42] Revised Guidelines, Annex to this Report: paras. 18-19.
[43] Revised Guidelines, Annex to this Report: para. 6.
[44] Revised Guidelines, Annex to this Report: para. 10.
[45] Revised Guidelines, Annex to this Report: Section II.B.(a)(2).

provide that the Department of State shall certify any harvesting nation pursuant to Section 609(b)(2)(C) on this basis that meets any of the following criteria:

(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

(b) any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles; e.g., any nation that harvests shrimp exclusively by artisanal means; or

(c) any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.[46]

2.30 There is also recognition in the Revised Guidelines that sea turtles require protection throughout their life cycle, not only when they are threatened during shrimp harvesting. Thus, in certifying, the Department "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles." The Department of State is also to engage in consultations with harvesting nations.[47]

2.31 Each year the Department of State considers for certification any nation that is currently certified and any other harvesting nation who requests certification prior to 1 September of the preceding year. In addition, "any harvesting nation that is not certified on 1 May of any year may be certified prior to the following 1 May at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on 1 May of any year may have its certification revoked prior to the following 1 May at such time as the harvesting nation no longer meets those criteria."[48]

2.32 There is recognition that the Revised Guidelines may be revised in the future to take into consideration additional information on the interaction between sea turtles and shrimp fisheries; changes in the US programme; and considering the pending domestic litigation in the United States.

III. MAIN ARGUMENTS OF THE PARTIES

A. PROCEDURAL ISSUES

1. Terms of reference

3.1 According to **Malaysia**, the mandate of the Panel is to examine the consistency with Articles XI and XX of the GATT 1994 of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB). Such an approach is consistent with the views expressed by the Appellate Body with regard to the scope of an Article 21.5 dispute settlement proceeding in *Canada - Measures Affecting The Export of Civilian Aircraft.*[49] Essentially, the Article 21.5 Panel, in reviewing the "consistency" under Article 21.5 of the Dispute Settlement Understanding (DSU), is entrusted with the task of determining that the "measures taken to comply with the recommendations and ruling of the DSB was in "conformity with", "adhering to the same principles" or "compatible" with the obligations of the implementing party under the relevant provisions of the WTO Agreement. Malaysia thus argues that the steps taken by the United States did not remove the elements of "unjustifiable discrimination" and "arbitrary discrimination". Therefore,

[46] Revised Guidelines, Annex to this Report: para. 14.
[47] Revised Guidelines, Annex to this Report: para. 23.
[48] Revised Guidelines, Annex to this Report: para. 40.
[49] Adopted on 4 August 2000, WT/DS70/AB/RW (hereafter "*Canada – Aircraft – Recourse by Brazil to Article 21.5 of the DSU*"), paras. 36-37 and 40-41.

Malaysia argues that the measure of the United States remains inconsistent with Article XI and is not justified under Article XX of the GATT 1994.

3.2 Malaysia further argues that it does not limit itself in this dispute to contesting whether the United States has complied with the DSB recommendations and rulings. Malaysia is thus exercising its rights under Article 21.5 of the DSU.

3.3 Malaysia also submits that the Panel should find that in order to comply with the recommendations and rulings of the DSB, the import prohibition pursuant to Section 609 should be removed. This is a component of Malaysia's request for the establishment of a panel.[50]

3.4 In the view of the **United States**, the issue in this proceeding is to determine whether the United States has complied with the rulings and recommendations of the DSB by modifying the application of Section 609 of Public Law 101-162 ("Section 609")[51] in accordance with the findings in the Appellate Body Report.

2. Submissions from non-governmental organizations

3.5 The Panel received two submissions from non-governmental organizations (NGOs) in this case. One was submitted on 12 November 2000 by Earth Justice Legal Defense Fund on behalf of *the Turtle Island Restoration Network, the Human Society of the United States, the American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and the Fiscalia Del Medio Ambiente (Chile)* (hereafter "Earthjustice Submission").

3.6 The second was submitted on 13 December 2000 by the National Wildlife Federation on behalf of *the Center for Marine Conservation, Centro Ecoceanos, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhapa, Project Swarajya, Visakha Society for Prevention of Cruelty to Animals* (hereafter "National Wildlife Federation Submission").

3.7 These submissions were respectively communicated to the parties on 15 and 18 December 2000. In a letter accompanying these submissions, the Panel informed the parties that they may comment in their submissions on the admissibility and relevance of these submissions. The Panel also informed the parties that it would address this matter in its report.

3.8 **Malaysia** holds the view that the Panel does not have the right to accept, or consider any unsolicited briefs. Moreover, Malaysia submits that the finding in the Original Panel that Article 13 of the DSU did not confer any right on a Panel to accept unsolicited briefs. Article 13 gives a panel the right to "seek" information and technical advice from any individual or body that it deemed appropriate. Articles 10 and 12 and Appendix 3 of the DSU provide that only Members who are parties to a dispute, or who have notified the DSB of their interest in becoming third parties have the legal right to make submissions to a panel and to have those submissions considered by a panel. To the contrary, the Appellate Body's interpretation in *United States – Import Prohibition of Certain Shrimp And Shrimp Products*[52] had the effect of providing greater rights to those who were not WTO Members.

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[50] WT/DS58/17, 13 October 2000.

[51] Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, US Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946-36952 (hereafter the "Revised Guidelines"). The text of the Revised Guidelines (pp. 36949-36952) is reproduced as the Annex of this Report. For ease of reference, the paragraphs of the Revised Guidelines have been numbered in the attached Annex.

[52] Adopted on 6 November 1998, WT/DS58/AB/R, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereafter the "Appellate Body Report").

3.9 Malaysia argues that, of prime importance for the Panel's consideration, is that the practice of admission and acceptance of unsolicited submissions by panels and the Appellate Body has been the subject of intense debate at a special meeting of the General Council on 22 November 2000. The overwhelming view of the WTO Members at the meeting was that panels and the Appellate Body did not have the authority to receive or consider unsolicited briefs. This view was conveyed to, and noted by the Chairperson of the Appellate Body.

3.10 The **United States** argues that under the findings of the Appellate Body in this case, the Panel has the discretion to consider either or both of the submissions from NGOs. The Appellate Body wrote that: "[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not."[53]

3.11 According to the United States, the National Wildlife Federation Submission was directly relevant to the issues in this dispute. It addresses the issue of US compliance with the recommendations and rulings of the DSB. Moreover, it presents the views of the submitters on the status under international environmental law of consensual versus unilateral environmental measures, an issue raised to varying extents by Malaysia and certain third parties.

3.12 Accordingly, the United States submits that the Panel should exercise its discretion to consider the National Wildlife Federation Submission. At the same time, however, the United States decided to attach the National Wildlife Federation brief to its submission in this case. The United States submits that this ensures that a relevant and informative document is before the Panel, regardless of whether the Panel decides to exercise its discretion to accept the National Wildlife Federation Submission directly from the submitters. On the other hand, the United States argues that the Earthjustice Submission does not appear to be as relevant to the issues in this dispute as it addresses a hypothetical issue that is not before the Panel. The United States notes, however, that the Panel does have the discretion to accept the Earthjustice Submission directly from the submitters according to the Appellate Body's ruling.[54]

3.13 In response to a question by the Panel[55], the United States argues that the "*amicus*" brief attached to its rebuttal submission reflected the independent views of the organizations that signed on to that brief. These organizations have a great interest, and specialized expertise, in sea turtle conservation and related matters. The views of these organizations should be of value to the Panel in resolving the matters at issue in this dispute. The United States notes, however, that the "*amicus*" brief included certain procedural and substantive defenses not advanced in the submission of the United States, and thus that these matters are not before the panel.

3.14 The United States also argues that Malaysia makes the rather extraordinary argument that the Appellate Body was wrong and the Panel should ignore the Appellate Body finding. Nowhere does the DSU grant dispute settlement panels the authority to overrule the Appellate Body. In addition, Malaysia's only rationale for its position is that the Appellate Body finding gives greater rights to "*amici*" than to WTO Member governments. This claim is demonstrably false. Under the DSU, any WTO Member may preserve its third-party rights and have its views considered by a panel. In stark contrast, the Appellate Body findings simply provide panels with the *discretion* to consider unsolicited submissions. The differences between the rights afforded to third parties and "*amici*" is dramatically illustrated by events in the recent proceedings in the case on *European Communities –*

[53] Appellate Body Report, para. 108.

[54] Appellate Body Report, paras. 108 and 110.

[55] The question reads as follows: "The Panel takes note of the fact that the United States attached to its rebuttals, as [an] exhibit, one of the "*amicus* briefs" submitted directly to the Panel. Having been submitted by the United States, this document becomes part of the US submissions in this case. Could the United States clarify whether, by doing so, it intends to fully endorse the content of the document contained in [this] Exhibit or whether [this] Exhibit is submitted for the information of the Panel, without the United States endorsing part or all of the views expressed in it?"

Measures Affecting Asbestos and Asbestos-Containing Products.[56] In that case, the Appellate Body accepted and considered all submissions filed by third parties. By contrast, the Appellate Body considered nearly twenty applications for leave to file unsolicited submissions, and rejected each one of those applications.

3.15 **Malaysia** argues that it is not suggesting that the Panel should overturn the Appellate Body's decision on this issue. However, in the light of the development in the special meeting of the General Council on 22 November 2000, Malaysia submits that the Panel should exercise extreme caution when dealing with unsolicited *"amicus curiae"* briefs.

3. Burden of proof

3.16 **Malaysia** submits that the burden of proof is on the United States, as the party invoking Article XX, to justify its invocation.[57] This approach has been adopted by the Appellate Body in *Brazil – Export Financing Programme for Aircraft – Recourse by Canada To Article 21.5 of the DSU*.[58] It was held in that case that since it was Brazil that asserted the "affirmative defence," the burden of proof rested on Brazil.[59] The issue of the burden of proof also has been dealt with in the Appellate Body's decision in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.[60] The Appellate Body held that " […] the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of the particular claim or defence."[61]

3.17 However, Malaysia argues, the pertinent point in the Appellate Body's decision is that it acknowledges the fact that several GATT 1947 and WTO panels have required such proof of a party invoking a defence, such as those found in Article XX. The Appellate Body clearly stated that the sub-paragraphs in Article XX are " […] limited exceptions from obligations under certain other provisions of GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it."[62]

3.18 Hence, Malaysia submits that, as the party who is asserting the affirmative defence under Article XX, the burden is on the United States to show that its measures are justified under Article XX. In this respect, the United States has failed to show that the steps taken by the United States to implement the DSB recommendations and rulings render Section 609 justified under Article XX. As such, the United States has failed to comply with the recommendations and rulings of the DSB.

3.19 Malaysia argues that the United States has to prove to the Panel that the implementation measures that have been undertaken fully satisfy the requirements of the chapeau of Article XX of the GATT 1994 and that there is no longer any inconsistency with Article XI of the GATT 1994.

3.20 Malaysia substantiates this argument with reference to the Appellate Body's assessment that the US measure has been "provisionally justified." This means that the United States has to prove that this measure is now fully justified under Article XX. Accordingly, the United States has to address each and every aspect stipulated by the Appellate Body in order to satisfy the elements of

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[56] Adopted on 5 April 2001, WT/DS135/AB/R (hereafter "*EC – Asbestos")*.

[57] Malaysia refers to *United States – Restrictions on Imports of Tuna* (DS21/R, not adopted, circulated on 3 September 1991, BISD 39S/155) in which the panel held that "the practice of Panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation [...]" (para. 5.22, emphasis added by Malaysia).

[58] Adopted on 4 August 2000, WT/DS46/AB/RW (hereafter "*Brazil – Aircraft – Recourse by Canada To Article 21.5 of the DSU*").

[59] *Ibid.* para. 65.

[60] Adopted on 23 May 1997, WT/DS33/AB/R (hereafter "*United States - Wool Shirts*").

[61] *Ibid*., p. 14.

[62] *Ibid*., p. 16.

"unjustifiable discrimination" and "arbitrary discrimination" where the same conditions prevail. If the United States does not fulfill these standards, the US measure would not qualify as an exception under Article XX.

3.21 In its response to a question of the Panel, the **United States** agrees that it had the initial burden of showing that the US measure falls within the scope of Article XX. In this proceeding, Malaysia has the initial burden of showing that the US measure is inconsistent with one or more obligations under a covered agreement. However, as Malaysia notes, the United States has not contested that its measure is an import prohibition under GATT Article XI.

3.22 The United States claims that it is asserting as an affirmative defense that its measure falls, as modified, within the scope of Article XX. As the Appellate Body explained in its Report on *United States - Wool Shirts*, the burden of establishing such a defense rests on the party asserting it.[63] As the Appellate Body also explained in *United States – Wool Shirts*, "If [the party asserting a particular claim or defense] adduces sufficient evidence to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[64] The United States submits that it has presented a *prima facie* case that its measure, as modified, falls within the scope of Article XX, and that the burden has thus shifted to Malaysia to present evidence and legal argument to the contrary. In particular, the United States has fully explained the manner in which it has modified the aspects of the application of the measure that the Appellate Body found to result in arbitrary or unjustifiable discrimination. Therefore, the United States has made a *prima facie* case that the US measure, as modified, indeed falls within the scope of Article XX.

3.23 In the view of the United States, this burden shifting analysis is particularly pertinent to the issue of whether the United States has modified the guidelines implementing Section 609 of the United States Public Law 101-162 ("the Revised Guidelines") to make them more flexible and to take account of local conditions. The United States contends it has shown that the Guidelines have been modified to provide for more flexibility. The United States further submits that it has also shown specific instances where these more flexible Guidelines have been applied in the cases of Pakistan and Australia. The United States claims that these facts are more than sufficient to meet its burden of establishing a *prima facie* case that it has complied with the aspects of the DSB recommendations and rulings relating to flexibility in the application of the measure. Therefore, the United States argues that the burden thus shifts to Malaysia to show that in fact the United States has not introduced such flexibility.

3.24 The United States submits that Malaysia has not presented any valid reasons why, as it claims, the Revised Guidelines do not provide the degree of flexibility envisioned in the DSB recommendations. This point is reinforced, the United States argues, when one considers that, first, under the Appellate Body's burden-shifting analysis, the burden now resides with Malaysia to rebut the *prima facie* case of the United States, and, second, that Malaysia has never even sought to test the Revised Guidelines by applying for certification. In other words, where the Revised Guidelines on their face provide for more flexibility, and where Malaysia has never tested these Guidelines and simply asserts that the Guidelines are insufficiently flexible, Malaysia cannot be found to have prevailed on this key issue in the proceeding.

3.25 A related issue in the view of the United States is that the Appellate Body finding was based on certain aspects of the US measure "in their cumulative effect". The United States argues that this issue should not arise because it has in fact responded to all aspects of the discrimination identified by the Appellate Body. Thailand, as a third party, spent a great deal of time addressing this issue, and claims that the United States would be in violation of its treaty obligations unless it addressed *each*

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[63] *United States – Wool Shirts*, p. 337.
[64] *Ibid*., p. 335.

aspect of discrimination identified by the Appellate Body. According to the United States, Thailand's reasoning is circular and reflects a misunderstanding of the Appellate Body Report. The Appellate Body did *not* find, as Thailand assumes, that each and every element of differential treatment among Members rises to the level of a violation of the Article XX chapeau. To the contrary, the Appellate Body carefully wrote that all five of the aspects of differential treatment, in their cumulative effect – that is in the aggregate, when added together – amounted to a violation. The United States thus argues that the Appellate Body, conservatively and properly, did not specify how it would have decided the case if some, but not other, aspects of differential treatment were corrected.

3.26 The United States submits that it has addressed all aspects of differential treatment, and thus that the Panel should not be presented with this issue. However, if the Panel finds otherwise, the United States notes that the Appellate Body Report does provide some guidance. For example, "the most conspicuous" flaw, the Appellate Body said, was the failure of the measure to be applied in a flexible manner. On the other hand, it would be fair to say that the Appellate Body Report placed less emphasis on the aspect of differential treatment arising from differing phase-in periods.

3.27 **Malaysia** agrees with the statement of the United States that the Appellate Body's use of the term "cumulative effect" is important in the Panel's examination of United States compliance with the Appellate Body's findings. The term "cumulative" is defined as "forming an aggregate; the word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other."[65] However, Malaysia claims that it does not agree with the United States' contention that it "need not necessarily address each one of those aspects [of the United States application of Section 609 which constituted "unjustifiable discrimination"] in order to comply with the Appellate Body's findings." Neither can Malaysia agree with the United States that "it has addressed all of the defects in the application of Section 609." Malaysia submits that the United States has to address each and every aspect in satisfying the elements of "unjustifiable discrimination".

B. VIOLATION OF ARTICLE XI

3.28 **Malaysia** argues that the prolonged enforcement of Section 609, which has the effect of an import prohibition, continues to undermine the Malaysian shrimp export industry to the United States' market. As submitted by Malaysia in the Original Panel[66], Malaysia's exports declined from US$9.1 million in 1995 to US$4.86 million in 1996. Exports had declined by a significant 38 per cent from US$2.87 million for the period (May – October 1995) to US$1.8 million for the corresponding months of 1996. Since then, Malaysian companies have ceased exporting to the United States and have had to develop other export markets in Europe, Hong Kong, Australia, Japan and China. As a result, Malaysia argues that its exporters continue to suffer a loss of export opportunities and market share in the United States for wild-harvested shrimp due to the prolonged import prohibition.

3.29 The **United States** claims that during the 13-month period agreed to by the parties to the dispute, it proceeded to modify its application of the measure in order to address the specific problems identified by the Appellate Body. The United States compliance includes: Revised Guidelines that provide more flexibility in decision-making; enhanced due process protections for exporting countries; efforts to negotiate a sea turtle conservation agreement in the Indian Ocean region; and enhanced offers of technical assistance.

3.30 Nevertheless, with regard to Section 609, the United States does not claim that the import prohibition is now compatible with Article XI of the GATT 1994, nor does it contend that the prohibition in question is not in force. Furthermore, in its reply to a question by the Panel[67], the

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[65] Black's Law Dictionary, 6th Ed., p. 380.

[66] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/R (hereafter the "Panel Report"), paras. 3.120 and 3.126.

[67] The question reads as follows: "Do you agree with Malaysia's statement that the burden of proof lies

United States expressly states that, as noted by Malaysia, the United States does not contest that its measure is an import prohibition under GATT Article XI.

C. JUSTIFICATION UNDER ARTICLE XX

1. General comments

3.31 The **United States** mentions that in detailed and exhaustive findings, the Appellate Body confirmed that the US measure which has the effect of an import prohibition was provisionally justified under GATT Article XX(g) as a measure relating to the conservation of an exhaustible natural resource. However, the Appellate Body Report also found that certain specifically-identified aspects of the application of the US measure amounted to unjustifiable or arbitrary discrimination under the chapeau of Article XX.

3.32 The United States claims that implementation of the recommendations and rulings of the DSB in this matter has several distinct elements. These elements respond to the several distinct findings contained in the Appellate Body Report relating to the way in which the United States formerly applied Section 609.

3.33 According to the United States, compliance steps include:

(a) Revised Guidelines that provide more flexibility in decision-making;

(b) enhanced due process protections for exporting countries;

(c) efforts to negotiate a sea turtle conservation agreement in the Indian Ocean region; and

(d) enhanced offers of technical assistance.

3.34 **Malaysia** argues that in its findings and conclusions, in paragraph 187, the Appellate Body:

> "concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994."

3.35 Malaysia submits that this explicitly means that the measure concerned, i.e. the import prohibition contained in Section 609, although provisionally justified under the GATT Article XX (g), is however not justified under Article XX because it fails to meet the requirements of the chapeau.

3.36 Malaysia submits that since the imposition of the import prohibition is not justified under Article XX of the GATT 1994, it should be removed in order for the United States to bring the measure into conformity with its obligations under that Agreement.

3.37 Thus, Malaysia claims that in order to comply with the recommendations and rulings of the DSB, the import prohibition contained in Section 609 should be removed instead of being modified.

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with the United States to demonstrate that the measures taken to comply with the recommendations and rulings of the DSB are justified under Article XX of the GATT 1994?"

2. Article XX(g)

3.38 With regard to Section 609 and its consistency with paragraph (g) of Article XX of the GATT 1994, the **United States** claims that the Appellate Body separately found that endangered sea turtle species covered by Section 609 were "exhaustible natural resources" under Article XX(g)[68], and that the United States made Section 609 "effective in conjunction with restrictions on domestic production or consumption" under Article XX(g).[69]

3.39 The United States claims that the Appellate Body clearly, and at length, explained that the general design of the Section 609 import prohibition was provisionally justified under Article XX(g). The United States quotes the relevant paragraphs of the Appellate Body Report:

> "137. 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.
>
> 138. Section 609(b)(1) 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. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused.
> […]
> 141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, 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, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.
>
> 142. 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."[70]

3.40 The United States also claims that the Appellate Body emphasized the distinction between the issues of whether the general design of a measure is provisionally justified under one of the specific Article XX paragraphs, and whether the application of the measure is consistent with the requirements of the chapeau of Article XX.

3.41 **Malaysia** claims that in its findings and conclusions the Appellate Body modified the Panel Report and, *inter alia*, found that the US measure, though provisionally justified under Article XX(g),

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[68] Appellate Body Report, paras. 127-134.
[69] Appellate Body Report, paras. 143-145.
[70] Emphasis added and footnotes omitted by the United States.

had failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of the GATT 1994.[71]

3.42 Malaysia submits that this explicitly means that the measure concerned, i.e. the import prohibition contained in Section 609, although provisionally justified under Article XX(g) is however not justified under Article XX because it failed to meet the requirements of the chapeau.

3.43 Moreover, Malaysia notes that it does not dispute the finding of the Appellate Body Report with regard to the provisional justification of Section 609 under Article XX(g).

3. Chapeau

(a) General compliance issues

3.44 The **United States** claims, as stated above, that the Appellate Body emphasized the distinction between the issues of whether the general design of a measure is provisionally justified under one of the specific Article XX sub-paragraphs, and whether the application of the measure is consistent with the requirements of the chapeau of Article XX. In support of this, the United States calls attention to the Appellate Body's citation to its earlier Report in *United States – Standards for Reformulated and Conventional Gasoline*, where it points out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied."[72]

3.45 The United States recalls that the Appellate Body Report, after finding that the US measure was provisionally justified under Article XX(g), considered the criteria in the chapeau of Article XX. The United States considers that the Appellate Body's detailed findings under the chapeau of Article XX are addressed not to the Section 609 statute itself, but to the United States' application of the measure.

3.46 The United States claims that it has addressed all of the defects in the application of Section 609 found and identified by the Appellate Body: unjustifiable discrimination and arbitrary discrimination. Thus, the United States claims that it has complied with the recommendations and rulings of the DSB.

3.47 The United States observes that the Appellate Body found that while Section 609 requires as a condition of certification that foreign programmes for the protection of sea turtles in the course of shrimp trawl fishing be comparable to the United States' programme, the practice of the Department of State in making certification decisions was to require foreign programmes to be essentially the same as the United States' programme. In assessing foreign programmes, the Department of State should have been more flexible in making such determinations and, in particular, should have taken into consideration different conditions that may exist in the territories of those other nations.

3.48 The United States claims that, in response to this recommendation, the Department of State now considers any evidence that another nation may present that its programme to protect sea turtles in the course of shrimp trawl fishing is comparable to the US programme.[73] In reviewing such evidence, the Department of State takes into account any demonstrated differences in foreign shrimp

[71] Appellate Body Report, para. 187.

[72] Appellate Body Report, para. 115 (citing its report on *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (hereafter "*United States – Gasoline"*), p. 22.

[73] Revised Guidelines.

fishing conditions, insofar as such differences may affect the extent to which sea turtles are subject to capture and drowning in the commercial shrimp trawl fisheries.[74]

3.49 It is also the view of the United States that the DSB found that the certification process under Section 609 was neither transparent nor predictable and denied to exporting nations basic fairness and due process. There was no formal opportunity for an applicant nation to be heard or to respond to arguments against it. There was no formal written, reasoned decision. But for notice in the United States Federal Register, nations were not notified of decisions specifically. There was no procedure for review of, or appeal from, a denial of certification.

3.50 In response to this finding, the United States claims that it has instituted a broad range of procedural changes in the manner in which it makes certification decisions under Section 609. The process is now transparent and predictable. For example, the Department of State now notifies governments of shrimp harvesting nations on a timely basis of all pending and final decisions and provides them with a meaningful opportunity to be heard and to present any additional information relevant to the certification decision. The Department of State also gives the governments of harvesting nations that are not certified a full explanation of the reasons that the certification was denied and clearly identifies steps that such governments may take to receive a certification in the future.[75]

3.51 The United States considers that the Appellate Body found that at the time the WTO complaint first arose, the United States did not permit imports of shrimp harvested by vessels using Turtle Excluder Devices ("TEDs") that were comparable in effectiveness to those used in the United States, unless the harvesting nation was certified pursuant to Section 609. In other words, shrimp caught using methods identical to those employed in the United States were excluded from the United States market solely because they had been caught in waters of uncertified nations.

3.52 In response the United States claims that even before the Appellate Body issued its Report, the United States revised the policy at issue. Since August 1998, the United States has permitted the importation of shrimp harvested by vessels using TEDs, even if the exporting nation is not certified pursuant to Section 609.

3.53 With regard to this finding, the United States also argues that on 19 July 2000, the US Court of International Trade ("CIT") issued a decision which found that the current policy of the United States to permit the importation of shrimp harvested by TEDs from countries that are not certified pursuant to Section 609 "violates that statute on its face." However, the Court also expressly refused to issue an injunction to reverse that policy, finding that there was insufficient evidence to show that the policy was harming sea turtles. An appeal of this decision has been lodged with the United States Court of Appeals for the Federal Circuit. Pending the outcome of this appeal, the current policy remains in effect.

3.54 The United States therefore claims that during the 13-month implementation period it has addressed all the recommendations and rulings of the DSB identified above.

3.55 **Malaysia** submits that the United States has mischaracterized the Appellate Body's finding and analysis by erroneously stating that the Appellate Body's detailed findings under the Article XX chapeau are addressed not to the Section 609 statute itself, but to the United States' application of the measure.

3.56 Malaysia argues that the dichotomy proposed by the United States is fallacious in light of the fact that the application of the measure by the United States in the context of satisfying the three

[74] Revised Guidelines, Annex to this Report: paras. 10-13, 16-19 and Section II.B.(a)(2).
[75] Revised Guidelines, Annex to this Report: paras. 27, 29, 30, 35, 37 and 38.

requirements of the chapeau is an integral part of the Section 609 statute, which had been found by the Appellate Body to be only provisionally justified. Failure by the United States to fulfil the required standards under the chapeau would render Section 609 unjustified under GATT Article XX.

3.57 Malaysia also argues that in determining whether the United States has fulfilled the chapeau requirements of Article XX of the GATT 1994, the Appellate Body had examined the manner in which Section 609 had been applied. The Appellate Body opined that there were three standards to be fulfilled, namely arbitrary discrimination between countries where the same conditions prevail; unjustifiable discrimination between countries where the same conditions prevail; and disguised restriction on international trade. It should be noted that the Appellate Body, in its analysis of these standards, had faulted the United States in the manner of its application of Section 609 on several counts and had simultaneously made pertinent observations and comments.

3.58 Moreover, Malaysia considers that in order to give effect to the DSB recommendations and rulings, the import prohibition contained in Section 609 instead of being modified should have been removed to allow the importation of certain shrimp and shrimp products without any restriction. Malaysia insists that the Appellate Body in its Report had instead amplified the discriminatory elements of "unjustifiable discrimination" and "arbitrary discrimination" that need to be removed in order to comply with the recommendations and rulings of the DSB.

3.59 It is the view of Malaysia that in spite of the steps taken by the United States, these discriminatory elements still remain and the United States has to prove to the Panel that the implementation it has undertaken has fully satisfied the requirements of the chapeau of Article XX of the GATT 1994 and there is no longer any inconsistency with GATT Article XI. Thus, Malaysia claims and insists that the United States has to address each and every aspect in satisfying the elements of "unjustifiable discrimination" and "arbitrary discrimination" where the same conditions prevail.

3.60 With regard to the chapeau, Malaysia submits that what is at issue here is not Article XX(g), as claimed by the United States, but whether the requirements of the chapeau of Article XX have been met, particularly whether the United States has demonstrated a justification to continue the import prohibition based on unilateral and non-consensual measures sufficient to meet the requirements of the chapeau of Article XX.

3.61 The **United States** claims that compliance with the DSB recommendations and rulings does not require that the United States lift its import prohibition on shrimp and shrimp products harvested in a manner harmful to endangered sea turtles.

3.62 The United States argues that the Appellate Body affirmatively found that the general design and structure of Section 609 - a fundamental element of which is an import prohibition on certain shrimp and shrimp products - is provisionally justified under Article XX(g) of the GATT 1994.[76] The United States claims that the Appellate Body's detailed findings under the Article XX chapeau are addressed not to the Section 609 statute itself, but to the United States' application of the measure. The United States also argues that by its very terms, the chapeau of Article XX deals with the manner in which a measure is applied.

3.63 Thus, in the view of the United States, Malaysia cannot be correct in asserting that the only way to comply with the DSB recommendations and rulings is to lift the import prohibition under Section 609. The United States also argues that the Appellate Body Report provided the United States with the compliance option of modifying the United States' application of the measure and therefore states that it chose this option, and proceeded to comply based on a careful consideration of the Appellate Body Report. The United States recalls that the European Communities (EC), in its

[76] Appellate Body Report, paras. 125-146.

third-party submission, agrees with the United States that Malaysia's position is inconsistent with the findings of the Appellate Body.

(b) Unjustifiable discrimination

(i) Cumulative assessment of the aspects found to constitute unjustifiable discrimination

3.64 The **United States** notes that the Appellate Body found that the "cumulative effect" of certain aspects of its application of Section 609 constituted "unjustifiable discrimination" between countries where the same conditions prevail. The United States considers that the Appellate Body's use of the term "cumulative effect" is important in the Panel's examination of the United States' compliance with the Appellate Body findings. This carefully considered phrase means that the Appellate Body's findings of unjustifiable discrimination depended on a combination of aspects of the application of Section 609, and that the United States need not necessarily address each one of those aspects in order to comply with the Appellate Body findings. However, the United States claims that it has addressed all of the defects in the application of Section 609 identified by the Appellate Body and the Panel is not required in this proceeding to consider and apply the Appellate Body's finding on "cumulative effects".

3.65 The United States also notes that Hong Kong, China takes issue with its position that the Appellate Body's use of the term "cumulative effect" was purposeful and potentially important; that the Appellate Body's findings of unjustifiable discrimination depended on a *combination* of aspects of the application of Section 609, and the United States need not necessarily address *each one* of those aspects in order to comply with the Appellate Body findings. However, since none of the aspects of unjustifiable discrimination identified by the Appellate Body remain under the modified US measure, the Panel is not required in this proceeding to consider and apply the Appellate Body's finding on "cumulative effects."

3.66 **Malaysia** agrees with the United States' statement that the Appellate Body's use of the term "cumulative effect" is important in the Panel's examination of United States compliance with the Appellate Body's findings. The term "cumulative" is defined as "forming an aggregate; the word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other."[77] However, Malaysia claims that it does not agree with the United States' contention that it "need not necessarily address each one of those aspects [of the United States application of Section 609 which constituted "unjustifiable discrimination"] in order to comply with the Appellate Body's findings." Neither can Malaysia agree with the United States that "it has addressed all of the defects in the application of Section 609." Malaysia submits that the United States has to address each and every aspect in satisfying the elements of "unjustifiable discrimination".

(ii) Efforts to negotiate and whether a WTO Member is obliged to seek or obtain international consensus

(a) Efforts to negotiate

3.67 The **United States** recalls that the Appellate Body found that the differences among exporting nations in the extent of the United States' efforts to negotiate conservation agreements contributed to the finding of unjustifiable discrimination. The Appellate Body found that the United States negotiated seriously with some, but not with other Members (including the appellees) that export shrimp to the United States and the Appellate Body stated that the effect is plainly discriminatory and unjustifiable. In other words, according to the Appellate Body findings, the United States failed to engage the other parties to this dispute, as well as other WTO Members exporting shrimp to the United States, in serious across-the-board negotiations, apart from negotiations on the Inter-American

[77] Black's Law Dictionary, 6th Ed., p. 380.

Convention for the Protection and Conservation of Sea Turtles ("The Inter-American Convention"), for the purpose of concluding agreements to conserve sea turtles.

3.68 With regard to this finding the United States clarifies that it is true that it negotiated the Inter-American Convention before embarking on negotiations toward the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region ("MOU"), largely because Section 609 was originally interpreted to apply to countries in the Inter-American region much earlier. Nevertheless, the United States has since undertaken negotiations with countries in the Indian Ocean and South-East Asian region that are as serious as the earlier negotiations.

3.69 The United States also recalls that seven nations have now ratified the Inter-American Convention for the Protection and Conservation of Sea Turtles. That Convention will enter into force 90 days after the eighth instrument of ratification is deposited with the Government of Venezuela. The United States also notes that the negotiation of that Convention took place from 1993 to 1996, after nations in the Caribbean and Western Atlantic were first affected by the import restrictions of Section 609.

3.70 The United States claims that as early as 1996, it proposed to governments in the Indian Ocean region the negotiation of an agreement to protect sea turtles in that region, but received no positive response. In 1998, even before the Appellate Body issued its Report, the United States reiterated its desire to enter into such negotiations with affected governments, including Malaysia. During the summer of 1998, the United States informally approached several governments in the Indian Ocean region, as well as numerous non-governmental organizations, in an effort to get such negotiations under way.

3.71 The United States also recalls that on 14 October 1998, following the issuance of the Appellate Body Report, but before its adoption by the DSB, it formally renewed this proposal to representatives of the embassies of the four complainants in Washington, D.C. United States embassies delivered the same message to a wide range of nations in the Indian Ocean region. In each case, the United States presented a list of "elements" that the United States believed could form the basis of such an agreement. The United States also made clear its willingness to support the negotiating process in a number of ways.[78]

3.72 The United States highlights in its submissions that, in a continuing effort to launch such negotiations, the United States actively participated in a Symposium and Workshop on Sea Turtle Conservation and Biology, held in Sabah, Malaysia on 15-17 July 1999. The Symposium concluded with the adoption of the Sabah Declaration, which called for "the negotiation and implementation of a wider regional agreement for the conservation and management of marine turtle populations and their habitats throughout the Indo-Pacific and Indian Ocean region."[79]

3.73 The United States also recalls that in October 1999, the Government of Australia hosted a follow-up conference in Perth, Australia, to consider the conservation of sea turtles throughout the Indian Ocean and South-East Asian region. The United States again participated actively and contributed funding to defray the costs of the conference and to facilitate the participation of representatives from developing countries. At the Perth Conference, participating governments committed themselves to develop an international agreement on sea turtle conservation for that region[80], and the Government of Malaysia subsequently hosted the first round of negotiations toward

[78] US Department of State, Possible Elements of a Regional Convention for the Conservation of Sea Turtles in the Indian Ocean.

[79] Sabah Declaration, July 1999.

[80] Resolution on Developing an Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and their Habitats, October 1999.

such an agreement in Kuantan, Malaysia, from 11-14 July 2000. The United States again participated actively and contributed significant funding to cover the costs of the meeting and to facilitate the participation of representatives from developing countries. In all, 24 countries participated in the negotiations, along with a number of intergovernmental organizations and non-governmental organizations.

3.74 The Kuantan meeting, the United States notes, adopted language for the non-binding Memorandum of Understanding. The meeting also produced a Final Act, indicating that, before the MOU can be finalized, a Conservation and Management Plan must first be negotiated and appended as an annex to the MOU. Negotiations on the Conservation and Management Plan are anticipated to take place in 2001.

3.75 Thus, the United States claims that it has, in fact, addressed this finding of the Appellate Body, by engaging in negotiations not only with Malaysia but also with other nations of the Indian Ocean region on a sea turtle conservation agreement and that those negotiations have achieved considerable, and indeed remarkable, progress in the last two years.

3.76 Moreover, in response to a question of the Panel[81] concerning the efforts of the United States to resort to international mechanisms to protect sea turtles to which the Appellate Body referred in its Report, the United States replies that perhaps the primary international mechanism mentioned by the Appellate Body is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The United States is a party to CITES and plays a leading role in CITES bodies, in particular the CITES Conferences of the Parties (COP).

3.77 For quite some time, the United States notes, all species of sea turtles covered by Section 609 have been listed in Appendix I to CITES. The United States fully supports these listings, which have essentially banned international trade in sea turtles and sea turtle products. The United States has also firmly and successfully resisted efforts at a recent CITES COP to "downlist" a particular population of hawksbill sea turtles to Appendix II, which would reopen trade in the sea turtles in question.

3.78 The United States also explains that by listing all these sea turtle species in Appendix I and by maintaining those listings, CITES has essentially done all it can to protect endangered sea turtles. CITES has no explicit mandate to manage wildlife populations; it only regulates international trade in the species themselves. In particular, CITES does not have responsibility for adopting measures to protect sea turtles from other types of harm, including their incidental drowning in shrimp trawl nets.

3.79 With regard to sea turtle species, the United States submits that unfortunately their listing in Appendix I to CITES has not secured their survival. Indeed, argues the United States, most species of sea turtles, including most species in the Indian Ocean and South-East Asian region, have continued to decline precipitously since their CITES listings, some to the brink of extinction.

3.80 Accordingly, while the United States has actively supported and promoted all CITES efforts to protect sea turtles, both before and after the Appellate Body Report, the United States does not feel that it can rely on those efforts alone to achieve its goal of effective sea turtle conservation.

3.81 The United States notes that another international mechanism mentioned in the Appellate Body Report is the Convention on the Conservation of Migratory Species of Wild Animals

[81] The question reads as follows: "With reference to the Appellate Body finding (WT/DS58/AB/R, para. 171) that the United States did not attempt to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban, could the United States specify if, since the issuance of the Appellate Body Report, the United States had recourse to those international mechanisms? If yes, please specify the agreements, the bodies and the procedures applied. If no, please explain why it was found impossible, inappropriate or irrelevant."

(CMS), also known as the Bonn Convention. Since the issuance of the Appellate Body Report, the United States has successfully worked with the CMS Secretariat in advancing the negotiations toward the MOU. CMS is contributing its recognized expertise in these negotiations and serves as the interim secretariat for the MOU.

3.82 Finally, the United States argues that it has had considerable recourse to the World Conservation Union (IUCN) since the issuance of the Appellate Body Report in furtherance of its goal to conserve sea turtles. With financial support from the United States and like-minded members, IUCN has adopted an active programme to support sea turtle conservation efforts in various regions. IUCN is working with the United States and other countries in the Inter-American region to prepare for the entry into force of the Inter-American Convention. IUCN has also actively supported the negotiating process toward the MOU. At the most recent IUCN Conservation Congress in Amman, Jordan, the United States worked with other delegations to ensure passage of resolutions calling for sea turtle conservation efforts worldwide.

3.83 Arguing that there was a lack of cooperative efforts by the United States prior to the imposition of the unilateral ban, **Malaysia** submits that the Appellate Body Report emphasized the "failure of the United States to engage […] 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 Members" as bearing heavily on any appraisal of unjustifiable discrimination.[82]

3.84 Malaysia submits that with regard to this failure of the United States "to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted,"[83] the Appellate Body stressed three very substantive points regarding the importance of international consensus for addressing environmental measures rather than resorting to unilateral actions. The Appellate Body firstly noted that the Congress of the United States expressly recognised the importance of securing international agreements for the protection and conservation of the sea turtles species in enacting Section 609, but apart from the negotiation of the Inter-American Convention, the United States did not indicate any serious substantial efforts to carry out the express directions of Congress.

3.85 Secondly the Appellate Body opined that the protection and conservation of highly migratory species of sea turtles demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. It noted that the need for such efforts have been recognised in the WTO itself and in a significant number of other international instruments and declarations, such as Principle 12 of the *Rio Declaration on Environment and Development*, paragraph 2.22(i) of *Agenda 21*, Article 5 of the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals, and in the Report of the WTO Committee on Trade and Environment on the occasion of the Singapore Ministerial Conference.[84]

3.86 Thirdly, the Appellate Body found that successful negotiation of the Inter-American Convention provides "convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609".[85] According to Malaysia, the well advanced state of negotiations in the Indian Ocean

[82] Appellate Body Report, para. 166.
[83] Appellate Body Report, para. 167 (emphasis added by Malaysia).
[84] Appellate Body Report, para. 168.
[85] Appellate Body Report, para. 171.

and South-East Asian Region, and the recognition of the effectiveness of Malaysia's sea turtle conservation programme also show that there are alternative courses of action reasonably open to the United States to protect sea turtles in Malaysia. Thus, Malaysia reiterates that as the country invoking the "exceptions" of Article XX, the United States bears the burden of proving otherwise.

3.87 Malaysia notes that the Original Panel Report concluded that "the best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development, would be to reach cooperative agreements on integrated conservation strategies,"[86] and notes that this finding by the Panel was not overruled by the Appellate Body.

3.88 With regard to Malaysia's cooperation efforts, Malaysia claims that, since 1999, it has participated in discussions with the United States and other Asian countries and has agreed, as stated in the Sabah Declaration of July 1999 as well as in the Perth Resolution of October 1999, to develop an MOU. At the Kuantan conference hosted by Malaysia in July 2000, Malaysia, the United States and 22 other countries adopted a Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region ("MOU") and, in the Final Act, agreed to hold negotiations in 2001 on a Conservation and Management Plan to be appended to this MOU.

3.89 Malaysia refers to the Conservation and Management Plan (CMP) under the MOU, the details of which have yet to be finalized. It is believed that the United States volunteered to prepare a draft of the CMP. This draft is expected to be discussed during the next negotiations scheduled to be held in the first quarter of 2001. Malaysia believes that the Philippines has indicated its interest in hosting this meeting. The CMP is expected to cover, *inter alia*, protection of sea turtles, sale and trade in sea turtles, reducing the threats to sea turtles, research and education, exchange of information, capacity building and harmonization of domestic laws on the protection of sea turtles. The two main issues that remain unresolved are funding and the setting up of a Secretariat. Of particular concern is where the Secretariat should be based.

3.90 Malaysia does not agree with the United States that the MOU will not be legally binding even when the Conservation and Management Plan has been adopted. Malaysia states that signatories to the MOU had expressed their willingness to make it legally binding in Clause 4 of the Basic Principles of the MOU, where signatory States expressly demonstrated that they "[w]hen appropriate [...]will consider amending this MOU to make it legally binding" (emphasis added). The fact that the signatory States will rather than may consider making the MOU legally binding is a manifestation of their intention to make it legally binding. This illustrates that there is a real likelihood that the MOU will be made legally binding. It is ironic that the United States makes this assumption when the clause was actually inserted at its request.

3.91 Malaysia notes that the MOU also recognises the importance of involving all States in cooperative conservation and management of marine turtles and their habitats. Therefore the continuous unilateral action by the United States in the imposition of the import prohibition and the application of unilaterally determined standards is an act contrary to its obligation to refrain from acts which would defeat the object and purpose of the MOU, as per Article 18 of the Vienna Convention on the Law of Treaties.

3.92 Malaysia also argues that the MOU is attached to the Final Act of the Negotiation meeting to adopt the text of the MOU, signed on 14 July 2000; that it is an international agreement signed by the representatives of several countries, including the United Sates. Article 2 of the Vienna Convention defines a "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related

[86] Panel Report, para. 9.1.

instruments." Further, there is also a direct reference to the Convention on Migratory Species and other international instruments in the Final Act and the MOU.

3.93 Malaysia's intentions with respect to the MOU are reflected in the fact that Malaysia is a signatory to the Final Act of the Negotiation Meeting to adopt the text of the MOU in which Clause 4 of the Basic Principles of the MOU states that the signatory States, when appropriate, will consider amending the MOU to make it legally binding.

3.94 It is the view of Malaysia that, even though the MOU will become legally binding only after the Conservation and Management Plan has been finalized and annexed to the MOU in 2001, there is a good faith obligation of the United States to refrain from unilateral acts that would defeat the purpose of this MOU to recognize the right of exporting countries, including Malaysia, to continue its conservation programme for sea turtles. Malaysia's turtle conservation programme has been confirmed as "one of the best conservation programmes for marine turtles anywhere in the world".[87] The unilateral import prohibition of the United States, by ignoring the internationally recognised effectiveness of Malaysia's existing conservation programme for sea turtles and by acting contrary to the declared United States' commitment to finalize the multilateral agreement on the conservation of marine turtles in 2001, continues to constitute "arbitrary or unjustifiable discrimination between countries" as prohibited by Article XX of the GATT 1994.

3.95 In the view of the **United States**, the application of the US measure does not defeat the purpose of the MOU. By its own terms, the objective of the MOU is "to protect, conserve, replenish and recover marine turtles and their habitats, based on the best scientific evidence, taking into account the environmental, socio-economic and cultural characteristics of the signatory States." Section 609 does not in any way undermine this objective. Indeed, Section 609 has the same basic objective as the MOU – to conserve sea turtles. Moreover, since the MOU does not regulate international trade in shrimp and shrimp products, the maintenance of the trade restrictions at issue in this dispute cannot be said to conflict with the provisions of the MOU in any way. The United States recalls that at its request, a clause was added to paragraph 4 of the "Basic Principles" section of the MOU, providing that "[w]hen appropriate, the signatory States will consider amending this Memorandum of Understanding to make it legally binding".

3.96 **Malaysia** submits that its efforts to reach a negotiated solution in relation to the issue of conservation of sea turtles in its region encompass participation in various negotiations and related activities on the conservation of nature, natural resources and environment. In this respect, Malaysia:

(a) Is a party to the ASEAN Agreement on the Conservation of Nature and Natural Resources signed in 1985;

(b) participated in the 1st ASEAN Symposium and Workshop on Sea Turtle Biology and Conservation;

(c) is a party to the ASEAN Memorandum of Understanding on Sea Turtle Conservation and Protection;

(d) is a signatory to the Langkawi Declaration on the Environment, 1989;

(e) participated in bilateral and regional turtle conservation programmes through the ASEAN Working Group for Nature Conservation; and

(f) is a party to the Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES).

[87] Panel Report, Annex IV, Transcript of the Meeting with the Experts held on 21-22 January 1998, para. 69.

3.97 With regard to its multilateral and bilateral negotiations since 1996, Malaysia submits that those include the following:

(a) In 1996, Malaysia launched the Turtle Island Heritage Protected Area in cooperation with the Philippines to develop uniform conservation measures for turtles on the islands;

(b) in the same year Malaysia hosted the first South-East Asian Fisheries Development Centre (SEAFDEC) workshop on marine turtle research and conservation;

(c) Malaysia participated in discussions with the United States and other Asian countries to develop the Indian Ocean and South-East Asian Region Agreement on the Conservation and Management of Marine Turtles and their Habitats as *per* the Sabah Declaration of July 1999 and the Perth Resolution of October 1999;

(d) in July 2000, Malaysia hosted negotiations on an Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and their Habitats, where a Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region was adopted (the Conservation and Management Plan is expected to be finalised soon);

(e) Malaysia agreed to host jointly with Thailand the Regional Millennium Conference on Sustainable Fisheries Development under ASEAN and SEAFDEC, scheduled for November 2001. Topics to be covered are fisheries management, aquaculture, and post harvest and fisheries trade;

(f) in April 2001, Malaysia will hold a national conference on fisheries management and conservation. Among the topics to be covered is conservation of endangered species which includes marine turtles;

(g) Malaysia is in the process of acceding to the Convention on the Conservation of Migratory Species of Wild Animals; and

(h) Malaysia has bilateral and regional turtle conservation programmes through the ASEAN Working Group for Nature Conservation.

3.98 The above elements, Malaysia submits, reflect the efforts of Malaysia to act to conserve and protect sea turtles.

(b) Whether a WTO Member is obliged to seek or obtain international consensus before resorting to the measure at issue

3.99 **Malaysia** submits that in order to comply with the Appellate Body's recommendations and rulings, on the expiry of the reasonable time period, the United States should lift the import prohibition whilst it engages in negotiations for the conservation of marine turtles. As mentioned earlier, the United States participation in the development of an Indian Ocean and South-East Asian Regional Agreement on the Conservation and their Habitats provides concrete evidence that an alternative course of action was reasonably open to the United States for securing the policy goal of its measure rather than imposing an import prohibition.

3.100 When arguing that cooperative efforts to protect and conserve sea turtles must be undertaken prior to the imposition of the import ban, Malaysia submits that the efforts made by the United States, set out in its Status Reports to the DSB[88] cannot be deemed to have any retrospective effect in eliminating the existence of the import prohibition which was present even before the actions taken by the United States.

[88] WT/DS58/15 and Add. 1-4.

3.101 In support of its claims, Malaysia recalls the following finding and conclusion in the Original Panel Report:

> "9.1. In our view, and based on the information provided by the experts, the protection of sea turtles throughout their life stages is important and TEDs are one of the recommended means of protection within an integrated conservation strategy. We consider that the best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development, would be to reach cooperative agreements on integrated conservation strategies, covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned."[89]

3.102 The **United States** claims that Malaysia's argument in the sense that "cooperative efforts to protect and conserve sea turtles must be undertaken prior to the imposition of the import ban", is incorrect for three reasons:

(a) First, the issue in this proceeding is not what steps the United States should have taken during the past decade to ensure comparable treatment between exporting nations, but whether or not the United States has taken appropriate steps to address the aspects of the application of Section 609 that the Appellate Body found inconsistent with the Article XX chapeau. The United States could not travel back in time and conduct negotiations with the complaining countries. Rather, the United States appropriately used the reasonable period of time to engage in serious sea turtle conservation negotiations with Malaysia and the other complaining countries. As a result, by the end of the reasonable period of time the United States had complied with the recommendations and rulings relating to discrimination in the level of negotiations. Moreover, by the present time - one year after the December 1999 end of the reasonable period of time - even further progress has been made in those negotiations.

(b) Second, if Malaysia is arguing that the Panel must ignore the negotiations conducted during the reasonable period of time because the import restrictions remained in effect, such an argument is inconsistent with the Dispute Settlement Understanding. In particular, Article 21.3 provides that "if it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time to do so." In this case, the United States and the four complainants agreed on a 13-month reasonable period of time. The United States was within its rights under the DSU to maintain the import restrictions during the reasonable period of time, and the United States complied with its obligations under the DSU by using this period to amend the Revised Guidelines, to offer and provide technical assistance, and to engage in serious, good faith negotiations on sea turtle conservation. Thus, the measure as modified by the end of the reasonable period of time complies with the DSB recommendations and rulings.

(c) Third, nowhere in the Appellate Body Report does the Appellate Body indicate that the United States should lift its import prohibition. In fact, the import prohibition on shrimp harvested in a manner harmful to endangered species of sea turtles is part of the general design and structure of the US measure, which the Appellate Body found to be provisionally justified under Article XX(g). As noted, the Appellate Body instead expressed concerns with respect to the *application* of Section 609, one element of which was the extent of efforts to negotiate with differing countries. By

[89] Panel Report, para. 9.1.

> addressing this aspect of the *application* of Section 609, without removing the ban on certain shrimp imports, the United States has directly and fairly complied with the DSB recommendations and rulings.

3.103 The United States also notes that in its third-party submission, the European Communities agrees [with the United States] that it would be unreasonable to interpret the finding of the Appellate Body to require the United States "to travel back in time" and hold negotiations some time in the past.

3.104 As a "corollary" to its submissions on the need for preliminary international consensus, **Malaysia** claims that no unilateral actions to deal with environmental measures may be imposed before any international consensus is reached. This is, according to Malaysia, particularly borne out by the references cited by the Appellate Body to the various international instruments and declarations. In the absence of any mutually agreed international standard to conserve and protect sea turtles, recognition of each country's sovereign right to manage and maintain its own conservation programme for sea turtles should be respected. This is consonant with the principle of national sovereignty which is accorded recognition in several multilateral environmental treaties, in particular, Articles XIII and XIV of the Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES), Articles 3 and 5 and the Preamble of the Convention on Biological Diversity (CBD), and Article 3 and the Preamble of the United Nations Framework Convention on Climate Change (UNFCCC).[90]

3.105 The **United States** argues that the rule proposed by Malaysia is most definitely not a corollary of any Appellate Body findings. To the contrary, such a rule is flatly inconsistent with the Appellate Body Report and would effectively eviscerate the Article XX(g) exception. In fact, Malaysia presented this very same argument to the Appellate Body, and the Appellate Body declined to adopt it.[91]

3.106 The United States recalls that the Appellate Body found that the general design and structure of Section 609 was provisionally justified under Article XX(g), but that certain aspects of the *application* of Section 609 were inconsistent with the chapeau of Article XX. Part of the general design and structure of Section 609 was for the United States to *initiate* sea turtle conservation negotiations with affected countries. The United States argues that the law, however, does not contemplate the *completion* of such negotiations before the effective date of the selective import prohibition. And, in fact, the import prohibition under Section 609 went into effect before such negotiations were completed with any exporting country. The Appellate Body found no defect with this fundamental aspect of the US measure. The Appellate Body thus approved of a measure that, by its general design and structure, was inconsistent with the purported "corollary" proposed by Malaysia.

3.107 With regard to Malaysia's argument on this particular issue, the United States finds that such a "corollary" in the Appellate Body Report would amount to grave legal error. The United States argues that Malaysia's "corollary" is inconsistent with the Appellate Body's reasoning with respect to negotiations. The unjustifiable discrimination found by the Appellate Body was that the United States' efforts to negotiate with Western Hemisphere nations were more extensive than the negotiations with the complaining, Indian Ocean nations. Since the United States did not complete negotiations with Western Hemisphere nations before imposing the import prohibition, the fact that the United States has similarly not yet completed negotiations with Indian Ocean countries is not an instance of "unjustifiable discrimination." To the contrary, this aspect of Section 609 results in the *same* treatment for both Indian Ocean nations and Western Hemisphere nations.

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[90] Panel Report, para. 3.99.

[91] Panel Report, para. 3.275 (summarizing Malaysia's argument that conservation measures may only be adopted on a cooperative basis); Appellate Body Report, para. 52 (incorporating by reference Malaysia's argument to the Panel on this issue).

3.108 The United States also argues that in comparing the length of time it took to negotiate the Inter-American Convention with the time it is taking to negotiate the MOU, one must also keep in mind that the former is a legally binding instrument, while the latter is not. Legally binding instruments almost always take longer time to negotiate and conclude than non-legally binding instruments, if only because the former are subject to higher levels of scrutiny. Governments often tend to take greater care in crafting provisions of legally binding instruments, which must be approved at the highest levels, than they take in crafting provisions of non-legally binding instruments. This heightened degree of care usually translates into longer negotiating periods.

3.109 **Malaysia** submits that the United States has misunderstood the Malaysian submission. The "corollary" that no unilateral actions to deal with environmental measures may be imposed before any international consensus is reached is premised on Malaysia's submission that cooperative efforts to protect sea turtles must be undertaken prior to the imposition of the import ban, after an analysis of the Appellate Body's examination of the standard of "unjustifiable discrimination". It is significant to note that the words "may be" have been used and not "shall". The elements of "cooperative efforts", "international mechanisms" and "international consensus" with the objective concluding bilateral or multilateral agreements for the protection and conservation of sea turtles before imposing the import prohibition has been considered vital by the Appellate Body whilst examining the standard of "unjustifiable discrimination." This deduction is made based on the Appellate Body's decision wherein it had acknowledged that the WTO itself and a host of international instruments and declarations essentially state that environmental measures addressing transboundary or global environmental problems should as far as possible be based on an international consensus and unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.[92] Based on the reasoning above, it is not correct for the United States to state that Malaysia seems to step back from this argument. Malaysia submits that the statement that the Appellate Body Report did not exclude the legal justifiability of unilateral import restrictions based on Article XX if international agreements for the protection of sea turtles cannot be secured, is consistent with the aforesaid reasoning.

3.110 The **United States** notes that Australia, in its third-party submission, is concerned about the continuation of an import ban based on a unilaterally determined conservation standard to address a transboundary or global environmental issue. Australia presents a legal argument to support its policy concern. The United States submits that this argument, however, is based on an unsupported leap from a description of the Appellate Body findings to the flawed premise that the United States must show that its import ban is now based on "consensual and multilateral procedures". Australia does not cite any Appellate Body finding that environmental measures must be based on "consensual and multilateral procedures," and, in fact, the Appellate Body made no such finding.

3.111 The United States argues that the Appellate Body uses the phrase "consensual and multilateral procedures" only once, in a discussion of the Inter-American Convention on Sea Turtle Conservation. Specifically, the Appellate Body notes that: "[t]he Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles."[93] From this observation, claims the United States, the Appellate Body does not jump, as Australia does, to the conclusion that all environmental measures must be based on "consensual and multilateral procedures," nor that all countries that participated in similar negotiations would share such convictions. Indeed, such conclusions would be illogical and untenable, since, depending on the positions of the Parties to the negotiation, it may not be possible to reach consensus.

3.112 The United States notes that Australia also makes a related argument that the progress in the ongoing Indian Ocean and South-East Asian regional negotiations proves that the United States has an

[92] Appellate Body Report, para. 168.
[93] Appellate Body Report, para. 170 (emphasis added by the United States).

alternative avenue for addressing its sea turtle conservation concerns. In the opinion of the United States, this argument is based on two flawed premises. First, Australia implies that prior to invoking the Article XX(g) exception, a WTO Member must exhaust all possibilities for achieving its goals in other ways. The WTO Agreement contains no such requirement, and the Appellate Body made no such finding in this regard. In fact, the Appellate Body affirmatively found that the means of the US measure were reasonably related to its ends (i.e., sea turtle conservation).

3.113 Second, continues the United States, the progress made in multilateral negotiations in the Indian Ocean and South-East Asian region will not necessarily translate into the achievement of the environmental goal of the US measure. In other words, the negotiations may, or may not, result in multilaterally-agreed steps that will save sea turtles from extinction. One fact, however, is more certain: if insufficient steps are taken to reduce incidental sea turtle mortality in shrimp trawling operations, sea turtles will be subject to irrevocable and permanent extinction. In short, the fact that the United States has engaged in multilateral negotiations cannot, as Australia suggests, be used as a basis for finding that the United States has not complied with the DSB recommendations and rulings.

3.114 Third, the United States also recalls that the Appellate Body uses this observation to support its finding that the failure of the United States to negotiate seriously with some countries but not with other Members that export shrimp to the United States, resulted in unjustifiable discrimination under the chapeau of Article XX(g). The United States claims that the Appellate Body repeatedly mentions that the issue was whether or not the United States *pursued* negotiations with the appellees; nowhere did the Appellate Body purport to impose a requirement that the parties to such negotiations must reach an agreement. Indeed, such an *a priori* requirement, as the Appellate Body wrote, would render Article XX "*inutile*." If the importing and exporting nation reach agreement on a particular conservation measure, neither WTO Member would likely need recourse to WTO dispute settlement procedures. The Appellate Body Report expressly rejected the creation of such *a priori* tests for the application of Article XX exceptions, and did so in the strongest possible terms:[94]

> "The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the US measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, 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 (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."

3.115 In response to Malaysia's disagreement with the unilateral determinations of the United States under Section 609, the United States explains that neither the Appellate Body Report nor the terms of the Article XX chapeau exclude the possibility that an importing Member may make certain determinations regarding imported goods. The test of the Article XX chapeau is whether a measure is

[94] Appellate Body Report, para. 121 (emphasis added by the United States).

applied in a manner that results in arbitrary or unjustifiable discrimination, not whether determinations are made by a Member itself or in conjunction with other Members. Individual Members have the capacity to act fairly and without discrimination; conversely, multilateral action is no guarantee against discrimination.

3.116 Moreover, the chapeau of Article XX makes clear that any single Member of the WTO may invoke its provision. In that regard, it is worth recalling the precise words of the chapeau of 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 ba *any Member* of measures [described in paragraphs (a) through (j)]." (Emphasis added by the United States).

3.117 Finally, the United States explains that the Panel is to examine whether the measure – that is the actions of the United States – is consistent with the chapeau of Article XX. The United States can control, and is responsible, for its actions. Thus, the United States can take steps to meet the requirements of the chapeau by expending *efforts* to negotiate. However, the United States cannot control, and cannot be held responsible, for the actions of its negotiating partners. It would not make sense if the issue of US compliance turned on the actions of other WTO Members, including the complaining parties. This would be the precise result if, as Malaysia suggests, the United States must reach agreement with other parties before applying the measure.

(iii) Other aspects

(a) Consideration of the situation of exporting countries in the Revised Guidelines

3.118 The **United States** claims that, in order to comply with the recommendations and rulings of the DSB, it introduced modifications to the 1996 Guidelines governing the application of Section 609. For that purpose, on 25 March 1999, the US Department of State published a notice in the US Federal Register that summarized the Appellate Body Report, proposed measures by which the United States would implement the recommendations and rulings of the DSB, and sought comments from any interested parties.[95] On July 8, 1999, the Department of State published a second notice in the US Federal Register that summarized the comments received and set forth the measures that the United States would take to implement the recommendations and rulings of the DSB, taking into account those comments.[96]

3.119 The United States also mentions that the Appellate Body found that the most conspicuous flaw in the application of Section 609 is an apparent requirement that "all other exporting Members […] adopt essentially the same policy (together with an approved enforcement programme) as that applied to, and enforced on, United States domestic shrimp trawlers."[97]

3.120 The United States claims that it directly addressed this "most conspicuous flaw" through the adoption of Revised Guidelines governing the application of Section 609. Those Revised Guidelines introduce added flexibility in a wide variety of ways. Notably, a country may be certified as having a comparable sea turtle conservation programme even if such country does not adopt a TEDs

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[95] Notice of Proposed Revisions to the Guidelines for the Implementation of Section 609 of Public Law 101-162, Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, US Department of State, Federal Register Vol. 64, No. 57, 25 March 1999, Public Notice 3013, pp. 14481-14485

[96] Revised Guidelines, Annex to this Report.

[97] Appellate Body Report, para. 161.

programme, and that the United States "will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations."[98]

3.121 The United States also recalls that another aspect of the application of Section 609 which contributed to the Appellate Body's finding of unjustifiable discrimination was that "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."[99] The United States, however, modified this aspect of the application of Section 609 even prior to the release of the Appellate Body Report. Specifically, since August 1998, the United States has permitted the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609.

3.122 **Malaysia** submits that an examination of the Revised Guidelines reveals they are still very biased towards meeting the United States' shrimping conditions even in cases where the fishing environment of a harvesting nation does not pose a threat to sea turtles or the harvesting nation adopts a regulatory programme bearing the common feature of "incidental taking of sea turtles in the course of commercial shrimp trawl harvesting" (emphasis added by Malaysia). This is evident from the part entitled "Guidelines for Making Certification Decisions."

3.123 Malaysia claims that the United States has failed to address other aspects of the application of the United States' measure which constitutes the unjustifiable discrimination faulted by the Appellate Body. The Appellate Body held that Section 609 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 programme) as that applied to, and enforced on United States domestic shrimp trawlers."[100] Malaysia claims that this element requiring *"all other exporting Members"* to adopt *"essentially the same"* policy is still present in the Revised Guidelines. In spite of the Revised Guidelines, Section 609 only allows import of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.[101] Therefore Malaysia insists that this only allows import of shrimps harvested exclusively by means in accordance with the United States programme.[102]

3.124 Malaysia also claims that by setting out this condition, the United States is subjecting exporting nations to its own unilaterally determined standard as to what constitute "means that do not pose a threat to sea turtles". Therefore, in order to enable its shrimp to enter into the United States, a harvesting nation will have to adopt a means of harvesting shrimps that the United States will consider as not posing "a threat to sea turtles". Hence, the harvesting nations will have to adopt "*essentially the same* policy" as that of the United States if they wish to exercise their GATT rights. This, Malaysia submits, is the "intended and actual coercive effect on the specific policy decisions made by foreign governments" which the Appellate Body has ruled to be the "most conspicuous flaw"[103] of the US measure.

3.125 Malaysia submits that what Malaysia is complaining about is the fact that the Revised Guidelines require harvesting nations to have conservation measures comparable to that of the United States before the product can be exported into the United States. In other words, before it can be brought into the United States, the harvesting nation must have a turtle conservation programme that is comparable to that of the United States. The effect is, sovereign harvesting nations

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[98] Revised Guidelines, Annex to this Report: Section II.B.(a)(2).
[99] Appellate Body Report, para. 165.
[100] Appellate Body Report, para. 161.
[101] Revised Guidelines, Annex to this Report: para. 2.
[102] *Ibid.*
[103] Appellate Body Report, para. 161.

are coerced into adopting sea turtle conservation measures comparable to the one that has been unilaterally determined by the United States.

3.126 Moreover, Malaysia submits that there is no compliance by virtue of the fact that it is Malaysia's sovereign right to monitor its own conservation programme for protection of sea turtles and it is not for the United States to examine the effectiveness of Malaysia's programme *vis-à-vis* its own in the absence of any mutually agreed standards to govern the effectiveness of such a conservation programme. Furthermore, the heavy burden imposed on Malaysia to demonstrate to the United States that it is enforcing a "comparably effective regulatory program" (even though without the use of TEDs) through empirical data supported by objective scientific studies of sufficient duration and scope is "[an] abuse and misuse of an exception of Article XX [as] the detailed operating provisions of the measure [the Revised Guidelines] prescribe the arbitrary or unjustifiable activity."[104]

3.127 In response to the question from the Panel concerning a situation where Malaysia would apply for certification to the United States[105], Malaysia contends that it should not be subjected to the application of provisions that have been determined to be flawed. The flaw in these provisions has been maintained in spite of the modifications made to Section 609. Further, Malaysia maintains that no sovereign nation should be subjected to the United States' own unilaterally determined standard on how conservation of sea turtles is to be carried out, the very element that has been faulted by the Appellate Body.

3.128 Since the Original Panel, Malaysia has submitted that it does not have the same shrimp harvesting conditions as those in the United States. The fact that the Revised Guidelines address "incidental taking of sea turtles in the course of commercial shrimp trawl harvesting" (emphasis added) completely ignores the fact that other harvesting nations, like Malaysia, do not practise commercial shrimp trawl harvesting like the United States. From the outset, therefore, Malaysia is already at a disadvantage as a result of this fact. Since Malaysia does not practise shrimp trawling, it does not have recourse to the Revised Guidelines as the Guidelines deal only with commercial shrimp trawl harvesting, whereas in Malaysia shrimp is a by-catch from fish trawling activities. Therefore, the incidental capture of sea turtles in Malaysia is due to fish trawling. That is why Malaysia claims that it is clear that Malaysia's programme for turtle conservation would never be comparable to the United States. Malaysia's turtle conservation measures have been found to be one of the best in the world, but it would never be comparable to the United States programme as it is tailored to address the conditions unique and peculiar to Malaysia.

3.129 Malaysia notes the claim of the United States that it has yet to have the opportunity to take into account the peculiar and unique circumstances of Malaysia because Malaysia has not sought certification, hence these unique and peculiar circumstances have not been presented to them. Malaysia submits that it is not for to the United States to unilaterally examine the conditions prevailing in Malaysia, and then make a unilateral decision as to whether Malaysia's programme is comparable to the United States' unilaterally determined programme. No sovereign nation should be subjected to such scrutiny. This is also one of the reasons why Malaysia has not chosen to seek certification.

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[104] Appellate Body Report, para. 160.

[105] The question reads as follows: "Should Malaysia apply for certification to the United States, would there be elements in the Malaysian programme [for sea turtle conservation] […] which would make it impossible for the United States to certify it? Why?" In response to this question, the United States replies that "there are no elements in the Malaysian program […] that would make it impossible for the United States to certify Malaysia pursuant to Section 609. As set forth in the implementing guidelines for Section 609 [the Revised Guidelines] […], the United States would review any documentary evidence that Malaysia may wish to provide to demonstrate that its regulatory program to protect sea turtles in the course of shrimp fishing is comparable to the US program. The fact that Malaysia is choosing to protect sea turtles through means that do not involve the use of TEDs is not a bar to certification, in light of the modifications made to the guidelines in implementation of the DSB recommendations and rulings."

3.130 Clarifying this point in its response to a question from the Panel as to whether there are any turtles caught as incidental by-catch in the course of shrimp trawling, Malaysia responds that in Malaysia, turtles caught as incidental by-catch are only in fish trawling. Malaysia does not practise shrimp trawling. Further, in Malaysia, sea turtle mortality is not due to fishery activities, but is attributed to other causes, for instance pollution. Some incidents of death result from choking due to the consumption by turtles of plastic materials, which have been thrown into the sea, that the turtles mistake for food.

3.131 In short, Malaysia recalls the unilateral imposition by the United States of a ban on imports of certain shrimp and shrimp products from Malaysia, and the unilateral imposition by the United States of a certification system that does not take into account the internationally recognized effectiveness of Malaysia's conservation programme for marine turtles without the use of TEDs, nor the particular circumstances that prevail in Malaysia. Malaysia claims that this results in continued "unjustifiable discrimination between countries" prohibited by the chapeau of Article XX.

3.132 In the view of the **United States**, Malaysia argues that the Revised Guidelines are not more flexible because they still require "comparability" with the United States' TEDs programme. This argument, however, reflects a fundamental misreading of the Appellate Body Report. Section 609, as part of its essential structure noted by the Appellate Body, requires a comparison between the programmes of the United States and those of other countries. The Appellate Body, claims the United States, found that this aspect of Section 609 was reasonably related to sea turtle conservation and provisionally within the scope of Article XX(g). The flaw found by the Appellate Body was that the US Guidelines appeared to require exporting nations to adopt a *specific* policy to achieve a particular take rate of sea turtles in shrimp fisheries. And this flaw has been explicitly addressed in the Revised Guidelines. The Revised Guidelines are very clear that countries seeking certification may select any policy, so long as the result is comparable to the US programme in terms of sea turtle conservation.

3.133 To explain the particularities of the Revised Guidelines and its compliance with the recommendations and ruling of the DSB, the United States, in its answer to a question [106]by the Panel, highlights the manner in which the Revised Guidelines are applied and how the different policies are compared, granting enough flexibility to the applicants.

3.134 The United States explains that with respect to any country that expresses interest in this matter (i.e. applies for certification), the Department of State solicits any information that a country may have to indicate it has adopted a regulatory programme for the protection of sea turtles in its commercial shrimp fisheries comparable to the US programme. The Department of State closely reviews such information in consultation with the United States National Marine Fisheries Service (NMFS) in light of the provisions of Section 609 and the attendant Revised Guidelines

3.135 The United States claims that it not only considers the regulatory programme for the conservation of sea turtles; it also takes into consideration all other available information about the fishing environment and sea turtle populations of the country, as provided by the country in question, and as may be produced by other reputable sources, including established scientific, fishery, industrial and environmental organizations.

3.136 The United States clarifies that officials of the Department of State and NMFS also travel to the country in question to engage in a face-to-face dialogue with its governmental counterparts. The purpose of these visits is to discuss the regulatory programme of the country, answer questions about

[106] The text of the question reads: "Could the United States describe the methodology used to assess the comparability of foreign regulatory programmes with the US programme? For instance, could the United States provide the Panel with materials describing how this assessment was made in the cases of Australia and Pakistan?"

its comparison to the US programme, and to review aspects of the former programme in practice. For example, if a country's programme requires the use of TEDs, US officials work with foreign officials to review the design and installation of those TEDs, as well as the efforts made to ensure at least adequate enforcement. The visits almost always include the provision of hands-on technical assistance with fishermen and fisheries managers.

3.137 The United States gives two particular examples of countries whose shrimp and shrimp products are exported to the United States after having applied for certification since the adoption of the Revised Guidelines: Australia and Pakistan. With regard to Australia, the United States mentions that Australia has not sought certification pursuant to Section 609, but has rather sought to export shrimp harvested in two areas of Australia (the Spencer Gulf and the Northern Prawn Fisheries), on grounds that the harvesting of those shrimp does not harm endangered sea turtles. In the case of the Spencer Gulf, Australia provided comprehensive information indicating that there was virtually no interaction between sea turtles and shrimp fisheries in that cold-water area. Following careful review of that information by the Department of State and NMFS, the United States readily agreed to permit the importation of shrimp from the Spencer Gulf. Similarly, Australia sought to export shrimp from its Northern Prawn Fishery following its imposition of a mandatory use of TEDs in that area. The Department of State and the NMFS reviewed information provided by Australia demonstrating that the TEDs were comparable to those required for use in the United States. United States' officials from these agencies also visited the shrimp fishing grounds in the Northern Prawn Fishery and engaged in a cordial and informative exchange of information with their Australian counterparts. As a result of these undertakings, the United States agreed to permit the importation of this shrimp as well. Australia in its third-party submission acknowledges that the United States has made changes in the application of its measure. In particular, Australia confirms that under the Revised Guidelines, the United States now permits imports from Australia's Spencer Gulf region and Northern Prawn Fishery.

3.138 Pakistan, in contrast, explains the United States, sought to be certified pursuant to Section 609 on the grounds that it had implemented a comprehensive programme that was comparable to the US programme. The process followed by the United States to review this request was nevertheless similar to the process followed in reviewing the Australian requests. The Department of State and NMFS reviewed information provided by Pakistan, which showed that, in one of its two coastal provinces it had banned trawl fishing outright, while in the other it had begun requiring TEDs. Following a visit by US officials to Pakistan and further exchanges of information, the Department of State certified that Pakistan had indeed adopted a programme that was comparable to the US programme.

3.139 Furthermore, the United States' answer to the complementary question of the Panel on the description of the precise criteria used in the comparison of the regulatory programmes provides a clear and better comprehension of the passages from the Revised Guidelines that set forth the criteria for certification on the basis of having a comparable regulatory programme.[107]

3.140 The United States, when referring to the precise criteria used in comparing a foreign regulatory programme based on TEDs usage, explains that if the government of the harvesting nation seeks certification on the basis of having adopted a TEDs programme, certification shall be made if a programme includes the following:

(a) Required use of TEDs – a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the

[107] The question reads as follows: "[…] can [the United States] give a clear description of the precise criteria used in the comparison of regulatory programmes of the applicant countries with the United States programme?"

United States. Any exceptions to this requirement must be comparable to those of the US programme described above; and

(b) Enforcement – a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

3.141 The United States adds that a country may also be certified on the basis of having a regulatory programme not involving the use of TEDs. If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory programme to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification. Such a demonstration, explains the United States, would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information for a reliable determination. In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources.

3.142 In addition, explains the United States, countries may also seek to be certified on the basis of having a shrimp fishing environment that does not pose a threat of incidental taking of sea turtles. The Revised Guidelines provide that the Department of State shall certify any harvesting nation on this basis that meets any of the following precise criteria:

(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

(b) any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles; e.g., any nation that harvests shrimp exclusively by artisanal means; or

(c) any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

3.143 The United States also refers to the particular situation of uncertified countries that may also export shrimp to the United States if such shrimp is harvested in a manner that does not pose a threat to sea turtles. According to the Revised Guidelines, the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:

(a) Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in pond prior to being harvested.

(b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

(c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, such as winches, pulleys, power blocks or other devices providing mechanical advantage, or by vessels using gear that, in accordance with the US programme described above, would not require TEDs.

(d) Shrimp harvested by any other means or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. The Department of State shall publish any such determinations in the Federal Register and shall notify affected foreign governments and other interested parties directly.

3.144 The United States also mentions that in accordance with the current policy, shrimp harvested in the northern shrimp fishery in Brazil, where the Government of Brazil is enforcing a requirement to use TEDs, is being imported into the United States, even though Brazil does not qualify for certification due to the lack of TEDs use in the southern Brazilian fishery.

3.145 Finally, the United States argues that with regard to Malaysia's concerns with the implications of the US measure for Malaysian sovereignty, such issues of sovereignty were fully discussed during the Original Panel proceeding. At that time, the United States pointed out that the US measure did not affect Malaysia's sovereignty - the United States could not force any nation to adopt any particular environmental policy. In contrast, claims the United States, control of a nation's borders is a fundamental aspect of sovereignty, and the US measure is simply an application of its sovereign right to exclude certain products from importation. Whether or not the United States, in acceding to the WTO Agreement, agreed to refrain from such actions is the subject of this dispute. And, in any event, the Appellate Body Report addresses and resolves these issues. The Appellate Body found that the United States has a jurisdictional nexus with respect to the sea turtles found in the complainants' waters, and the Appellate Body found that the general design and structure of Section 609 falls within the scope of Article XX(g).

(b) The ruling of the United States Court of International Trade

3.146 **Malaysia** submits that since the United States Court of International Trade ("CIT") in the case of *Turtle Island Restoration Network and Anor. v. Robert L. Mallett, Acting Secretary of Commerce and Anor. and National Fisheries Institute Inc.* ruled that the United States Administration is ordered immediately from relying on the part of the Revised Guidelines which violates Section 609, it would appear that the relevant part of the revision made to the Revised Guidelines is null and void since the Revised Guidelines are *ultra vires* Public Law 101–162, in particular Section 609. Since a part of the Revised Guidelines which the United States seeks to rely upon as an element of its implementation process is being rendered a nullity *vis-à-vis* its parent legislation, Malaysia submits that there is therefore no compliance of the recommendation and rulings of the DSB by the United States.

3.147 Malaysia argues that the CIT held that the United States Administration determination(s) to grant United States entry to shrimp or products from shrimp which have been harvested with trawls equipped with US-comparable TEDs in waters of nations not duly certified by the President to the US Congress pursuant to Section 609 (on a shipment-by-shipment basis) violate that statute on its face.[108] On page 44 of its judgement, the CIT also held that the United States Administration "[defendants] be enjoined immediately from relying on that part of their guidelines which is violative of Section 609 on its face […]".

3.148 Malaysia claims that according to Article 27 of the Vienna Convention on the Law of Treaties, "A party may not invoke the provisions of its internal law as justification of its failure to perform a treaty". This was also the legal position adopted by the Appellate Body when it opined that "the United States bears responsibility for acts of all its departments of government, including its judiciary"[109]. On this score Malaysia submits that the United States bears responsibility for the CIT decision. Neither can the United States excuse itself that just because the CIT did not restrain it by the non-issuance of an injunctive relief, it is in a position to maintain its current policy. Malaysia submits that pending the outcome of the appeal the CIT decision stands.

3.149 The **United States** notes that the Appellate Body explained that another aspect of the application of Section 609 which contributed to the finding of unjustifiable discrimination was that "when this dispute was before the Panel and before us" - that is, the Appellate Body - "the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using

[108] *Turtle Island Restoration Network, v. Robert Mallett*, 110 Fed. Supp. 2d 1005 (CIT 2000).
[109] Appellate Body Report, para. 173.

TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609." The United States, however, modified this aspect of the application of Section 609 even prior to the release of the Appellate Body Report. Specifically, since August 1998, the United States has permitted the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609.

3.150 With regard to the Malaysian submission referring to the judgement of the CIT, the United States claims that Malaysia's argument, however, is incorrect, and is based on a misunderstanding of the ruling. The CIT did find, as Malaysia notes, that in its view Section 609 did not allow the importation from non-certified nations of shrimp harvested by TEDs. The court did not, however, order the US Department of State to change its current policy. The US Executive Branch does not agree with the court's interpretation, and the issue is currently under review by an appellate court. This appellate process will take considerable time to reach any conclusion. In the meantime, the United States plans to maintain its current policy. Thus, the ongoing legal proceedings have not resulted in any change in the US measure which is at issue and within the Panel's terms of reference. In short, the United States permits the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609, in accordance with the recommendations and rulings of the DSB.

3.151 The United States mentions that it does not expect a decision in that case for at least eight months or more, as the parties are still in the process of exchanging written briefs. In addition, there is always the possibility that the dates for submitting briefs may be extended. After the parties have completed exchanging written briefs, the court must set a date for oral arguments. Usually the court sets an oral argument date at least three months ahead of time. Its best estimate is that a date for the oral hearing would be set at the end of June or early July 2001, at the earliest. Following the oral hearing, the court may issue its decision. The court is not required by law to issue its decision by any particular date. Normally decisions are issued within three to nine months after argument, but it could be longer. Furthermore, there remains the possibility of another round of review within the court of appeals itself (i.e. either party may request a review by all of the judges on the court of appeals rather than a review by a subgroup of judges). In addition, notes the United States, there remains the possibility that the case could be appealed to the US Supreme Court. As a result, it may take considerable time before the *Turtle Island Restoration Network* case finishes working its way through the US judicial system.

3.152 With regard to the possible outcome of the appeal, the United States is of the opinion that the outcome of this litigation will likely be one of two possibilities. First, the Court of Appeals could reverse the decision by the CIT that the determination of the Department of State to permit the importation of TED-caught shrimp from countries not certified pursuant to Section 609 violates that law. If this were the case, the United States would be able to continue to import TED-caught shrimp from uncertified nations, as long as the shipments were accompanied by the appropriate customs documentation.

3.153 The second possible outcome, explains the United States, would be for the US Court of Appeals to affirm the lower court's decision, in which case the Court of Appeals probably also would enforce the prohibition against importing any shrimp or shrimp products from non-certified countries. Such a prohibition might not be enforced until after all appellate options had been exhausted. Such options would include consideration of whether to request review by the US Supreme Court.

3.154 The United States considers that the Court of Appeals may render any number of other decisions that it cannot predict at this point. But these two outcomes are the most likely at this time.

3.155 The United States also argues that it is also worth noting that it was precisely this aspect of the US measure upon which the Panel Report was based. In particular, this Panel reasoned that the country-wide application of the import prohibition, including with respect to TED-caught shrimp,

raised the possibility that exporting nations might be subject to inconsistent requirements, resulting in a threat to the multilateral trading system. Since the US import prohibition no longer applies to TED-caught shrimp, the reason why this Panel originally found the US measure outside the scope of Article XX would no longer apply.

3.156 Finally, the United States argues that the Mexican submission notes Mexico's view that a definitive court ruling regarding TED-harvested shrimp imported from non-certified countries would be a "serious setback" to US implementation. However, the US measure at issue in this proceeding does allow the importation of TED-caught shrimp from non-certified countries. In any proceeding, it would be possible for one or more parties to speculate on future changes in the measure at issue. However, such hypothetical scenarios are not before the Panel. Rather, the issue here is whether the US measure currently in effect is consistent with the obligations of the United States under the WTO Agreement.

(c) Technical assistance

3.157 The **United States** mentions that the Appellate Body also found that differences in levels of available technical assistance contributed to its finding of unjustifiable discrimination, because far greater efforts to transfer TEDs technology successfully were made to certain exporting countries than to others. The United States provided less technical assistance to those nations that first became affected by the law at the end of 1995 as a result of the decision of the US Court of International Trade.

3.158 The United States argues that it has reiterated many times its offer of technical assistance and training in the design, construction, installation and operation of TEDs to any government that requests it. The United States has made clear that any government wanting to receive such training need only make a formal request to the United States.

3.159 The United States also submits that it has provided such assistance and training to a number of governments and other organizations in the Indian Ocean and South-East Asian region since the DSB adopted the Appellate Body Report in this matter. For example, in July 1999, the US National Marine Fisheries Service (NMFS) presented a paper on TEDs and technology transfer at the sea turtle symposium in Sabah, Malaysia, discussed above. In September 1999, NMFS officials travelled to Bahrain to assist that government in the development of its TEDs programme. In July 2000, the NMFS hosted a visit to the United States by the Bahrain Director of Fisheries for discussions on TEDs and other fishery management subjects. The NMFS also conducted a TEDs workshop in Karachi, Pakistan in January 2000, focusing on evaluation and training issues. The United States believes that this workshop assisted the Government of Pakistan in its adoption of a successful TEDs programme. The NMFS conducted similar training in three places in Australia in July 2000 (Karumba, Cairns and Darwin) relating to the Australian Northern Prawn Fishery. In April 2000, the NMFS hosted a training seminar relating to TEDs for technical experts from the South-East Asian Fisheries Development Center.

3.160 The United States recalls that one of the complaining countries, Pakistan, accepted this offer, and Pakistan now has been certified under Section 609. The United States claims that Malaysia does not contest that the United States has made such good faith offers of technical assistance, nor the fact that Malaysia has not availed itself of such assistance.

3.161 **Malaysia** submits that the offer of technical assistance to the complaining parties, including Malaysia, does not eliminate the unjustifiable discrimination because it is not incumbent on Malaysia to use TEDs as a means of conserving turtles, in the absence of any multilaterally agreed standard on the use of TEDs and besides TEDs is not the sole measure to protect sea turtles. Furthermore Malaysia claims that it has been reported to have one of the best conservation programmes for marine turtles anywhere in the world and this programme has been maintained without the need to use TEDs.

3.162 Thus, with respect to the claim of the United States of its offer of technical training in the design, construction, installation and operation of TEDs to any government that requests it, Malaysia submits that it is of no consequence to Malaysia because, as in the words of Dr. Eckert, one of the scientific experts called by the Panel:[110] "[Malaysia] has one of the best conservation programmes for marine turtles anywhere in the world. They have really taken hold of the situation relative to the conservation of their nesting stocks, and done very, very well. It's been a very admirable effort".[111] The conservation programmes in Malaysia have been sustained at such a remarkable level even without resorting to the use of TEDs.[112] Nevertheless, Malaysia argues, its turtle conservation measures would never be comparable to the United States' programme as they are tailored to address the conditions unique and peculiar to Malaysia. Although the United States claims that it has yet to have the opportunity to take into account the peculiar and unique circumstances because Malaysia has not sought certification, Malaysia submits that it is not for the United States to unilaterally examine the conditions prevailing in Malaysia, and then make a unilateral decision on whether Malaysia's programme is comparable to the United States' unilaterally determined programme. No sovereign nation should be subjected to such scrutiny. This is also one of the reasons why Malaysia has chosen not to seek certification.

3.163 The **United States** claims that Malaysia's only comment on the offers of technical assistance by the United States is that Malaysia needs no such assistance because it has already established certain sea turtle conservation programmes. However, the programmes to which Malaysia refers relate to the protection of sea turtle eggs, while the US conservation measure is aimed at reducing the mortality of juvenile and adult sea turtles in shrimp trawling operations. The expert quoted by Malaysia, Dr. Scott Eckert, was very clear in stating that programmes to protect sea turtle eggs are not sufficient to conserve sea turtles. The United States notes that Dr. Eckert stated that "there are quite a few different possible threats faced by sea turtle populations but the most significant ones are the incidental take of sea turtles by fishing industries" and that "I do not believe that it is possible to mitigate incidental take in fisheries if that is your problem by simply trying to enhance production on a nesting beach. The data we have so far to date suggests that this is simply not a valid mitigation measure. You must take a multifaceted approach to all of your conservation."[113]

3.164 **Malaysia** further submits that evidence accepted by the Original Panel shows that the threats faced by sea turtles in Malaysia are different from those in the United States. As such, Malaysia addresses the situation differently. The extinction of sea turtles is not solely due to incidental take. In Malaysia, commercial exploitation of turtle eggs is a major problem; hence Malaysia's emphasis on the protection of turtle eggs as a conservation strategy. Malaysia notes that there is no evidence that the use of TEDs is the only way to address incidental take. Thus, insisting on the use of TEDs when the situation does not warrant it shows the inflexibility of the US measure. Malaysia also reiterates its stand that the Panel should not dwell on facts that were accepted in the Original Panel deliberations.[114] At this stage, the focus is on whether the United States has complied with the recommendations and rulings of the DSB. Malaysia's turtle conservation programme has been found to be one of the best in the world. However, Malaysia has been compelled to prove to the United States that its turtle conservation programme is comparable to that of the United States in order to be certified, so that its shrimp could gain entry into the United States. This has served to amplify the non-compliance of the United States with the DSB rulings and recommendations.

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[110] Panel Report, Annex IV, Transcript of the Meeting with the Experts held on 21-22 January 1998.
[111] *Ibid*, para. 69 of Annex IV.
[112] Panel Report, para. 3.7.
[113] Panel Report, Annex IV, Transcript of the Meeting with the Experts held on 21-22 January 1998, paras. 12-13.
[114] Panel Report, para. 3.73.

(d) Phase-in period

3.165 **Malaysia** argues that the unilateral import prohibition of the United States, by ignoring the internationally recognized effectiveness of Malaysia's existing conservation programme for sea turtles and by acting contrary to the declared commitment of the United States to finalize the multilateral agreement on the conservation of marine turtles in 2001, continues to constitute arbitrary and unjustifiable discrimination between countries as prohibited by Article XX of the GATT 1994. This discrimination, continues Malaysia, also becomes evident when one compares the more than five years of US negotiations, in the early 1990s, for the Inter-American Convention for the Protection and Conservation of Sea Turtles of 1996, with a corresponding Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and their Habitats.

3.166 The **United States**, in response to Malaysia's claim and Australia's comment, in its third-party submission, argues that the difference in phase-in periods has been corrected by the passage of time. The Appellate Body noted that Western Hemisphere countries had a three-year phase-in period before the import prohibition went into effect, while other nations - due to a domestic court ruling - only had a four-month period. By this point, however, Malaysia has had more than sufficient time to adopt a TEDs or comparable conservation programme. The United States argues that the Appellate Body started counting the phase-in period from December 1995, when the domestic court first ruled on the geographic scope of the measure. The reasonable period of time ended in December 1999 - four years after the domestic court ruling. And, by this time, more than five years have elapsed.

3.167 It is the view of the United States that these periods provide more than sufficient time for Malaysia to have adopted a TEDs or comparable programme, had it chosen to do so. For example, Thailand adopted a TEDs programme, and was certified by the US Department of State, in less than one year after the December 1995 domestic court ruling. Similarly, Pakistan made use of the Revised Guidelines adopted during the reasonable period of time, as well as the enhanced US offers of technical assistance, and has now also been certified.

3.168 Finally, the United States argues that since Malaysia has indicated no intention of adopting TEDs or other comparable measures to reduce sea turtle mortality in shrimp trawling operations, this is a non-issue.

(c) Arbitrary discrimination

(a) Lack of flexibility

3.169 The **United States** claims that it has addressed the two distinct aspects of the US application of Section 609 that the Appellate Body found constituted "arbitrary discrimination" between countries where the same conditions prevail. The United States recalls that the Appellate Body found:

(a) That the lack of flexibility in applying the guidelines not only contributed to a finding of "unjustifiable discrimination", but also resulted in "arbitrary discrimination" under the Article XX chapeau. The Revised Guidelines responded to this finding by increasing the flexibility in its application; and

(b) that the US certification process lacked transparency and due process protections for exporting WTO Members. The Revised Guidelines responded to these findings by providing extensive new procedures to ensure that every exporting country was fairly treated in the certification process.

3.170 The United States claims that, as explained above, the Revised Guidelines introduce added flexibility in a wide variety of ways. Notably, a country may be certified as having a comparable sea turtle conservation programme even if such country does not adopt a TEDs programme, and that the

United States "will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations."[115]

3.171 **Malaysia** submits and recalls that the flexibility in considering the comparability of foreign programmes and the United States' programme, the increased transparency and predictability of the certification process, and greater degree of due process alleged to be provided through the Revised Guidelines have not eliminated the elements of unjustifiable and arbitrary discrimination, which continue to persist and which are prohibited by Article XX of the GATT 1994. Malaysia considers that the alleged flexibility, as claimed by the United States, that takes fully into account any demonstrated differences between the shrimp fishing conditions in the United States and in other nations is negated if one examines how the Revised Guidelines are structured; an examination of the Revised Guidelines reveals they are still very biased towards meeting the shrimp trawling conditions in the United States. Malaysia observes that throughout the part of the Revised Guidelines entitled "II. Guidelines for Making Certification Decisions", the slant adopted by the United States is geared towards the scenario where the harvesting nation adopts a regulatory programme that addresses the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting.

3.172 Malaysia also submits that by limiting importation only to shrimp that meet the unilaterally determined conditions, the United States has failed to remove the "rigidity and inflexibility" that the Appellate Body held to constitute "arbitrary discrimination". The certification process subjects shrimp exporting nations to the sole discretion of the United States, which is the sole determinant of whether the exported shrimps meet the unilaterally determined standards set by the US Department of State.

3.173 Malaysia submits that, even though the US Department of State now takes into consideration any evidence that an exporting nation may present, the programme to protect sea turtles in the course of shrimp trawl fishing practised by that exporting nation still has to be "comparable to the United States' program". The actual coercive effect on the specific policy decisions made by foreign governments is still maintained in spite of the Revised Guidelines. Member countries are still subjected to the discretion of the US Department of State which can refuse certification if it finds that the turtle protection programme is not comparable to that of United States. The United States' failure to remove this "coercive effect" amounts to blatant non-compliance of the recommendations and rulings of the DSB.

3.174 Malaysia argues that from an examination of the Revised Guidelines, it is clear that the United States has no intention of removing the "unilateral character" of Section 609. Clearly the United States still intends to maintain an economic embargo that enforces the unilaterally determined environmental standard. Failure of the United States to remove the "unilateral character" embedded in Section 609 is a clear manifestation of the United States' intention to maintain the disruptive and discriminatory influence of the import prohibition. In doing so, the United States fails to comply with recommendations and rulings of the DSB.

3.175 Furthermore, Malaysia claims that it has demonstrated that the same conditions do not prevail in Malaysia and that the United States has not considered those unique and peculiar conditions. Malaysia also submits that the following characterization made by Malaysia was accepted by the Panel and that the Appellate Body did not overrule it:

(a) Malaysia was a nesting ground but was not known to be a feeding ground for sea turtles;

(b) the nesting season in Malaysia did not overlap with the shrimp season;

[115] Revised Guidelines, Annex to this Report: Section II.B.(a)(2).

(c) the loggerhead and Kemp's ridley sea turtles rarely nested on Malaysian beaches and did not occur in Malaysian waters respectively and the high mortality of sea turtles reported in shrimp trawls in the United States relate to both these sea turtles;

(d) the green turtle, hawksbill, leatherback and olive ridley were the major sea turtle species in Malaysia. Green turtles were resident in sea grass beds which were found in shallow coastal waters whilst hawksbills were found in coral reef; trawling was prohibited in these areas. During the nesting season, green turtles remained close to shore, in areas where trawling was also prohibited;

(e) during long-distance migrations between feeding and nesting grounds, turtles were actively swimming close to the surface of the water, which made them more vulnerable to the driftnets and longlines rather than trawlnets; and

(f) in Malaysia trawling targeted fish for most of the year and thus the incidental capture of sea turtles was due to fish trawls and not shrimp trawls.[116]

3.176 Malaysia considers that the Revised Guidelines are "saddled with detailed operating provisions"; Malaysia therefore submits that the heavy burden imposed on Malaysia to demonstrate to the United States that it is enforcing a comparably effective regulatory programme through empirical data supported by objective scientific studies of sufficient duration and scope is an abuse and misuse of an exception of Article XX.

3.177 The **United States** argues that it has not yet had the opportunity to take such circumstances into account since Malaysia has never sought to be certified under Section 609.

3.178 As stated above, the United States argues that Section 609, as part of its essential structure noted by the Appellate Body, requires a comparison between the programmes of the United States and those of other countries and recalls that the Appellate Body found that this aspect of Section 609 *was* reasonably related to sea turtle conservation and provisionally within the scope of Article XX(g). The flaw found by the Appellate Body was that the Revised Guidelines appeared to require exporting nations to adopt a *specific* policy to achieve a particular take rate of sea turtles in shrimp fisheries, a matter addressed in the Revised Guidelines and its current application.

(b) Due process

3.179 The **United States** recalls that another finding of the Appellate Body was that the certification process under Section 609 was neither transparent nor predictable and denied to exporting nations basic fairness and due process. There was no formal opportunity for an applicant nation to be heard or to respond to arguments against it. There was no formal written, reasoned decision. Except for notice in the US Federal Register, nations were not notified of decisions specifically. There was no procedure for review of, or appeal from, a denial of certification.

3.180 In response to this finding, the United States explains that it has instituted a broad range of procedural changes in the manner in which it makes certification decisions under Section 609. The process is now transparent and predictable. For example, the Department of State now notifies governments of shrimp harvesting nations on a timely basis of all pending and final decisions and provides them with a meaningful opportunity to be heard and to present any additional information relevant to the certification decision. The Department of State also gives the governments of harvesting nations that are not certified a full explanation of the reasons why the certification was denied and clearly identifies steps that such governments may take to receive a certification in the future.[117]

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[116] Panel Report, paras. 3.273 and 3.287.

[117] Revised Guidelines, Annex to this Report: para. 27.

3.181 The United States claims that many procedures have been established to ensure that the certification determinations will be both more predictable and transparent. The section of the Revised Guidelines entitled "Timetable and Procedures for Certification Decisions" provides, *inter alia*, for the considerable information exchange that is intended to allow the foreign government to predict the likely result.

3.182 The United States explains that the Revised Guidelines, as stated in Public Notice 3086[118], stipulate that:

> "By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information […], does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April 15, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant US officials and officials of the harvesting nation to discuss the situation."

3.183 Furthermore, according to the Revised Guidelines, between 15 March and 1 May, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

3.184 The United States argues that when applying the Revised Guidelines, the Department of State makes formal decisions on certification by 1 May of each year and, moreover, the governments of all nations that have requested certification are notified in writing of the decision promptly through diplomatic channels.

3.185 The United States explains that according to the Revised Guidelines, in the case of those nations for which certification is denied, such notifications will again state the reasons for such denial as well as the necessary steps to receive a certification in the future.

3.186 Finally, the Revised Guidelines establish that the government of any nation that is denied a certification by 1 May may, at any time thereafter, request reconsideration of that decision.

3.187 Another important improvement of the Revised Guidelines, explains the United States, is that when the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, US officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial have indeed been corrected, the United States will certify that nation immediately thereafter.

3.188 With regard to a question of the Panel about whether and under which conditions the administrative decisions taken in the certification process under Section 609 could be appealed before a domestic court in the United States by an exporting member [119], the United States responds that

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[118] *Ibid.*

[119] The question reads: "The Revised Guidelines do not expressly provide for judicial appeal. Could the United States specify whether and under which conditions the administrative decisions taken in the certification process under Section 609 could be appealed before a domestic court in the United States by an exporting member?"

administrative regulations often do not expressly address whether judicial appeal is possible. As a general matter, judicial review of a final decision by the US State Department regarding certification of a country may be had in the US court system pursuant to the Administrative Procedure Act, (5 USC. 701 *et. seq.).*

3.189 **Malaysia** submits that it had chosen not to make use of the Revised Guidelines and technical assistance offered because it considers that in order to comply with the DSB recommendations and rulings, the import prohibition contained in Section 609 should be removed instead of being modified in the way that it has been.

(d) Disguised restriction on international trade

3.190 The **United States,** argues that the parties fully briefed the issue of "disguised restriction on international trade" in the Original Panel proceeding. The United States recalls its main arguments to demonstrate that its measure is not a disguised restriction on international trade are mentioned in the Panel Report.[120]

3.191 The United States points out that a number of factors showed that the United States measure was a *bona fide* conservation measure, not a disguised trade restriction. Those factors include the facts that: (1) the international community, as reflected in CITES, agrees that sea turtles are endangered; (2) TEDs have been adopted by dozens of countries worldwide as an important sea turtle conservation measure; (3) the United States has made extensive efforts to disseminate TED technology; and (4) the import prohibition is narrowly crafted to affect only shrimp harvested in manners harmful to sea turtles.

3.192 Moreover, continues the United States, although this issue was not directly addressed by the Appellate Body, several Appellate Body findings support the United States position that the measure is not a disguised restriction on international trade. The Appellate Body acknowledged that TEDs are an effective tool for sea turtle conservation.[121] The Appellate Body affirmatively found that the measure, which exempts types of shrimp harvested in manners not harmful to sea turtles, "is not disproportionately wide in scope and reach in relation" to its policy objective.[122] And, it found that, as between domestic and foreign shrimpers, the measure in principle was "even-handed."[123]

3.193 In short, concludes the United States, the record plainly shows that the US measure is not a disguised restriction on international trade. Neither Malaysia in its submissions, nor, indeed, Mexico in its third-party submission, has presented any evidence or arguments to the contrary.

3.194 **Malaysia** is of the view that the issue of the US measure being a disguised restriction on international trade under the Article XX chapeau was not dealt with by the Appellate Body. Malaysia mentions that upon deciding that the measure was not entitled to the justifying protection of Article XX of GATT 1994, the Appellate Body did not even consider it necessary to examine whether the measure was applied in a manner that constitutes a disguised restriction on international trade. The issue was not even considered, let alone decided. The Appellate Body held that it was not necessary to do so after having found that the application of the US measure constituted "unjustifiable discrimination" and "arbitrary discrimination". On this score Malaysia does not deem it necessary to deal likewise with this issue.

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[120] Panel Report, paras. 3.277-3.281.
[121] Appellate Body Report, para. 140.
[122] *Ibid.*, para. 141.
[123] *Ibid.*, paras. 144-145.

IV. SUMMARY OF THIRD PARTY SUBMISSIONS[124]

1. Australia

4.1 Australia submits that the United States continues to apply an import prohibition inconsistent with Article XI of the GATT 1994. In these circumstances, the United States needs to demonstrate that its measure now meets the requirements of the general exceptions provision of Article XX of the GATT 1994, if it is to demonstrate compliance with the recommendations and rulings of the DSB in this dispute.

4.2 Australia notes the Appellate Body found that the United States measure, Section 609 of Public Law 101-162, qualified for provisional justification under Article XX(g), but that it failed to meet the requirements of the chapeau of Article XX, as it was applied in a manner that constituted arbitrary and unjustifiable discrimination. This finding that the US measure was provisionally justified under Article XX(g) recognized that there might well be circumstances in which the import prohibition contained in Section 609 could be applied in a manner consistent with the requirements of the chapeau of Article XX. Australia notes that this could be the case if the import prohibition was applied as part of a cooperative approach to addressing sea turtle conservation based on intergovernmental consensus.

4.3 It is pointed out by Australia that the preamble to the WTO Agreement recognizes the need for the trading relations of WTO Members to be conducted in accordance with the objective of sustainable development. Through the work of the Committee on Trade and Environment (CTE), WTO Members have specifically sought to ensure that trade and environment policies are mutually supportive in promoting sustainable development. They have recognized that trade measures may be needed in some circumstances to achieve environmental objectives, and the scope for WTO provisions, including Article XX of the GATT 1994, to accommodate such measures. In particular, WTO Members have recognized the complementarity between the work of the WTO and multilateral environmental agreements.

4.4 Australia's participation as a third party throughout this dispute has reflected both substantive trade interests and concerns with important issues of principle. In relation to its substantive trade interests, Australia had immediate access concerns for shrimp from the Spencer Gulf region and the Northern Prawn Fishery. Australia welcomes changes in the application of the US measure which have restored this access. However, access for shrimp from other Australian fisheries remains prohibited.

4.5 On the issues of principle, Australia shares the concerns of the United States in relation to sea turtle conservation and has welcomed and supported the efforts of the United States and other countries, including Malaysia, to address these concerns through cooperative initiatives in the Indian Ocean and South-East Asian region. In October 1999 Australia hosted a workshop aimed at addressing the need for a "regional agreement for the conservation and management of marine turtle populations and their habitats throughout the Indo-Pacific and the Indian Ocean region." The outcomes of the Workshop provided a building block leading to the adoption by consensus of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia at the meeting in Kuantan, Malaysia in July 2000. The Memorandum of Understanding acknowledges and seeks to address the wide range of threats to sea turtles, including habitat destruction, direct harvesting and trade, fisheries by-catch, pollution and other man-induced sources of mortality.

[124] Canada and Pakistan reserved their rights as third parties but did not make any submissions to the Panel.

4.6 However, Australia remains concerned at the continuation of an import ban by the United States based on a unilaterally determined conservation standard to address a transboundary or global environmental issue. In particular, Australia considers that the progress in recent efforts to promote sea turtle conservation in the Indian Ocean and South-East Asian region demonstrates the existence of alternative avenues to achieve the important objective of sea turtle conservation. Australia considers that such cooperative efforts are an appropriate and effective means of dealing with an issue such as sea turtle conservation. Not only do they allow the full range of issues involved in sea turtle conservation to be identified and addressed, but they also provide a means of avoiding inappropriate or unnecessarily trade restrictive action.

4.7 As its legal argument, Australia submits that the Appellate Body found that the US measure qualified for provisional justification under Article XX(g), but that it failed to meet the requirements of the chapeau of Article XX. In particular, the Appellate Body found that the measure had been applied by the United States in a manner that constituted arbitrary and unjustifiable discrimination between Members of the WTO due to the following problems:

(a) The rigidity and inflexibility in the administration of the import ban;

(b) the unilateral and non-consensual procedures of the import measure;

(c) the differential phase-in periods and differential approaches to technology transfer for different groups of countries; and

(d) the denial of transparency, procedural fairness and due process in the administration of the import ban.

4.8 Australia considers that the legal issue of whether the United States has rectified the problem identified in (a) and (d) requires an analysis of the changes to the US Guidelines and US practice in their administration. In this regard, Australia welcomes certain changes to the US Guidelines which have subsequently allowed the US to make determinations granting import access to shrimp from the Spencer Gulf region and the Northern Prawn Fishery. Australia notes that certain of the changes are subject to continuing domestic court action in the United States and will be following closely developments in this regard.

4.9 Australia considers that the legal issue of whether the United States has rectified the problems identified in (c) above requires, at least in part, an analysis of current US practice in relation to the provision of technical assistance and training in the design, construction, installation and operation of Turtle Excluder Devices (TEDs). Australia notes that the US does not appear to have expressed a view on what actions it has taken, or was required to take, to address the issue of differential phase-in periods for TEDs which the Appellate Body also found to constitute unjustifiable discrimination.

4.10 In relation to (b), Australia notes the argument of the United States that one of the elements needed for it to achieve compliance was "to engage in serious, good faith negotiations on sea turtle conservation". Australia agrees with the United States that such negotiations may have provided it with one means of bringing its measure into compliance with the requirements of the chapeau of Article XX, specifically to address problem (b).

4.11 Australia notes that many of the points raised by the Appellate Body in relation to problem (b) concern actions which the United States failed to take before moving to impose or enforce the import ban. If these actions had been taken they could have obviated the need for an import ban, through achievement of intergovernmental agreement or consensus on a range of actions to address sea turtle conservation, or ensured that a ban would have been implemented in accordance with a multilaterally agreed approach. Indeed, the key objective of "serious, good faith negotiations", from the perspective of the chapeau of Article XX, is that they should be aimed at seeking to avoid any discrimination at all, to the extent that was possible, or limiting any unavoidable discrimination to that

which was not "arbitrary" or "unjustifiable", while also avoiding any disguised restrictions on international trade.

4.12 Australia notes that the United States is largely silent on the content, objectives or nature of the negotiations required for them to be "serious, good faith negotiations" and to repair the unjustifiable discrimination found by the Appellate Body. Furthermore, the United States has presented no evidence that indicates any change to the "unilateral and non-consensual procedures" of the import ban it maintained after the end of the reasonable period of time, or that the ban is now based on "consensual and multilateral procedures".

4.13 Preserving the delicate balance of Article XX, Australia puts forward, is essential if it is to achieve its aim of allowing WTO Members to take measures otherwise inconsistent with the GATT 1994 for a range of important public policy objectives, while preventing it from being used to inappropriately escape from treaty obligations owed to other Members.

4.14 Australia argues that Article XX of the GATT 1994 is central to this dispute. Australia considers that the findings of the Appellate Body have confirmed the vitality of the balance of rights and obligations in Article XX, and its continuing relevance to the current concerns of the international community to reconcile economic growth and environmental protection.

4.15 Australia refers to the Indian Ocean and South-East Asian Regional Initiative in its response to the request by the panel for a description of efforts made to reach a multilateral solution in relation to the conservation of marine turtles.[125]

4.16 Australia notes the technical workshop that it hosted from 19 to 22 October 1999 in Perth. This adopted a resolution on the value of a new regional instrument to facilitate closer collaboration to improve the conservation of marine turtles and their habitats. The participants also agreed on further consultations aimed at concluding such an instrument. The meeting welcomed Australia's offer to prepare a draft text.

4.17 Australia also notes that the endorsement at the workshop of the need for a new regional instrument built upon the agreement at the 2nd ASEAN Symposium and Workshop on Sea Turtle Biology and Conservation, held from 15 to 17 July 1999. The cooperative efforts advanced by these meetings resulted in the adoption of the *Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia* at an intergovernmental meeting of 24 States hosted by Malaysia in Kuantan in July 2000.

4.18 Australia notes that the Memorandum of Understanding requires the completion of a Conservation and Management Plan prior to being opened for signature. Australia had prepared a draft Conservation and Management Plan based on the consultations held at the Perth Workshop as part of its preparation of a draft text of the Memorandum. The Kuantan meeting agreed to develop further the Plan with a view to having it adopted at the next intergovernmental meeting which should be held in the first quarter of 2001.

4.19 Australia puts forward that the discussion at the Perth workshop was wide ranging in its scope. The discussions identified the need for action in relation to a number of areas: the protection of marine turtle habitat; the management of direct harvesting and trade; reduction in the incidental capture and mortality of marine turtles in the course of fishing activities; and promotion of research, information exchange, and capacity building.

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[125] Australia submitted to the Panel the *Report of the Consultation on Needs and Mechanisms for Regional Conservation and Management of Marine Turtles*, Perth, Western Australia, 19–22 October 1999.

4.20 Australia notes that the Memorandum of Understanding provides for all of these issues to be addressed in the Conservation and Management Plan. This will provide a comprehensive basis for cooperative efforts to address the range of threats faced by marine turtles and their habitats within the region. In particular, Australia notes that the threat posed to marine turtles by fisheries by-catch is explicitly identified as one of the issues that will continue to be pursued through this process.

4.21 Australia argues that it has not claimed, as asserted by the United States, that "all environmental measures must be based on 'consensual and multilateral procedures'." However, the Appellate Body has clearly indicated that these considerations are directly relevant to examination of whether the US measure conforms to the requirements of the chapeau of Article XX. In particular, the Appellate Body emphasized that "[t]he unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability." In this regard, Australia considers that three issues are particularly relevant.

4.22 Australia is of the view that first, "multilateral and consensual procedures" have been and are available for pursuing concerns about marine turtle conservation, including fisheries by-catch. Second, the US has not presented any evidence to indicate that its import measure is now based on 'multilateral and consensual procedures'. Third, in these circumstances, the question which the panel must address is whether the US had demonstrated a justification for the continuance of import measures based on 'unilateral and non-consensual procedures' sufficient to meet the requirements of the chapeau of Article XX.

4.23 Australia notes that the United States has claimed that Australia's argument about the existence of an alternative avenue for addressing sea turtle conservation concerns "is based on two flawed premises". On the first of these, Australia has not claimed, as asserted by the United States, that "a WTO Member must exhaust all possibilities for achieving its goals in other ways." In Australia's view the question is whether the US measure meets the specific requirements of the chapeau of Article XX. In this regard, Australia notes that the Appellate Body drew attention to four specific points relating to the failure of the United States to engage other countries in serious negotiations on marine turtle conservation before enforcing its import prohibition. These points have been strengthened by progress with the current cooperative initiative in the Indian Ocean and South-East Asian region.

4.24 The second of the "flawed premises" that the United States identified in Australia's argument is that "the progress made in multilateral negotiations in the Indian Ocean and South-East Asian region will not necessarily translate into the achievement of the environmental goal of the US measure." However, it is difficult to see how the regional initiative could be substantively inferior to the import prohibition imposed by the United States in this regard. The import prohibition only addresses one of the threats posed to marine turtles, whereas the current cooperative initiative in the Indian Ocean region provides for a comprehensive approach. The current cooperative initiative provides a framework for addressing all fisheries by-catch issues relevant to marine turtle conservation, whereas the import prohibition will only directly affect export oriented fisheries. Furthermore, the import prohibition will only be effective if it induces the adoption of TEDs, an outcome that it clearly cannot guarantee.

4.25 In concluding, Australia submits that a key argument of the United States in support of its claimed compliance with the Appellate Body's findings is that it has engaged in serious, good faith negotiations. From the perspective of Article XX, the key objective of serious, good faith negotiations, in the context of this dispute, is that they should be aimed at seeking to avoid any discrimination at all, to the extent that was possible, or limiting any unavoidable discrimination to that which was not "arbitrary" or "unjustifiable". At the same time, the negotiations would need to avoid any disguised restrictions on international trade to ensure compliance with all the requirements of the chapeau of Article XX.

4.26 In short, Australia is of the view that the United States must demonstrate what serious efforts it has taken aimed at obviating or eliminating the discriminatory impact of the import ban. In particular, good faith negotiations, aimed at addressing the defects in the application of Section 609 identified by the Appellate Body, would require the United States to engage in discussions that could involve changes in the existence or nature of the import ban, as well as changes in aspects of its implementation. It would be a serious misconstruction of the Appellate Body's findings to suggest that these should be interpreted in a manner that could never require the lifting of the import prohibition.

2. Ecuador

4.27 Ecuador submits that it is participating as a third party given its trade interest and the systemic implications of the case. Ecuador is one of the main suppliers of shrimp to the United States' market and Ecuadorian exports could be affected by the scope of Article XX of the GATT 1994.

4.28 Ecuador considers that the Panel has before it a very delicate case requiring careful evaluation of the arguments submitted by all the parties. While in principle the Panel's terms of reference are to ascertain whether the United States has applied the conclusions and recommendations adopted by the Dispute Settlement Body (DSB), the practical consequences of this Panel's decisions will send a clear signal regarding proper compliance with Article XX of the GATT so as to prevent the possible use of environmental policies to disguise protectionist trade measures.

4.29 Ecuador shares the genuine concern of the United States, Malaysia and other Members of the WTO regarding the need to preserve marine species which may be endangered by economic activity not guided by considerations of environmental sustainability. However, these genuine concerns are not now under discussion. What the Panel has to determine is whether the United States has complied with the conclusions and recommendations adopted by the DSB and whether the measures it has taken to protect sea turtles are compatible with its obligations under the WTO Agreements.

4.30 Ecuador's view is that the United States maintains an import prohibition inconsistent with Article XI of the GATT 1994. The United States did not appeal against this conclusion by the Original Panel, nor does it now contend that the prohibition in question is not in force. It is therefore easier, in these circumstances, to establish that the issue for this Panel is to determine whether the changes which the United States claims to have introduced in the application of Section 609 are sufficient to take advantage of the general exception provided for in GATT Article XX.

4.31 Ecuador takes the view that the burden of proof in this matter is on the United States, despite its being the responding party, since the issue here concerns the application of an exception to a measure inconsistent with the GATT 1994. It is the United States which must justify such inconsistency by responding to all the points raised by the Panel and, in particular, by the Appellate Body in this matter.

4.32 Ecuador does not agree with the United States that, pursuant to the Appellate Body's findings, it is not necessarily obliged to lift its prohibition on shrimp imports. On the contrary, if the United States cannot show that it has complied with all the conditions laid down by the Appellate Body in determining that the measure constitutes arbitrary and unjustifiable discrimination and that the exception under Article XX of the GATT is not, therefore, applicable, then the United States should withdraw the prohibition on shrimp imports by amending Section 609.

4.33 Ecuador considers that it is inadmissible that a violation of Article XI of the GATT should be countenanced pending modification of the application of Section 609 of the Trade Act by the United States. That line of reasoning, which was adopted by the United States during the reasonable period of time, is no longer applicable. In the event that the Panel finds that the United States has not

fully applied the conclusions and recommendations adopted by the DSB, the United States is not entitled to a further reasonable period of time.

3. European Communities

4.34 The European Communities notes with considerable concern that, contrary to the requirement contained in Article 6.2 of the Dispute Settlement Understanding (DSU), the request for the establishment of a panel in the present proceedings does not mention whether consultations were held between Malaysia and the United States before the disagreement on the compatibility of the US measures with a covered agreement was referred to the Panel.[126] While the parties to the present dispute have agreed, by an exchange of letters dated 22 December 1999[127], to hold consultations before requesting the establishment of a panel[128], the notice concerning the request for consultations foreseen in Article 4.4 of the DSU was not provided to the DSB and was not circulated to WTO Members. There is thus no indication whether such consultations were held in the present case.

4.35 The European Communities notes in this context that an inconsistent and contradictory practice has developed in a number of cases in which parties had recourse to procedures pursuant to Article 21.5 of the DSU without regard for the requirement of first entering into consultations under Article 4 of the DSU before filing a request for the establishment of a panel. In certain cases, parties have agreed bilaterally to dispense with recourse to formal consultations under Article 4 of the DSU. Even though the bilateral agreement in this case provides explicitly that consultations are required before the disagreement could be referred to the Panel pursuant to Article 21.5 of the DSU, as already mentioned there is no indication that consultations were indeed held and, even if they were, such consultations were certainly not held in accordance with the procedural requirements of Article 4 of the DSU.

4.36 The procedural step of holding consultations is however of fundamental importance for the dispute settlement system, in the view of the European Communities. Consultations give the parties an opportunity to resolve their differences without an adjudication of the dispute and will, at the very least, allow the parties to clarify the precise issues on which they continue to disagree. In this way, consultations contribute to ensuring that panel proceedings are limited to issues on which there is real and serious disagreement. In addition, any request for consultations under Article 4 of the DSU must be circulated to the entire WTO membership in order to identify and circumscribe the dispute, thus allowing potential third parties to prepare their request to participate in the procedure. In this regard, it must be recalled that third parties may participate in consultations requested under any of the provisions cited in Article 4.11 and footnote 4 of the DSU. Thus, third party rights are clearly impaired by the omission of the formal consultation stage in a dispute settlement procedure.

4.37 In the context of the *European Communities - Bananas* dispute, the European Communities has made it clear[129] that it considers consultations pursuant to Article 4 of the DSU to be necessary before the establishment of a panel can be requested pursuant to Article 21.5 of the DSU. The reason is the reference contained in Article 21.5 that any dispute on implementation "shall be decided through recourse to these dispute settlement procedures." In the view of the European Communities, "these dispute settlement procedures" include consultations and a right to an appeal. This is so for reasons related to the multilateral character of the procedures, which include procedural rights of other WTO Members, particularly potential third parties, and a standardised dispute settlement procedure the basic features of which may not be amended simply because that pleases the parties in an individual case.

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[126] WT/DS58/17, 13 October 2000.
[127] WT/DS58/16, 12 January 2000.
[128] *Ibid*. para. 2.
[129] Statement of the EC at the DSB meeting of 22 September 1998, WT/DSB/M/48, p. 7.

4.38 If the parties to a dispute were entirely free to develop procedures of their own choice (*quod non*), the European Communities submits this would jeopardise third party rights enshrined in the DSU (particularly in Articles 4.11 and 10). Nothing would stop the parties from agreeing bilaterally not only to omit the procedural step of consultations, but also to avoid other procedural steps such as the panel stage and to submit their dispute to the Appellate Body straight away (e.g. in order to "gain time" and to exclude third parties who cannot participate in Appellate Body procedures if they did not reserve their right to participate in the preceding panel procedure). It would also mean that the parties would be free to agree among themselves that a panel report pursuant to Article 21.5 of the DSU is not binding and that it may be subjected to some kind of review by another international body outside the WTO.

4.39 The European Communities believes these scenarios are not compatible with the multilateral nature of the procedures under the DSU, the procedural rights of third parties and indeed the general matrix of procedural checks and balances built into the dispute settlement system. The DSU contains sufficient flexibility to adapt the basic procedural requirements to the needs of the parties in individual disputes. As an example, Article 4.7 (second sentence) of the DSU allows the parties to shorten the 60-day period on the basis of a bilateral agreement. If the parties to the dispute agree, a panel under Article 21.5 of the DSU may be established at the first meeting where the request is considered by the DSB (Article 6.1 of the DSU). Panels may propose special working procedures after consultations with the parties (Article 12.1 of the DSU). All these provisions indicate that there is some flexibility in the procedures, which is largely dependent on the agreement of the parties to the dispute. None of these provisions however allows the parties to the dispute to simply omit one of the essential procedural steps before requesting the next one.

4.40 The European Communities considers that all the important functions of the consultations are undermined if the parties to the dispute are considered to be free to "jump the gun" and go to a panel procedure without holding formal consultations under Article 4 of the DSU first. Moreover, consultations must in any event take place in order to agree on the procedure to be followed, and it is obvious that this is also an occasion to consult on substantive issues. Thus, in reality no time is gained in omitting this procedural step; the only consequence is that third parties are put at a disadvantage and that the panel may have to address issues on which there is no real disagreement.

4.41 In conclusion, the European Communities is firmly of the view that the existing rules of the DSU do not allow parties to a dispute to agree bilaterally simply to dispense with consultations under Article 4. Any other approach leads to unacceptable procedural uncertainty about the limits of the procedural guarantees for both parties and to curtailing third party rights clearly enshrined in the DSU. If the parties to the dispute do not respect their obligations under Article 4 of the DSU, the Panel should draw the consequence of this failure of the parties and make a ruling that the dispute is not properly before it (or inadmissible, to use a term of art), since all the procedural steps that are required before a dispute may be submitted to a panel have not been followed in the present case.

4.42 In the event that the Panel concludes that it is nonetheless necessary to enter into the consideration of the merits of the present case, the European Communities raises the following points.

4.43 The European Communities notes that the parties to the present dispute seem to agree that the United States has engaged into serious negotiations concerning conservation measures aiming at the protection of sea turtles in the Indian Ocean. Malaysia recognises that substantial progress has been made toward the conclusion of an agreement on standards for such fishing techniques in the Indian Ocean. However, Malaysia claims that as long as an agreement on these fishing techniques has not been concluded, the United States is obliged, by virtue of the recommendations and rulings of the DSB in this case, to discontinue the application of Section 609 of its law Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations to shrimps and shrimp products imported from Malaysia.

4.44 The European Communities notes that Malaysia claims that the 1999 amendments to the Guidelines for the application of Section 609 (the Revised Guidelines) are insufficient for the purpose of bringing the United States measure into compliance with the US obligations under the WTO in accordance with the recommendations and rulings of the DSB in this case. Malaysia argues that it cannot be compelled to submit its own conservation measures to scrutiny of their equivalence with the US standards because that would mean that it has to bow to standards unilaterally determined by the United States. The European Communities shares Malaysia's concern regarding the unilateral application of domestic standards outside the territory of the state that originally developed them.

4.45 In this context, the European Communities notes that the Revised Guidelines satisfy themselves with standards that are "equivalent" in their effectiveness to the standards applicable to US shrimp trawlers. The United States thus does not apply its domestic standards as such to foreign fishing activities. It is only the effectiveness of the measures taken by Malaysia that is the United States wishes to be able to ascertain.

4.46 The European Communities notes that the Appellate Body specifically underlined in the *United States - Shrimp* case that the United States is required by the chapeau of Article XX GATT to apply its conservation measures in a manner that is compatible with the need for international cooperation and negotiation. The European Communities further notes that international cooperation, which is the opposite of unilateral action, cannot take place in any meaningful way without an exchange of information before more far-reaching cooperative efforts may be envisaged.

4.47 The European Communities therefore considers that a request for information relating to readily available empirical data and objective scientific studies on the effectiveness of conservation measures taken by a foreign country is a necessary part of a cooperative effort. Of course, to require burdensome research of data that are not easily available may not be part of a reasonable effort for cooperation in good faith. The European Communities cannot judge whether it would be difficult for Malaysia to demonstrate the effectiveness of its own conservation measures or, in the absence of such measures, whether it is able to show with readily available empirical data that there is no need for such measures under the specific conditions prevailing in the waters in which Malaysian shrimp trawlers operate. The European Communities notes that there is some reference to these conditions in Malaysia's written submissions.

4.48 Malaysia's claim that the United States is applying unilateral effectiveness standards cannot stand, the European Communities submits, if it is Malaysia that refuses to enter into a cooperative effort by communicating to the United States and other interested nations, on the basis of readily available empirical data and scientific studies, the conservation situation for sea turtles threatened by shrimp trawling in the waters of the Indian Ocean. After all, there can be no doubt that sea turtles of the species to which Section 609 refers are among the species that are threatened by extinction according to CITES and that these sea turtles form part of the "global commons" which cannot be adequately protected by a single state without some form of international cooperation. International cooperation means, as a minimum, communication of relevant available data between the nations that participate in such cooperation.

4.49 In the view of the European Communities, the United States was required by the recommendations and rulings of the DSB to enter into negotiations during the reasonable period of time in order to be able to apply Section 609 in a non-discriminatory manner. Malaysia confirms that such negotiations have indeed been initiated by the United States and that they are "well advanced" at present. It would be difficult to claim that there is an obligation of result with regard to international negotiations. Rather, to paraphrase the third sentence of Article 3.7 of the DSU, it would be clearly preferable if the parties to the present dispute could find a mutually acceptable solution to the dispute that is consistent with the covered agreements. Such a solution could best be achieved by the conclusion of an international agreement on the conservation of sea turtles in the Indian Ocean. Of course, since the conclusion of such an international agreement depends on the consent of both

parties, it would not be possible to require that the parties enter into such an agreement at a particular point in time, such as the end of the reasonable period of time in the present case.

4.50 The EC notes that, as a separate matter, Malaysia draws the Panel's attention to the fact that the Revised Guidelines have been found inconsistent with Section 609 by a domestic court in the United States. Malaysia claims in this context that, even though the court ruling in that case is presently under appeal and that in the meantime the ruling has not led to a change in the way in which the Revised Guidelines are applied, the United States must assume international responsibility for the rulings taken by its courts.

4.51 It is true, the European Communities argues, that the domestic court ruling in the present case casts a doubt on the ability of the United States to continue the application of the Revised Guidelines without an amendment to Section 609. This is at present an open issue and may make it more difficult to make informed decisions on the prospect for the access of shrimp and shrimp products from non-certified nations to the market of the United States. On the other hand, it does not appear that the domestic court ruling has any immediate effect on the ability of the United States to take a more flexible approach to the imports of shrimp and shrimp products, as required by the Appellate Body.

4.52 Thus, in conclusion the European Communities finds the present complaint by Malaysia somewhat premature. However, since the European Communities is not in possession of all the factual elements that may be relevant to the resolution of the present dispute, the European Communities will abstain from making a more detailed suggestion on how the Panel should dispose of this dispute.

4.53 In response to the question of the Panel concerning efforts to reach a multilateral solution in relation to the conservation of sea turtles, the EC considers that the *Report of the Consultations on Needs and Mechanisms for Regional Conservation and Management of Marine Turtles* held in Perth, Western Australia, from 19 to 22 October 1999 gives the full picture of the efforts undertaken to develop multilateral conservation methods for sea turtles in the Indian Ocean region. The European Communities cannot add any further information on these negotiations (nor on the negotiations of the Inter-American Convention for the Protection and Conservation of Sea Turtles, in which it did not participate) beyond the material that is already before the Panel.

4.54 In response to the question posed by Malaysia on the burden of proof, the European Communities makes reference to the following finding of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*:

> "The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."[130]

4.55 In addition, as is apparent from its answer to the same question, the United States accepts that it "is asserting as an affirmative defense that its measure falls, as modified, within the scope of Article XX. As the Appellate Body explained in *United States - Wool Shirts*, the burden of establishing such a defence rests on the party asserting it." It appears, therefore, that there is no dispute with regard to the issue raised by Malaysia's question concerning the burden of proof.

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[130] Adopted on 20 May 1996, WT/DS2/AB/R, p. 22 *et seq*.

4. Hong Kong, China

4.56 Hong Kong, China makes its submission as a third party in this case out of legal and systemic interest. Hong Kong, China also notes that it took part as respectively a third party and a third participant in the Original Panel and the Appellate Body proceedings.

4.57 In summary, the aim of Hong Kong, China's written submission is first to set out what is the appropriate legal framework to consider the question of whether or not the United States has implemented the DSB recommendations and rulings. In this connection, Hong Kong, China provides its understanding of the mandate of "compliance panels" and identifies the recommendations and rulings of the DSB which the present compliance panel should examine. The submission also aims to answer a question raised, i.e. in case the implementing actions of a WTO Member are overturned by its domestic court.

4.58 With respect to the mandate of a 21.5 panel, Hong Kong, China refers to a recent Appellate Body case and argues that what is at stake before a compliance panel is whether a new (in comparison to the original dispute) measure is in itself consistent with the WTO Agreements, particularly with the specific provisions with which the panel or Appellate Body found the original measure inconsistent. The new measure must also be a measure which is related to the original dispute, that is, it must be a measure which is adequate for the WTO Member concerned to be deemed to have complied with the recommendations and rulings of the DSB.

4.59 Hong Kong, China recalls the relevant rulings of the Appellate Body and states that the compliance panel must examine whether the US actions taken consequent to the rulings of the DSB and taken to comply with the said rulings are in conformity with the relevant GATT provisions.

4.60 Hong Kong, China recalls the statement of the United States in its written submission that it "need not necessarily address each one of those aspects in order to comply with the Appellate Body findings" on the grounds that the term "cumulative effect" used in paragraph 176 of the Appellate Body Report in *United States – Shrimp*, as read by the United States, means that the Appellate Body's findings of unjustifiable discrimination depended on a combination of aspects of the application of Section 609. Hong Kong, China disagrees with this reading although it notes that the United States, notwithstanding its assertion above, also states that it has indeed addressed all of the defects in the application of Section 609.

4.61 In case the implementing actions are overturned by a domestic court, Hong Kong, China touches upon a decision by the US Court of International Trade (CIT), attached to Malaysia's written submission. The legal question that arises is whether, in view of the mentioned CIT decision, the United States can be deemed to have complied with its WTO obligations. Hong Kong, China considers that the other issues before the compliance panel are whether implementation occurs once legislative/administrative actions have been taken, and the effects of subsequent judiciary action that put into jeopardy the mentioned legislative/administrative implementing actions.

4.62 In concluding, Hong Kong, China reiterates that environmental protection in general and conservation of sea turtles in particular is not in dispute in this case. Indeed, all parties and third parties to the dispute fully endorsed these causes. What is at issue is whether the specific measures taken by the United States to comply with the recommendation and rulings of the DSB are consistent with the WTO provisions, particularly the chapeau of GATT Article XX.

4.63 In response to the question of the Panel on efforts to reach a multilateral solution in relation to the conservation of sea turtles, Hong Kong, China replies that it has not been involved in any negotiations with the United States in this respect.

5. India

4.64 India submits that Section 609, in its present form and manner of application would amount to a unilateral economic embargo. It requires other Members, which want to have access to the US market, to adopt essentially the same shrimp/turtle policy as that of the United States without taking into account the different conditions of other countries. The unilateral character of the measure heightens its disruptive and discriminatory effects. This measure ought to be multilateral and consensual. In this regard, India urges the Panel to take into account Principles 7, 11 and 12 of the Rio Declaration on Environment and Development. India also joins Malaysia and others in calling upon the United States to remove the measure, i.e. Section 609 and the import prohibition under that Section.

4.65 In response to Malaysia's question with respect to the burden of proof in this case, India agrees with Malaysia that the burden of proof lies with the United States to demonstrate that the measures taken by it to comply with the DSB recommendations and rulings are justified under GATT Article XX.

4.66 In response to the Panel's question concerning efforts to reach a multilateral solution in relation to the conservation of sea turtles, India notes that it participated in the Perth Seminar held on 19-22 October 1999. The needs and mechanisms for regional cooperation in the conservation and management of marine turtles was discussed at this seminar, and a resolution on developing a regional agreement on Conservation and Management of Marine Turtles and their Habitats in the Indian Ocean and South-East Asian Region was adopted. India also was represented at the follow-up meeting held in Malaysia on 11-14 July 2000. Various aspects of marine turtle conservation were discussed at this meeting and the draft agreement was further modified. The draft agreement was circulated to the different state parties for consideration and signature. India notes that it is still studying this draft agreement. India confirms that it is a signatory to the Bonn Convention on Migratory Species of Wild Animals.

6. Japan

4.67 Japan believes that preserving the global environment is important and that protecting endangered species is essential. At the same time, it is also necessary to ensure that both trade and environment policies are mutually supportive. As mentioned by Japan during the CTE discussions, when a trade measure is applied for environmental purposes, it is necessary to ensure that such measures are not used: (a) to disguise protectionism; nor (b) in an arbitrary manner. Japan believes the extraterritorial use of unilateral trade measures could raise concerns over arbitrary and discriminatory implementation. When such measures are used for environmental policy, their legal consistency must be checked carefully.

4.68 In Japan's view, the key legal issue in this panel is whether the measures taken by the United States in order to comply with the recommendations and rulings of the DSB are sufficient to justify the import ban under GATT Article XX (in particular, the chapeau of Article XX). While the United States could have fully implemented the recommendations and rulings of the DSB by lifting the import ban under Section 609, Japan does not agree with the arguments that the DSB recommendations necessarily require the United States to lift the import ban itself.

4.69 Japan considers that as the provisions in Article XX are "exceptions" to the basic principles of the GATT, they should be applied in a strict manner. Japan fully agrees with the Appellate Body Report that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'."[131] Therefore, Japan believes that if the United States maintains the import ban, all the aspects examined by the Appellate Body in the original

[131] Appellate Body Report, para. 116.

dispute should be carefully examined again in order to find out if the US measure is now justifiable under Article XX. In this regard, Japan cannot accept the argument of the United States that "the United States need not necessarily address each one of those aspects in order to comply with the Appellate Body findings." Japan considers that the arguments presented by Australia are important, for example: (a) that "the US does not appear to have expressed a view on what actions it has taken, or was required to take, to address the issue of differential phase-in periods for TEDs"; and (b) that "the US has not presented any evidence in its first submission that indicates any change to the 'unilateral and consensual procedures' of the import ban, or that the ban is now based on 'consensual and multilateral procedures'."

4.70 In response to the question of the Panel concerning efforts for the conservation of sea turtles, Japan submits that it has not been involved in any bilateral or multilateral negotiations with the United States. Regarding the conservation of sea turtles in general, however, their conservation has been on the agenda of the Conference of the Parties to CITES, in which both Japan and the United States have participated. In its meeting in 2000, CITES considered a proposal to downlist or transfer a particular species of sea turtles (the hawksbill turtle) from Appendix I to Appendix II, i.e. in order to change the import/export regulations applied by CITES.

4.71 The view of Japan in response to Malaysia's question concerning the burden of proof is that the key legal issue in this Panel is whether the measures taken by the United States in order to comply with the recommendations and rulings of the DSB are sufficient for making the import ban justifiable under GATT Article XX. Japan's understanding of the argument of the United States in this proceeding is, essentially, that the United States has rectified all the problems identified in the recommendations and rulings of the DSB, and that now the import ban under Section 609 is justified under the provisions of Article XX.

4.72 Generally speaking, since the provisions of Article XX are "exceptions" to the basic GATT principles, Japan considers that the burden of establishing an affirmative defence based on these provisions should rest on the party asserting it. This is a well-established principle and was confirmed by the Appellate Body in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India.*[132] Japan also considers the finding of the Appellate Body in *Brazil - Export Financing Programme for Aircraft*[133] lead to the conclusion in this context that the above-mentioned allocation of burden of proof would not be altered even before an Article 21.5 panel.

7. Mexico

4.73 As a general observation, Mexico submits that it does not believe this case concerns an environmental dispute. The WTO is not the appropriate forum for raising such issues. Moreover, neither the parties nor the third parties question the appropriateness of protecting the environment in general or migratory species such as sea turtles in particular. Mexico reiterates its substantial interest in this case, *inter alia*, because of its systemic implications for the interpretation of the general exceptions to the GATT 1994.

4.74 With reference to the terms of reference of the Panel, Mexico agrees with the line of reasoning followed by the Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*[134], inasmuch as the present Panel's terms of reference are not confined to determining whether or not the United States has complied with the DSB

[132] Adopted on 23 May 1997, WT/DS33/AB/R (hereafter "*United States - Wool Shirts*").

[133] Adopted on 4 August 2000, WT/DS46/AB/RW (hereafter "*Brazil – Aircraft – Recourse by Canada To Article 21.5 of the DSU*"), para. 66.

[134] Adopted on 4 August 2000, WT/DS70/AB/RW (hereafter *"Canada – Aircraft – Recourse by Brazil to Article 21.5 of the DSU"*), para. 41.

recommendations and rulings, but rather to determining whether the United States' measure is consistent with a covered agreement, in this case the GATT 1994.

4.75 In view of the fact that the parties appear to agree that the United States' measure continues to constitute a "prohibition or restriction" within the meaning of Article XI:1 of the GATT 1994,[135] Mexico argues that the scope of this dispute is confined to determining whether that measure is justified under GATT Article XX[136] and, specifically, under the chapeau of that article.

4.76 Mexico agrees with the Panel that Article XX is a limited and conditional exception to the obligations imposed by other provisions of the General Agreement, *not a positive rule establishing obligations in itself*, and that it has therefore been interpreted narrowly.

4.77 With respect to the actions of the United States to bring its measure into conformity with the recommendations and rulings of the DSB, Mexico argues that the United States confined itself to modifying the *application* of its law on the basis of the Appellate Body's findings.

4.78 Thus, in referring to the differences of treatment which constituted "unjustifiable discrimination", the United States indicates that:

(a) It has introduced greater flexibility in the application of Section 609;

(b) it no longer prohibits the importation of shrimp harvested by vessels using TEDs even where they originated in non-certified countries. (The United States recognizes that this aspect is the subject of domestic judicial proceedings);

(c) it has endeavoured to conduct negotiations with the complaining parties, in particular with Malaysia and other Indian Ocean nations; and

(d) it has offered and provided technical assistance services.

4.79 In referring to the United States' measure that has been considered to constitute a means of arbitrary discrimination, Mexico points out the observation by the United States that it has resolved the two main problems, namely lack of flexibility and lack of transparency (concepts identified in sub-paragraphs (a) and (b) above).

4.80 With respect to whether the United States has complied with the recommendations and rulings of the DSB, Mexico considers that the United States' argument that it only needed to modify specific aspects of the *application* of its legislation is excessively minimalist, particularly when it comes to justifying a measure under the general exceptions to the GATT 1994. In Mexico's opinion, in order to determine whether the United States' measure is now in conformity with the GATT 1994, the Panel should consider the following:

(a) Whether the United States measure can be justified under Article XX.

(b) Whether the judicial proceeding in the case concerning *Turtle Island Restoration Network and Anor. v. Robert L. Mallett Acting Secretary of Commerce and Anor. and*

[135] According to Mexico, para. 7.17 of the Panel Report in this case (WT/DS58/R) stated that: "the wording of Section 609 and the interpretation of it made by the CIT are sufficient evidence that the United States imposes a "prohibition or restriction" within the meaning of Article XI:1. We therefore find that Section 609 violates Article XI:1 of GATT 1994." Mexico notes that no appeal was made against that finding.

[136] Mexico refers to para. 187(c) of the Appellate Body Report that states that the United States measure "while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994."

National Fisheries Institute Inc. constitutes in itself non-compliance with the DSB recommendations and rulings.

4.81 Concerning the justification of the measure under Article XX, Mexico's argument on this subject may be set forth as follows:

(a) The Panel determined that the US measure constitutes a violation of Article XI:1 of the GATT 1994. This was not appealed.

(b) The Appellate Body found that the measure is not justifiable under Article XX of the GATT 1994 because it was applied in a manner which constituted arbitrary discrimination, as well as unjustifiable discrimination.

(c) The Appellate Body did not rule on the third element of the chapeau to Article XX (disguised restriction on international trade).[137]

(d) The United States decided to maintain a prohibition on importation, which had been declared inconsistent with Article XI of the GATT 1994, and alleges that, by merely following the findings of the Appellate Body, it brought its measure into conformity.

(e) Mexico maintains that it is not enough for the United States to demonstrate that it followed the findings of the Appellate Body; rather, it must show that its measure no longer constitutes a means of arbitrary or unjustifiable discrimination and, in addition, that it is not applied in a manner which would constitute a disguised restriction on international trade.

(f) The United States has not demonstrated that its measure is not applied in a manner that constitutes a disguised restriction on international trade. In fact, Mexico considers that the Panel could only examine this aspect if the United States were to submit arguments on the subject. As it has not done so, Mexico does not see how the Panel could justify the United States' measure under Article XX.

(g) As the measure cannot be justified under Article XX of the GATT, the finding that the United States' measure is inconsistent with Article XI of the GATT prevails.

4.82 Mexico recalls that the United States asserted that Mexico was disregarding the fact that the parties had discussed the matter of a disguised restriction in the Original Panel proceeding, apart from which the Appellate Body supported the United States' position that its measure was not a disguised restriction on international trade. However, Mexico observes that, in referring to the Panel Report, the United States confined itself to repeating the arguments that it had itself submitted, which were clearly not endorsed by the Panel. In addition, the United States referred to two paragraphs (140 and 141) of the Appellate Body Report, without mentioning that those paragraphs referred to sub-paragraph (g) of Article XX, not its chapeau.

4.83 Mexico comments on the judicial proceedings in the case concerning *Turtle Island Restoration Network and Anor. v. Robert L. Mallett Acting Secretary of Commerce and Anor. and National Fisheries Institute Inc.* Malaysia maintains that the CIT determined that the fact of granting entry to shrimp or shrimp products harvested by vessels using TEDs, but from non-certified nations, resulted in a violation of the letter of Section 609, for which reason the US Administration should not apply the Revised Guidelines, and that the United States had, therefore, not complied with the recommendations and rulings of the DSB. Mexico notes that the response of the United States is that Malaysia had misunderstood the Court's ruling, which did not oblige the US Department of State to change its current policy, and that, in fact, the issue is currently under review by an appellate court, for which reason there has been no modification of the measure for the time being.

[137] Mexico notes that in para 184 of its Report, the Appellate Body stated that "[h]aving 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."

4.84 Mexico takes note of the arguments and considers that a prohibition on importation of shrimp harvested by TEDs merely because of a lack of certification would be harmful.

4.85 In its response to the Panel's question with respect to efforts to achieve multilateral agreement, Mexico points out that the efforts to achieve a multilateral settlement are irrelevant for determining compliance or non-compliance with the requirements of Article XX because otherwise the implication would be that a level of effort is required as a threshold for determining whether a measure is justified or unjustified. In Mexico's opinion, no such threshold requirement is contained, either explicitly or implicitly, in Article XX, apart from which it would be necessary to specify which party or parties would be responsible for that effort: the party which imposes the measure, or the one which suffers the consequences of the measure? Nor is an import prohibition justifiable on the grounds that the negotiations for an international agreement have not been concluded, since the success or failure of a multilateral negotation is also no guarantee of compliance with all the requirements of Article XX.

4.86 An import prohibition, Mexico argues, may be applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination even where the Member imposing the prohibition or the other Members involved have made serious efforts, in good faith, to achieve a multilateral settlement. Moreover, irrespective of whether negotiations have taken place, all WTO Members must comply in the first instance with their substantive obligations under the covered agreements, including Article XI of the GATT. When that is not possible and the Member concerned decides to avail itself of the general exceptions, that Member must comply with each and all of the requirements laid down in Article XX. Otherwise, that Member will not be entitled to impose a prohibition or quantitative restriction on the importation of products, regardless of the aim pursued and whether or not it has entered into negotiations with other Members.

4.87 Regarding submissions to the Panel from non-governmental organizations, Mexico makes the following observations:

(a) In Spanish, the normal meaning of the verb "recabar" (to seek) as used in Article 13 of the DSU is: "*alcanzar, conseguir con instancias o súplicas lo que se desea*" (to get what one wants by formal request or entreaty), or "*pedir, solicitar*" (to ask for, request). The Panel's authority is restricted to "asking or requesting" or to "getting what it wants by formal request or entreaty". Therefore, if the Panel does not take that initiative, Article 13 is not applicable.

(b) The United States attached to its submission a communication from an entity called the Center for Marine Conservation ("CMC"). In Mexico's opinion, that communication should not have been accepted when it was initially submitted unless it had been sought, i.e. "asked for or requested", by the Panel.

4.88 Moreover, Mexico notes the fact that the United States attached the communication to its submission at a later stage does not give it the right to have it taken into account by the Panel, unless the United States assumes responsibility for it, in which case it would no longer be a CMC communication but the official position of the Government of the United States. In that case, this status would be applicable to the entire document originally submitted by the CMC, since if one or more parts of that communication did not conform to the official position of the United States Government, the part or parts in question would not have been included in the second written submission of the United States. Finally, the document in question had not been transmitted to Mexico or, presumably, to any of the parties to this proceeding. Mexico was therefore unable to refer to the content of the communication.

4.89 In concluding, Mexico is of the opinion that the United States bears the burden of proving that its measure is justified under Article XX of the GATT 1994. The United States has not succeeded in

doing so, in particular because it has not taken the trouble to demonstrate that its measure is not applied in a manner which would constitute a disguised restriction on international trade.

4.90 Moreover, taking into account the findings of the Panel, to the effect that the United States' measure constituted a violation of Article XI:1 of the GATT 1994, Malaysia has a presumption in its favour, which has not been effectively refuted by the United States.

4.91 In view of the fact that the United States attached the CMC communication to its submission as an integral part thereof, Mexico considers that it should be treated as the official position of the United States and not as a CMC communication or an *"amicus curiae"* brief. Furthermore, any reference to that communication in the Panel Report should be made as a reference to the written submission of the United States, without mentioning the CMC. Otherwise, recognition would be given to a communication from a non-member of the WTO, which was not requested by the Panel.

4.92 On Malaysia's question concerning the burden of proof, Mexico considers that it is the responsibility of the party which invokes the general exception under Article XX to justify the invocation of that exception. This has been the approach adopted by various panels.[138]

4.93 In this Panel, Mexico considers that the burden is on the United States to prove that its measure is consistent with the three requirements of the Article XX chapeau, i.e. that the measure is not applied in a manner which would constitute: (i) a means of unjustifiable discrimination; (ii) a means of arbitrary discrimination; or (iii) a disguised restriction on international trade.

4.94 In Mexico's opinion, the United States has put forward arguments concerning the first two elements, but not the third. Accordingly, it is not possible for the United States' measure to be justified under Article XX of the GATT 1994.

8. Thailand

4.95 Thailand submits that the issue at hand is whether the United States has taken measures to comply with the DSB recommendations and rulings that remove the inconsistencies with the covered agreements as identified in the Panel and Appellate Body Reports adopted by the DSB. In Thailand's view, the United States has not done so.

4.96 First, Thailand argues that the US statutory prohibition may be justified under GATT Article XX only if it is applied in a manner that does not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." According to the DSB recommendations and rulings, the United States is requested to bring its measure found by the Panel to be inconsistent with Article XI and found by the Appellate Body not to be justified under Article XX into conformity with its obligations under the GATT 1994.[139]

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[138] Mexico refers to the Panel in *Canada – Administration of the Foreign Investment Review Act* (L/5504, adopted on 7 February 1984, BISD 30S/140) that held that: "(s)ince Article XX(d) is an exception to the General Agreement, it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act". See *Analytical Index to the GATT*, Vol. I, p. 621. Similarly, the Panel in *United States – Restrictions on Imports of Tuna* (WT/DS21/R, not adopted, circulated on 3 September 1991, BISD 39S/155) pointed out that "Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked" (para 5.22, references deleted).

[139] Appellate Body Report, para. 188. According to the Original Panel, the import ban as applied by the United States on the basis of Section 609 is not consistent with Article XI of the GATT 1994 and is not

4.97 In Thailand's view, it is the statutory prohibition, as applied, not its "application" that violates the obligations of the United States under the GATT 1994. The term "measure" used in the Appellate Body Report paragraph 188 can only be understood to refer to *the import prohibition* as mandated by Section 609 and applied by the Department of State through its Guidelines, not the application of this prohibition as suggested by the United States. Careful reading of the Appellate Body Report, paragraphs 184 (4th line), 186 (6th line), and 187(c) , confirms Thailand's understanding of the ruling: the Appellate Body mentions the word "measure" and not "application." The *measure at issue* in this dispute has been identified by the panel as *"the embargo applied by the United States on the basis of Section 609."*[140] The Appellate Body confirms that it is this measure, not its application, which is at issue in the appeal.[141] Thailand is of the view that as long as its application by the United States Government is inconsistent with a covered agreement, the prohibition, as applied, violates the US obligations under the WTO Agreement. If the United States cannot or does not apply the prohibition in a manner consistent with Article XX, it must stop applying the import prohibition and consequently review and amend Section 609 in order to comply with the DSB recommendations and rulings.

4.98 In order that the statutory prohibition of the United States is justified, Thailand submits that *all* the aspects of inconsistency with GATT 1994 Article XX must be removed. The Appellate Body has identified a number of discriminatory elements in the US measure. Any of these elements constitute in itself a breach of treaty obligation. The United States must remove *all* of these discriminatory elements in order to comply with the ruling and conform to the principle *pacta sunt servanda* – the rule that treaties are binding on the parties and must be performed in good faith, which is a fundamental principle of the law of treaties well enshrined in Article 26 of the Vienna Convention on the Law of Treaties.

4.99 Thailand disagrees with the suggestion of the United States that it need not necessarily address each one of the aspects of discrimination in order to comply with the Appellate Body findings. On the contrary, the principle of good faith treaty performance dictates that any and each breach of treaty obligation by the United States must be removed.

4.100 Thailand considers that the Panel should examine whether each and every aspect of the discrimination identified by the Appellate Body has been removed, notwithstanding the US claim that the Panel is not required to do so because the United States has addressed all the aspects of discrimination found by the Appellate Body. Only *one* of these aspects that remains after the expiry of the reasonable period of time constitutes in itself a violation by the United States of its obligations under the GATT 1994.

4.101 Second, Thailand is of the view that the United States still applies the statutory prohibition in a manner that constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." The reasonable period of time has expired, but the United States still has not removed some of the aspects of the discrimination found by the Appellate Body to be inconsistent with Article XX of the GATT 1994. Two of these aspects are addressed as follows.

4.102 The first aspect Thailand considers is that the United States Government cannot implement the DSB ruling that it must permit importation of shrimps harvested using TEDs from non-certified countries because such permission violates Section 609 as interpreted by the US judiciary.

4.103 Thailand notes that, according to the DSB recommendations and rulings, the United States must permit importation of shrimps harvested by vessels using TEDs comparable in effectiveness to

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justified under Article XX of the same Agreement (Panel Report, para. 8.1). The Appellate Body confirmed that the US "measure" is not justified under Article XX (Appellate Body Report, para. 187(c)).

[140] Panel Report, para. 7.11. *See* also paras. 7.17 and 8.1.

[141] Appellate Body Report, para. 98(b).

those required in the United States, even if the harvesting nation is not certified pursuant to Section 609. Failure to do so constitutes an unjustifiable discrimination in the sense of the Article XX chapeau.[142]

4.104 Thailand notes that in July 2000, however, the US Court of International Trade ruled that allowing such importation is inconsistent with Section 609 ("the CIT ruling").[143] The CIT ruling means that Section 609, as interpreted by the US judiciary, mandates action that is inconsistent with paragraph 165 of the Appellate Body Report and the relevant provision of the covered Agreement (i.e. the chapeau of Article XX of the GATT 1994). Section 609, therefore, cannot be reconciled with, as the Appellate Body puts it, "the declared policy objective of protecting and conserving sea turtles"[144] and, consequently, is not justified under Article XX(g), provisionally or otherwise.

4.105 Pursuant to the legal system of the United States, Thailand notes, it is the Judiciary that has the authority to adopt interpretations of legal provisions. The US judiciary is *not* bound by interpretations given by the Executive Branch of legal provisions. It is the meaning of the law as ascertained by the US courts that must be retained by the Panel. Previous panels and the Appellate Body have underlined this point in *United States - Anti-Dumping Act of 1916*[145] and *United States – Sections 301-310 of the Trade Act of 1974*.[146] The Appellate Body also ruled in the *United States - Shrimp* report that "the United States, like all other Members of the WTO and of the general community of States, bears responsibility for acts of all its departments of government, including its judiciary."[147]

4.106 It is Thailand's view, therefore, that Section 609 as currently interpreted by the US Judiciary is inconsistent with the obligations of the United States under the WTO Agreement. Contrary to the claim of the United States, this is not a matter of speculation. Section 609 *currently* stands in violation of the obligations of the United States. Under customary international law and under the WTO Agreement, Article XVI:4, the United States must amend this Act in order to comply with its obligations.

4.107 The second aspect Thailand argues is that the United States has failed to remove the inconsistency regarding the "lack of flexibility" issue. The US measure at issue in the original dispute requires other WTO Members to adopt essentially the same conservation programme as that applied by the United States. The use of approved TEDs at all times is required regardless of possible different conditions in other countries. According to the Appellate Body, this "rigidity and inflexibility" constitutes an unjustifiable and arbitrary discrimination within the meaning of the chapeau of Article XX. [148] The Revised Guidelines are not sufficient to remove the discrimination found by the Appellate Body, since:

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[142] Appellate Body Report, para. 165.

[143] *Turtle Island Restoration Network v. Robert Mallett*, 110 Fed. Supp. 2d 1005 (CIT 2000).

[144] Appellate Body Report, para. 165.

[145] Both panels and the Appellate Body Reports WT/DS136/AB/R, WT/DS162/AB/R were adopted on 26 September 2000. *See* para. 101 of the Appellate Body Report, para. 6.84 of the Panel Report in WT/DS136/R, and para. 6.97 of the Panel Report in WT/DS162/R.

[146] Adopted on 27 January 2000, WT/DS152/R. *See* para. 8.1(d), which should be read in conjunction with footnote 700 on p. 337 of that Report.

[147] Appellate Body Report, para. 173. The Appellate Body rightly quoted doctrinal writings in support of this ruling in footnote 177 on p. 71 of the Report. In this respect, it is pertinent to note the view of Lord McNair, an authority on the law of treats in *The Law of Treaties*, Oxford University Press, 1961, p. 346. Therefore, the fact that the US Government (the Department of State) has not, as of now, modified the 1999 Revised Guidelines in order to comply with the CIT ruling does not remove the inconsistency of Section 609 with the DSB recommendations and rulings.

[148] Appellate Body Report, paras. 161-164, 172 and 177.

(a) TEDs remains the requirement or *the standard of judgment* regardless of any different conditions prevailing in the territories or jurisdiction areas of other Members.[149]

(b) The US Department of State remains the sole authority to assess the effectiveness of other Members' programmes to protect sea turtles in the course of shrimp trawl fishing, on the basis of a standard decided by the US authorities alone.

(c) The applying nations have the burden of demonstrating that they apply comparably effective regulatory programmes. This amounts to a presumption that only a TED-based programme is effective for sea turtle conservation in shrimp trawl fishing, unless proven otherwise.

(d) The apparent, newly introduced "flexibility" of allowing non-TED users to be certified is rendered meaningless by the statement (Section II.B(a) of the Revised Guidelines) that the Department of State is "aware of no measures or series of measures that can minimize the capture and drowning of sea turtles [...] that is comparable in effectiveness to the required use of TEDs." Since the sole judge (i.e. the US Department of State) is not aware of anything else that may be as effective as TEDs, it becomes quite impossible to prove otherwise.

4.108 Therefore, Thailand submits that the Revised Guidelines still impose *de facto* the use of TEDs as the only basis for certification. The Appellate Body has ruled, however, that the United States must not require other nations to adopt essentially the same programme as that applied by the United States because this violates the chapeau of Article XX.[150] Under the Revised Guidelines, the United States "system and processes of certification", as the Appellate Body puts it, are still "established and administered by the United States Agencies alone" and decision making by the US authorities in this regard is still "unilateral."[151]

4.109 In conclusion, Thailand submits that the United States has not taken measures to comply with the DSB recommendations and rulings consistent with the GATT 1994. The measures taken by the United States to comply with the DSB recommendations and rulings in this case are still *inconsistent* with the provisions of the relevant covered Agreement, i.e. Article XX of the GATT 1994.[152] Consequently, the United States has failed to bring its prohibition measure into conformity with its WTO obligations as recommended by the DSB. Since the discrimination has not been removed, it is the statutory prohibition itself, i.e. Section 609, as applied, that *remains* in violation of the US obligations under the WTO Agreement and unjustified by GATT Article XX.

4.110 In response to Malaysia's request, Thailand submits that the Panel should recommend that the United States bring its measure into conformity with the WTO Agreement and suggest that the United States stop applying the import prohibition mandated by Section 609 immediately.

4.111 In response to the question posed by Malaysia, Thailand considers that it is well-established GATT/WTO practice that when an affirmative defence, such as GATT Article XX, is invoked, the burden of proof rests on the party asserting it.[153]

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[149] The differences in fishing conditions are taken into account only to the extent relevant to determining whether a non-TED programme is as effective as the US TED-based programme, and not to determining whether it is effective on its own merit as a turtle conservation programme for shrimp fishing.

[150] Appellate Body Report, paras. 161-164.

[151] Appellate Body Report, para. 172.

[152] As demonstrated above, the United States still applies the import prohibition under Section 609 in a manner that constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."

[153] Panel Report, para. 7.30; Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (adopted on 23 May 1997, WT/DS33/AB/R) p. 16 and footnote 23.

V. FINDINGS

A. GENERAL APPROACH TO THE ISSUES BEFORE THE PANEL

5.1 This Panel was established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") to examine the claims raised by Malaysia with respect to the consistency with the GATT 1994 of the measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") in the case *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereafter "the implementing measure").[154] Malaysia claims that the United States did not comply with the findings contained in the Original Panel Report and with the findings of the Appellate Body for the following main reasons:

(a) Malaysia argues that the United States was not entitled, further to the Appellate Body findings, unilaterally to adopt an import ban outside the framework of an international agreement.

(b) Malaysia also argues that the United States should have negotiated an agreement on the protection and conservation of sea turtles before the eventual imposition of an import ban. Thus, by continuing to apply a unilateral measure[155] after the end of the reasonable period of time pending the conclusion of an international agreement, the United States failed to comply with its obligations under the GATT 1994.

(c) Malaysia also claims that the Revised Guidelines adopted by the United States do not comply with the recommendations and rulings of the DSB. In particular, Malaysia is of the view that the United States imposes its own conservation policy and standards on other Members and that such a practice is contrary to the sovereign right of Malaysia to define its own environmental policies and standards.

5.2 The United States does not contest the fact that it imposes an import ban that falls within the scope of Article XI of the GATT 1994. However, the United States argues that:

(a) Section 609 has been found to be provisionally justified under paragraph (g) of Article XX of the GATT 1994; and

(b) as far as the other recommendations and rulings of the DSB are concerned, the United States has made efforts to negotiate a sea turtle conservation agreement and has modified the guidelines implementing Section 609 in order to comply with those recommendations and rulings.

5.3 In light of the claims and arguments of the parties and of the recommendations and rulings of the DSB, the Panel is of the view that the matter before it should be addressed as follows. First, the Panel should determine a number of preliminary issues such as: (i) the exact scope of its terms of

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[154] The "implementing measure" is composed of Section 609 of Public Law 101-162, of the revised guidelines pursuant to Section 609, dated 8 July 1999, Federal Register, Vol. 64, No. 130, Public Notice 3086, p. 36946 (hereafter the "Revised Guidelines"), as well as of any practice under those Revised Guidelines. The measure reviewed by the Panel in its report (WT/DS58/R), hereafter respectively the "Original Panel" and the "Original Panel Report", and in the Appellate Body Report (WT/DS58/AB/R) will be referred to hereafter as the "original measure".

[155] Throughout these findings and unless stated otherwise, the term "unilateral measure(s)" shall be deemed to refer to a measure which has been designed and is applied without being expressly mandated or permitted by a multilateral agreement, without prejudice to the question of its justification under Article XX of the GATT 1994 or any other provision of the Marrakesh Agreement Establishing the World Trade Organization (hereafter the "WTO Agreement").

reference; (ii) the burden of proof and the date at which the Panel should consider the evidence before it; and (iii) the treatment of unsolicited submissions from non-governmental organizations.

5.4 Second, since an Article 21.5 panel is supposed to review the existence and consistency of the measures taken to implement the DSB recommendations and rulings with a covered agreement, we shall proceed with determining if, as claimed by Malaysia, the implementing measure violates Article XI:1 of the GATT 1994. If we find that to be the case, we shall proceed to address the defence put by the United States under Article XX of the GATT 1994. In this context we will review the specific arguments raised by both parties as well as the general issue, invoked by Malaysia, of the sovereign right of a country to determine its own environmental policies and standards.

5.5 In doing so, we shall take into account the fact that Malaysia's claims are concentrated on the findings of the Appellate Body in this case, which will require us to start our analysis from the Appellate Body findings and the Original Panel findings. In other words, although we are entitled to analyse fully the "consistency with a covered agreement of measures taken to comply", our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body. In particular, we note that some of the basic assessments of the Original Panel were reversed by the Appellate Body and, consequently, our evaluation of the consistency of the "measures taken to comply" has to respect the Appellate Body analysis as stated in the Report adopted by the DSB.

B. PRELIMINARY ISSUES

1. Terms of reference of the Panel

5.6 We note that, as confirmed by the Appellate Body[156], a panel has the responsibility to determine its jurisdiction and that assessing the scope of its terms of reference is an essential part of this determination. We note that Malaysia argues that it does not limit itself in this dispute to contesting whether the United States has complied with the DSB recommendations and rulings. It states that it is exercising its rights under Article 21.5 of the DSU. Malaysia adds that the mandate of the Panel under Article 21.5 of the DSU is to examine the existence or the consistency with Articles XI and XX of the GATT 1994 of measures taken by the United States to comply with the recommendations and rulings of the DSB. Malaysia further argues that the steps taken by the United States did not remove the elements of "unjustifiable discrimination" and "arbitrary discrimination" that existed in the original measure. The implementing measure remains inconsistent with Article XI and not justified under Article XX. We note that the United States does not argue that Malaysia's claims are insufficiently specific or that its request for establishment of an Article 21.5 panel otherwise fails to meet the requirements of Article 6.2 of the DSU.

5.7 The first sentence of Article 21.5 of the DSU reads in relevant parts as follows:

> "Where there is disagreement as to the *existence* or *consistency with a covered agreement* of *measures taken to comply with the recommendations and rulings* [of the DSB] such dispute shall be decided through recourse to these dispute settlement procedures, […]" (Emphasis added).

[156] See, e.g., Report of the Appellate Body on *United States – Anti-Dumping Act of 1916*, adopted on 26 September 2000, WT/DS136; 162/AB/R, para. 54.

5.8 We recall that, *in Canada – Measures Affecting The Export of Civil Aircraft - Recourse by Brazil to Article 21.5 of the DSU*[157], the Appellate Body stated that:

> "[…] a panel [under Article 21.5] is not confined to examining the measures taken to comply from the perspective of the claims, arguments and factual circumstances that related to the measure that was subject to the original proceedings. […] Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel […] It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measure taken to comply", as required by Article 21.5 of the DSU."[158]

5.9 The terms of reference of this Panel[159] do not differ from the standard terms of reference applied in other Article 21.5 cases. In light of the reasoning of the Appellate Body mentioned above, the Panel considers that it is fully entitled to address all the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings *provided*, as recalled by the panel on *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 21.5 of the DSU*[160], that the claims are identified in the request for referring the matter to a panel under Article 21.5 of the DSU.

5.10 In this respect, we reviewed the recourse by Malaysia to Article 21.5 of the DSU.[161] We are mindful of the requirements of Article 6.2 of the DSU and of the reasoning of the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* [162]and *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*.[163] We do not intend, however, to take a position on the application of Article 6.2 in Article 21.5 proceedings. We simply note at this stage that the United States did not argue that any claim made by Malaysia was insufficiently specific in the light of Article 6.2 of the DSU and, therefore, we will proceed to address all of them, to the extent necessary for the fulfilment of our mandate.

5.11 The Panel finally notes that third parties also have formulated a number of claims and arguments in their submissions and at the hearing. In accordance with the practice of other panels

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[157] Adopted on 4 August 2000, WT/DS70/AB/RW (hereafter "*Canada – Aircraft – Recourse by Brazil to Article 21.5 of the DSU*").

[158] *Ibid*., para. 41.

[159] WT/DS58/18.

[160] Adopted on 20 March 2000, WT/DS18/RW (hereafter "*Australia – Salmon – Recourse by Canada to Article 21.5 of the DSU*"), para. 7.10, sub-paragraphs 11 and 12.

[161] WT/DS58/17.

[162] Adopted on 25 September 1997, WT/DS27/AB/R, paras. 141 and, mostly, 142.

[163] Adopted on 12 January 2000, WT/DS98/AB/R, paras. 127-128 and 130-131.

under the GATT 1947 and the WTO Agreement[164], we have decided to consider only those claims of third parties that have been raised by the parties themselves.

2. Date on which the Panel should assess the facts

5.12 The Panel notes that the 13-month reasonable period of time agreed upon by the parties expired on 6 December 1999. However, the DSB only established this Article 21.5 Panel at its meeting on 23 October 2000. The Panel notes that the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed. On the one hand, it could be argued that such a date must be logically the day following the end of the reasonable period of time referred to in Article 21.3 of the DSU. On the other hand, keeping in mind that a prompt settlement of disputes is, pursuant to Article 3.3 of the DSU, essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members, it may be appropriate for the Panel to take into account events subsequent to the end of the reasonable period of time.[165]

5.13 The Panel takes the view that it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time. The Panel, while mindful of the obligation of the United States to bring its legislation into conformity by the end of the reasonable period of time, considers that it is consistent with the spirit of Article 3.3 of the DSU to take into account any relevant facts until the date on which the matter was referred to the Panel.[166]

3. Admissibility of submissions from non-governmental organizations

5.14 In the course of the proceedings, the Panel received two unsolicited submissions from non-governmental organizations. One was submitted by *Earthjustice Legal Defense Fund* on behalf of *Turtle Island Restoration Network, The Humane Society of the United States, The American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife,* and *Fiscalia del Medio Ambiente (Chile).*[167] The other submission was filed by the *National Wildlife Federation* on behalf of the *Center for Marine Conservation, Centro Ecoceanos, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhapa, Project Swarajya, Visakha Society for Prevention of Cruelty to Animals.*[168] Those submissions were respectively communicated to the parties on 15 and 18 December 2000. In a letter accompanying these submissions, the Panel informed the parties that they were free to comment in their rebuttals on the admissibility and relevance of these submissions. The Panel also informed the parties that it would set out in its report its decision as to how it would address these submissions.

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[164] See the report of the panel on Japan – *Trade in Semiconductors*, adopted on 4 May 1988, BISD 35S/116, para. 98, where the panel stated that a panel is not required to make findings on issues raised solely by interested third parties. See also the report on *Australia – Salmon – Recourse by Canada to Article 21.5 of the DSU, Op. Cit.*, where the panel did not formally address the question of the absence of consultations pursuant to Article 4 of the DSU raised by the European Communities as a third party.

[165] We note that similar premises seem to have been at the origin of the approach followed by the panel in *Australia – Salmon – Recourse by Canada to Article 21.5 of the DSU, Op. Cit*. See para. 7.21.

[166] The Panel notes that, in the case on *Australia – Salmon – Recourse by Canada to Article 21.5 of the DSU, Op. Cit*., para. 7.10, sub-para. 24, the panel took into account, in relation to the definition of its terms of reference, facts that occurred after the end of the reasonable period of time.

[167] Hereafter the "Earthjustice Submission".

[168] Hereafter the "National Wildlife Federation Submission".

5.15 The parties discussed the above-mentioned submissions in their rebuttals, at the hearing and in replies to questions of the Panel.[169] The Panel notes that Malaysia considers in substance that the Panel has no right under the DSU to accept or consider any unsolicited briefs, whereas the United States argues that the Earthjustice Submission, which addresses a hypothetical question not before the Panel, does not appear to be as relevant to the issue in this dispute as the National Wildlife Federation Submission. As far as the National Wildlife Federation Submission is concerned, the United States considers that it raises issues directly relevant to the matter before the Panel and decided to attach it as an exhibit to its submissions "to ensure that a relevant and informative document [would be] before the Panel, regardless of whether the Panel decid[ed] to exercise its discretion to accept [that submission] directly from the submitters." However, we take note of the fact that the United States does not endorse some of the legal arguments contained in the "amicus brief" submitted by the National Wildlife Federation.[170]

5.16 As far as the Earthjustice Submission is concerned, the Panel takes note of the arguments of the parties and decides not to include it in the record of this case. Regarding the National Wildlife Federation Submission, the Panel notes that it is part of the submissions of the United States in this case and, as a result, is already part of the record.

4. Burden of proof

5.17 Malaysia refers to the Appellate Body Report in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*[171] to claim that a defence such as that invoked by the United States under Article XX of the GATT 1994 is an affirmative defence. The burden is on the United States to prove that its implementing measure complies with the requirements of Article XX of the GATT 1994. The United States argues that Malaysia has the initial burden of showing that the implementing measure is inconsistent with one or more obligations under a covered agreement. However, the United States does not contest that the implementing measure is an import prohibition under Article XI. The United States also agrees that it has the initial burden of proof of showing that the implementing measure falls within the scope of Article XX.

5.18 We recall that, in *Brazil – Export Financing Programme For Aircraft – Recourse by Canada to Article 21.5 of the DSU*[172], the Appellate Body confirmed the finding of the Article 21.5 panel that Brazil had invoked item (k) of the Illustrative List of Export Subsidies[173] as an "affirmative defence". The Appellate Body also considered that the fact that the measure at issue was taken to comply with recommendations and rulings of the DSB did not alter the allocation of the burden of proving Brazil's defence under item (k). The Appellate Body then stated that:

> "In *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, we said: "It is only reasonable that the burden of establishing [an affirmative] defence should rest on the party asserting it." [Footnote omitted] As it is Brazil asserting this "defence" using item (k) in these proceedings, we agree with the

[169] See paras. 3.5 to 3.15 above.

[170] The United States specified that "[t]he amicus brief attached to the US rebuttal submission reflects the independent views of the organizations that signed on to the amicus brief. […] We would note, however, that the amicus brief includes certain procedural and substantive defences not advanced in the US submission […], and thus that these matters are not before the Panel."

[171] Adopted 23 May 1997, WT/DS33/AB/R (hereafter "*United States – Shirts and Blouses*").

[172] Adopted on 4 August 2000, WT/DS46/AB/RW (hereafter "*Brazil – Aircraft – Recourse by Canada to Article 21.5 of the DSU*").

[173] WTO Agreement on Subsidies and Countervailing Measures, Annex I.

> Article 21.5 Panel that Brazil has the burden of proving that the revised PROEX is justified under the first paragraph of item (k)".[174]

5.19 We therefore conclude that it is up to Malaysia to establish a *prima facie* case that its claims under Article XI:1 of GATT 1994 are founded. We also conclude that, even though this is a compliance case and even though good faith application of treaty obligations is to be presumed[175], the United States still has to establish a *prima facie* case that the implementing measure is justified under Article XX, since it is an affirmative defence. If the United States establishes a *prima facie* case, the burden of proof will shift onto Malaysia. If the evidence on a particular claim or defence remains in equipoise, the party bearing the initial burden of proof will be deemed to have failed to provide sufficient evidence in support of its claim.

C. VIOLATION OF ARTICLE XI:1 OF THE GATT 1994

5.20 The Panel notes that Malaysia claims that Section 609 as it is currently applied by the United States continues to violate Article XI:1 of the GATT 1994. The United States does not claim that the implementing measure is compatible with Article XI:1.

5.21 Article XI:1 of the GATT 1994 provides as follows:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member."

5.22 The Panel notes that the elements of the original measure found to be incompatible with Article XI:1 in the Original Panel Report are still part of the implementing measure, i.e. Section 609 as currently applied by the United States. In particular, the United States continues to apply an import prohibition on shrimp and shrimp products harvested in a manner determined to be harmful to sea turtles. We note that the United States does not contest the fact that it applies such a prohibition of import. We consider that the prohibition at issue falls within the "prohibitions or restrictions, other than duties, taxes or other charges" maintained by a Member on the importation of a product from another Member, in contravention of Article XI:1.

5.23 The Panel therefore concludes that the measure taken by the United States to comply with the recommendations and rulings of the DSB in this case violates Article XI:1 of the GATT 1994.

D. APPLICATION OF ARTICLE XX OF THE GATT 1994

1. Preliminary remarks

5.24 We note that the United States claims that the Revised Guidelines respond to all the inconsistencies identified by the Appellate Body under the chapeau of Article XX of the GATT 1994 and thus its import prohibition on certain shrimp and shrimp products is justified. Malaysia, on the contrary, claims that the United States is not entitled to impose any prohibition in the absence of an international agreement allowing it to do so. Malaysia also claims that the United States should have withdrawn the import prohibition pending the conclusion of an international agreement. Malaysia

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[174] *Brazil – Aircraft – Recourse by Canada to Article 21.5 of the DSU*, para. 66.

[175] See Article 26 of the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), (hereafter the "Vienna Convention").

adds that the Revised Guidelines are still biased and that the United States has failed to address the aspects of the original measure faulted by the Appellate Body.[176]

5.25 We first note that the United States invokes Article XX as a "defence" for the violation of Article XI:1. We recall what we said above about the burden of proof with respect to "affirmative defences" in Article 21.5 cases. The United States chose to demonstrate the consistency of the implementing measure with Article XX by proving that it satisfactorily responded to all the findings of the Appellate Body. We also note that, when Malaysia contests that the implementing measure is consistent with Article XX, it also claims that the United States did not satisfy the requirements contained in the Appellate Body findings. The Panel notes in this respect that the claims of Malaysia are exclusively based on the findings of the Appellate Body and on non-compliance with them. Malaysia does not make any new claim under Article XX.

5.26 The Panel is mindful that the United States bears the burden of proving that the implementing measure is compatible with *all* the requirements of the chapeau of Article XX. The Panel notes in this respect that the Appellate Body did not discuss whether the original measure was a disguised restriction on international trade. As a result, this aspect will have to be addressed separately and without referring to any finding in the Appellate Body Report. However, as far as unjustifiable and arbitrary discrimination is concerned, the Panel is of the view that, in the absence of new claims, it is not required to go beyond reviewing the conformity of the implementing measure of the United States *with the findings of the Appellate Body*. In that context, the Panel considers it appropriate to apply the following approach: (i) present its understanding of the Appellate Body findings; and (ii) address the defence of the United States and Malaysia's arguments with respect to Article XX.

5.27 The Panel notes that, in its Report, the Appellate Body recalled the approach which it considered to be appropriate when assessing the conformity of an affirmative defence under Article XX:

> "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed in Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under Article XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."[177]

5.28 As a result, when considering the arguments of the United States, we shall first determine the consistency of the implementing measure under paragraph (g) of Article XX. If we find the implementing measure to be "provisionally justified" under paragraph (g), we shall proceed to determine whether it is applied in conformity with the chapeau of Article XX.

5.29 In this respect, we recall that both the Original Panel and the Appellate Body expressly addressed the question of the negotiation of a multilateral agreement for the protection of sea turtles. Both considered the absence of negotiations with the complaining parties to be evidence of "unjustifiable discrimination" within the meaning of the chapeau of Article XX. We also note that the Appellate Body presented 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

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[176] A more detailed account of the arguments of the parties is found in Section III above.

[177] Appellate Body Report, para. 118, quoting the Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, WT/DS2/AB/R (hereafter "*United States – Gasoline*"), p. 22.

turtles" as "another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination".[178] We also note that the Appellate Body insisted on the fact that such negotiations had not taken place *before* the United States enforced its import prohibition.[179]

5.30 Without taking a definitive position at this stage on the actual scope and consequences of these statements of the Appellate Body[180], we assume, for the sake of the structure of our findings, that the Appellate Body, like the Original Panel, considered that negotiations should have taken place *before* an import prohibition was applied. This, in our opinion, implies that, *as part of our analysis of the implementing measure before us*, we must first determine whether the United States engaged in serious negotiating efforts. Therefore, it seems appropriate for us first to determine the actual scope of the Original Panel and Appellate Body findings, as adopted by the DSB, in respect of the negotiation of an international agreement before reviewing the modifications made by the United States to its original measure. Indeed, if we were to conclude that the United States may not impose any measure of the type currently applied except pursuant to an international agreement, it would not be necessary to review any further the compatibility of the implementing measure, unless such an international agreement exists and actually allows the implementing measure currently in place.[181]

5.31 This is why, as part of our analysis of whether the US implementing measure constitutes or not unjustifiable discrimination, we shall first seek to determine the extent of the obligations of the United States with respect to the negotiation of an international agreement, as identified by the Appellate Body. Thereafter, as necessary, we will pursue our analysis of the compatibility of the implementing measure with the chapeau of Article XX by determining whether, on the basis of the other requirements identified in the DSB recommendations and rulings, the implementing measure meets the "unjustifiable discrimination" and "arbitrary discrimination" tests of the chapeau of Article XX.

5.32 Finally, since we are called upon to examine the compatibility of the implementing measure with all the relevant provisions of Article XX, we shall determine, as appropriate, whether or not that measure constitutes or not a disguised restriction on international trade.

2. Consistency of the implementing measure with paragraph (g) of Article XX of the GATT 1994

5.33 Paragraph (g) of Article XX of the GATT 1994 provides that, subject to the requirement that such measure not be applied in a manner contrary to the chapeau of Article XX, nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures:

> "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

5.34 The Panel notes that it is instructed by Article 21.5 of the DSU to review "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The Panel notes that the Appellate Body found that:

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[178] Appellate Body Report, para. 166.
[179] *Ibid.*
[180] See section V.D.3(a) below on the question of the actual scope of the findings of the Appellate Body with respect to the issue of bilateral or multilateral negotiations with the objective of reaching an agreement on the protection and conservation of sea turtles.
[181] This approach is consistent with the principle of judicial economy as recalled by the Appellate Body, *inter alia*, in *United States – Shirts and Blouses, Op. Cit.* , p. 19.

> "134. For all the forgoing reasons [developed in paragraphs 127 to 133 of the Appellate Body Report], we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994."[182]

5.35 The Appellate Body also found that:

> "141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake [footnote omitted], it appears to us that Section 609, *cum* implementing guidelines, 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, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.
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> 142. 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."

5.36 Finally, the Appellate Body found that:

> "145. Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restriction on domestic harvesting of shrimp, as required by Article XX(g)".

5.37 The Panel recalls that, as the party invoking Article XX, the United States bears the burden of proving that its implementing measure meets *all* the relevant requirements of that Article, including those of paragraph (g). This implies that the United States must make a *prima facie* case that the implementing measure relates to the conservation of exhaustible natural resources if such a measure is made effective in conjunction with restrictions on domestic production or consumption.

5.38 The United States has argued that Section 609 was found to be "provisionally justified" by the Appellate Body under paragraph (g). Malaysia does not raise any claims or arguments on the specific issue of the compatibility of Section 609 with paragraph (g) as such.[183]

5.39 The Panel considers that two questions have to be addressed in order to determine whether the implementing measure meets the requirements of paragraph (g) of Article XX. First, the Panel notes that the Appellate Body found that Section 609 was "provisionally justified" under Article XX(g).[184] We understand this to mean that, in the process of determining whether Section 609 was justified under Article XX, the Appellate Body concluded that Section 609 satisfied the first tier of the analysis

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[182] Appellate Body Report, para. 134.
[183] A more detailed account of the arguments of the parties can be found in Section III above.
[184] Appellate Body Report, para. 147.

defined in its report on *United States – Gasoline*[185], i.e. the *characterization* of the measure under Article XX(g). This implies that, as long as the implementing measure before us is identical to the measure examined by the Appellate Body in relation to paragraph (g), we should not reach a different conclusion from the Appellate Body.

5.40 This leads us to the second question, i.e. what exactly did the Appellate Body find to be "provisionally justified" under Article XX(g)?[186] We note that the Appellate Body stated that it had to "examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to save, that is, the conservation of sea turtles."[187] We also recall that, in footnote 76 of its report, the Appellate Body stated that the United States measure at issue was referred to as "Section 609" or "the measure" and that, by these terms, the Appellate Body meant Section 609 *and* the 1996 Guidelines. While we have no doubt that the Appellate Body actually considered the measure as a whole, our reading of the relevant paragraphs of the Appellate Body Report nonetheless leads us to believe that the Appellate Body essentially based its finding of "provisional justification" on the features of Section 609 as such. This is because, according to the Appellate Body interpretation, the elements to be considered in order to determine the compatibility of the measure with paragraph (g) are essentially found in the text of Section 609 as such. In our view, references to the implementing guidelines are there to confirm that the content of those guidelines does not affect the interpretation of Section 609 as such in that respect.

5.41 As already mentioned above, the United States did not amend Section 609, whereas it has issued revised implementing guidelines. We therefore conclude that since Section 609 as such has not been modified, the findings of the Appellate Body regarding paragraph (g) remain valid and the consistency of Section 609 as such with the requirements of paragraph (g) also remains valid, to the extent that the Revised Guidelines do not modify the *interpretation* to be given to Section 609 in that respect. We have no evidence that the Revised Guidelines have modified in any way the meaning of Section 609 *vis-à-vis* the requirements of paragraph (g), as interpreted by the Appellate Body.

5.42 We therefore conclude that the implementing measure is provisionally justified under paragraph (g) of Article XX. We proceed with the second tier of the method applied by the Appellate Body in this case, i.e. the "further appraisal of the *same measure* under the introductory clause of Article XX."[188]

3. Arbitrary or unjustifiable discrimination between countries where the same conditions prevail: the question of international negotiations

(a) Extent of the US obligation to negotiate and/or reach an international agreement on the protection and conservation of sea turtles

(i) Abuse or misuse of rights under Article XX as a standard for determining the extent of an obligation to negotiate and/or enter into an international agreement

5.43 As mentioned above, the Appellate Body, as part of its process of determining whether the original measure had been applied in a manner that constituted a means of "unjustifiable discrimination", addressed the issue of international negotiations, an issue which is raised by Malaysia before this Panel. After having considered that the lack of flexibility to take into account the different

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[185] *Op. Cit.*, p. 22. See also Appellate Body Report, para. 118.

[186] We are mindful that, as mentioned by the Appellate Body in *Australia – Measures Affecting Importation of Salmon* (adopted on 6 November 1998, WT/DS18/AB/R, para. 223), our findings must be complete enough to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance in order to ensure effective resolution of disputes to the benefit of all Members.

[187] Appellate Body Report, para. 137.

[188] Appellate Body Report, para. 118.

situations in different countries amounted to unjustifiable discrimination[189], the Appellate Body added that:

> "166. 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."

5.44 As underlined by the Appellate Body itself, Section 609(a) directs the US Secretary of State *inter alia* to initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of sea turtles. This as such is not a ground for a finding of unjustifiable discrimination unless, in implementing Section 609(a), the United States authorities have discriminated between exporting countries by negotiating seriously with some and less seriously or not at all with others.

5.45 However, the Appellate Body did not conclude its analysis at that point. It also noted that "the protection and conservation of highly migratory species […] demand concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations."[190] The Appellate Body went on to recall that the need for and the appropriateness of such efforts had been recognized by the WTO itself as well as in a significant number of other international instruments and declarations.[191] In addition, the Appellate Body recalled that the United States had actually succeeded in negotiating an international agreement for the protection and conservation of sea turtles, namely the Inter-American Convention.[192] In the conclusion to its analysis, the Appellate Body also stated that "The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability."[193]

5.46 The approach of the Appellate Body leads us to conclude that it is not solely the fact that the United States negotiated seriously with some Members and less seriously with others which is at the origin of its finding of unjustifiable discrimination in relation to negotiations, even though it would have been sufficient in itself to justify such a conclusion. We believe that another reason for the Appellate Body finding is that the United States, by unilaterally defining and implementing criteria for applying Section 609, failed to take into account the different situations which may exist in the exporting countries. In other words, the United States failed to pass the "unjustified discrimination" test by applying the same regime to domestic and foreign shrimp.

5.47 This second requirement is, however, insufficient on its own to explain the findings of the Appellate Body. We believe the reason for such findings on this issue by the Appellate Body flows from the context. The protection and conservation of sea turtles is a field where a multilateral approach is appropriate because of the highly migratory nature of sea turtles. Moreover, this is a field where international cooperation is clearly favoured under the applicable norms of international law. Finally, the successful negotiation and the content of the Inter-American Convention are evidence that

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[189] See para. 5.90 below.
[190] Appellate Body Report, para. 168.
[191] *Ibid*.
[192] Appellate Body Report, paras. 169-171.
[193] Appellate Body Report, para. 172 *in fine*.

a multilateral agreement is a reasonably open alternative course of action for securing the legitimate goals of the US measure.[194]

5.48 Having determined that the United States *had* to engage in negotiations does not suffice to determine whether the United States has complied with the recommendations and rulings of the DSB in this respect. It is also necessary to assess the extent of the efforts required. In this regard, we consider that the findings of the Appellate Body concerning the nature of the chapeau of Article XX and, in particular, the notion of abuse or misuse of rights under Article XX provide clear guidance as to how to assess the degree of efforts required from the United States in relation to the negotiation of an international agreement.

5.49 We note that the Appellate Body stated in its Report that:

> "156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. […] thus, 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."[195]

5.50 The Appellate Body also considered that:

> "159. 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 (e.g., Article XI) of the GATT 1994, 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."[196]

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[194] Appellate Body Report, para. 171.
[195] Italics in the original, underlining added.
[196] Underlining added.

We conclude that, in order for us to determine what is actually required from the United States in relation to engaging in serious "across-the-board" negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, we need to assess what is required to avoid abuse or misuse of the rights of the United States under Article XX in the present case.

5.51 The existence of an abuse or misuse of those rights is dependent on 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 (e.g., Article XI) of the GATT 1994. As mentioned by the Appellate Body, "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." In other words, the position of the line itself depends on the type of measure imposed and on the particular circumstances of this case. The measure at issue – an import prohibition – has been described by the Appellate Body as "ordinarily, the heaviest 'weapon' in a Member's armoury of trade measures."[197] In making this analogy, it seems that the Appellate Body meant to imply that other, less trade restrictive measures existed and also that import prohibitions, because of their impact, had to be subject to stricter disciplines. We believe that, in order to determine the position of the line, we need not only to identify the facts making up this specific case, i.e. the factual context, but also to consider the legal framework influencing the interpretation to be given to the notion of "unjustifiable discrimination" in the factual context of the protection and conservation of sea turtles.

5.52 The *factual context* is essentially related to the biology of sea turtles and, more particularly, the fact that the sea turtles covered by Section 609 are highly migratory species, as was confirmed by the experts consulted by the Original Panel.[198] We also note that the Appellate Body stated that this objective - the protection and conservation of sea turtles as highly migratory species - "demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations."[199] It is also important to keep in mind, as implicitly noted by the Appellate Body, that the situation of each Member may be different in terms of sea turtle protection and conservation.[200]

5.53 As far as the *legal framework* is concerned, we recall that the Appellate Body also noted that "the need for, and the appropriateness of, such efforts [to protect migratory species] have been recognized in the WTO itself as well as in a significant number of international instruments and declarations."[201] Inevitably, when considering this legal framework, we will have to rely on the customary norms of international law on treaty interpretation, as embodied in the Vienna Convention.

5.54 In that framework, assessing first the *object and purpose* of the WTO Agreement, we note that the WTO preamble refers to the notion of "sustainable development".[202] This means that in

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[197] Appellate Body Report, para. 171.

[198] Original Panel Report, paras. 5.1 to 5.312.

[199] Appellate Body Report, para. 168, citing the Rio Declaration, Agenda 21, the Convention on Biological Diversity, the Bonn Convention on the Conservation of Migratory Species of Wild Animals, and the Report (1996) of the CTE.

[200] Appellate Body Report, para. 165, where the Appellate Body specifies that "many of those Members [of the WTO] may be differently situated".

[201] Appellate Body Report, para. 168.

[202] *See* the final texts of the agreements negotiated by Governments at the United Nation Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, 3-14 June, 1992, specifically the Rio Declaration on Environment and Development (hereafter the "Rio Declaration") and Agenda 21 at www.unep.org; the concept is elaborated in detailed action plans in Agenda 21 so as to put in place development that is sustainable - i.e. that "meets the needs of the present generation without compromising the ability of future generations to meet their own needs". *See* World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1988).

interpreting the terms of the chapeau, we must keep in mind that sustainable development is one of the objectives of the WTO Agreement.

5.55 How this objective is to be appreciated can further be elaborated by reference to the Marrakesh Decision establishing the Committee on Trade and Environment (CTE). The preamble of that Decision provides, *inter alia*, that:

> "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand and acting for the protection of the environment and promotion of sustainable development on the other."

These terms would seem to imply that recourse to trade-related measures not based on international consensus is generally not the most appropriate means of enforcing environmental measures, since it leads to the imposition of unwanted constraints on the multilateral trading system and may affect sustainable development.

5.56 We also have evidence in the context of Article XX showing that preference must be given to a multilateral approach in terms of protection of the environment. In this respect, we note the content of the 1996 Report of the CTE, where the CTE endorsed and supported "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature."[203] Insofar as this report can be deemed to embody the opinion of the WTO Members, it could be argued that it records evidence of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3(b) of the Vienna Convention) and as such should be taken into account in the interpretation of the provisions concerned. However, even if it is not to be considered as evidence of a subsequent practice, it remains the expression of a common opinion of Members and is therefore relevant in assessing the scope of the chapeau of Article XX.

5.57 Finally, we note that the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to this dispute.[204] Article 31.3(c) of the Vienna Convention provides that, in interpreting a treaty, there shall be taken into account, together with the context, "any relevant rule of international law applicable to the relations between the parties". We note that, with the exception of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS)[205], Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body in paragraph 168 of its Report.[206]

5.58 To clarify the meaning of "unjustifiable discrimination" in the context of measures relating to the protection of endangered migratory species, the above-mentioned elements, to which proper weight must be given pursuant to customary norms of interpretation, influence the positioning of the

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[203] Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171.

[204] Appellate Body Report, para. 168.

[205] However, we note that the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region (MOU) "shall be considered an agreement under Article IV, paragraph 4 of the CMS" ("Basic Principles", para. 1 of the MOU). It is also our understanding that the CMS Secretariat provided assistance in the negotiation of the MOU and is the provisional secretariat for this Memorandum of Understanding.

[206] See footnote 199 above.

line of equilibrium that the United States must respect in this case. Undoubtedly, these elements move the line of equilibrium towards multilateral solutions and non trade-restrictive measures.[207]

5.59 We therefore conclude that the fact that sea turtles are highly migratory species whose protection concerns all the States through the territories or sea zones of which they migrate and the recognition, both at the WTO level and in other international agreements that the protection of migratory species is best achieved through international cooperation, significantly move the line of equilibrium referred to by the Appellate Body towards a bilaterally or multilaterally negotiated solution, thus rendering recourse to unilateral measures less acceptable. This is in our opinion the reason why the Appellate Body established that it was necessary for the United States to engage in serious efforts in the field of sea turtle protection and conservation in order to avoid abuse or misuse of Article XX of the GATT 1994. This means that, if we were to find that the US import prohibition had been applied without serious efforts having been made to negotiate a multilateral agreement for the protection and conservation of sea turtles, the measure might constitute an abuse or misuse of Article XX.

5.60 We also note that the Appellate Body stated that "the chapeau of Article XX is but one expression of the principle of good faith".[208] The notion of good faith, in relation to the issue under examination in this section, implies a continuity of efforts which, in our opinion, is the only way to address successfully the issue of conservation and protection of sea turtles through multilateral negotiations, as demonstrated by the circumstances of this case. We therefore consider that, even though the Appellate Body only refers to "serious efforts", the notion of good faith efforts implies, *inter alia*, that the seriousness of the United States' efforts in this case must be assessed over a period of time. It is this continuity of efforts that matters, not a particular move at a given moment, followed by inaction.

5.61 On that basis, we proceed to determine whether the line of equilibrium in the field of sea turtle conservation and protection is such as to require the conclusion of an international agreement or only efforts to negotiate.

(ii) Obligation to negotiate v. obligation to reach an international agreement

5.62 We recall that the parties differ as to the extent of the obligations of the United States in relation to the negotiation and conclusion of an international agreement on the protection and conservation of sea turtles. The United States argues that it only has to make good faith efforts to negotiate an agreement whereas Malaysia claims, as a first line of argumentation, that an international agreement has to be reached before any measure can be imposed.

5.63 The Panel first recalls that the Appellate Body considered "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

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[207] We note in this respect that the Appellate Body itself used the Inter-American Convention as an illustration of the positioning of the line of equilibrium which defines when a particular measure may be perceived as an abuse or misuse of Article XX:

> "170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention <u>together marked out the equilibrium line to which we referred earlier</u>." (Italics in the original, underlining added).

[208] Appellate Body Report, para. 158.

the protection and conservation of sea turtles, *before* enforcing the import prohibition against the shrimp exports of those other Members"[209] bears heavily in any appraisal of justifiable or unjustifiable discrimination within the meaning of the chapeau of Article XX. From the terms used, it appears to us that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms "with the objective"; it would have simply stated that an agreement had to be concluded.

5.64 We also note that the Appellate Body stated that:

> "172. Clearly, the United States *negotiated seriously with some, but not with other Members* (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the *failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved*, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements. [Footnote omitted]"

This paragraph is evidence that the Appellate Body considered that the requirement is one of "negotiation", not "conclusion" of an agreement. Moreover, we consider that, if the Appellate Body had intended to imply that no measure could be adopted outside the framework of an international agreement on the protection and conservation of sea turtles, it would not have continued with its review of the unilateral measure applied pursuant to Section 609. Rather, it would have reached a final conclusion once it had determined, as had the Original Panel, that no serious efforts had been made at that time by the United States to negotiate an agreement on the protection and conservation of sea turtles.

5.65 We also note that, in paragraph 121 of its Report, the Appellate Body stated 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 (a) to (j) of Article XX." This seems to mean that, in the opinion of the Appellate Body, recourse to a unilateral measure cannot *a priori* be excluded under Article XX of the GATT 1994.

5.66 In the context of this section, we conclude that the United States had the following obligations in this case in order to avoid "unjustifiable discrimination":

(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 sea turtles;

(c) the United States had to make serious efforts in good faith[210] to negotiate; and

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[209] Appellate Body Report, para. 166 (emphasis added).
[210] See para. 5.60 above.

(d) serious efforts in good faith had to take place before[211] the enforcement of a unilaterally designed import prohibition.[212]

5.67 We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a "one-off" exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement. Indeed, we consider the reference of the Appellate Body to a number of international agreements promoting a multilateral solution to the conservation concerns subject to Section 609 to be evidence that a multilateral, ideally non-trade restrictive, solution is generally to be preferred when dealing with those concerns, in particular if it is established that it constitutes "an alternative course of action reasonably open".[213]

5.68 Having determined the context in which recourse must be made to bilateral or multilateral negotiations, we now proceed to determine the extent of the "serious good faith efforts" required in the present case.

(iii) The Inter-American Convention as a benchmark of serious good faith efforts in this case

5.69 As mentioned above, what is at issue at this stage is the existence of "unjustifiable discrimination" as a result of: (i) an absence of or insufficient negotiation with some Members compared with others and, in general; and (ii) the unilateral nature of the design and application of the original measure which did not allow for the particular situation of each exporting country to be taken into account. As a result, in order to remove the unjustifiable discrimination, serious good faith efforts must address these two aspects.

5.70 We note that, with respect to the Inter-American Convention, the Appellate Body stated, *inter alia*, that:

> "170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the

[211] The Panel considers that the use of the word "before" by the Appellate Body has to be considered in the context of the original case. This does not mean that, in terms of implementation, the United States would have to go back in time to correct the original error, something obviously impossible. The question of the conformity with the DSB recommendations and rulings has to be assessed on the basis of the actions taken by the United States subsequent to the adoption of the Panel and Appellate Body reports.

[212] On this last point, the Panel considers it to be important to note that it is not sufficient formally to "initiate" negotiations before having recourse to a unilateral measure. Serious good faith efforts must take place continuously up to the satisfactory conclusion of the negotiations.

[213] Appellate Body Report, para. 171.

> *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention.
>
> 171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609."[214]

5.71 With respect to the absence of or insufficient negotiation with some Members compared with others, the reference of the Appellate Body to the Inter-American Convention is evidence that the efforts made by the United States to negotiate with the complainants before imposing the original measure were largely insufficient. The Inter-American Convention was negotiated as a binding agreement and has entered into force on 2 May 2001.[215] We conclude that the Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. While we agree that factual circumstances may influence the duration of the process or the end result, we consider that any effort alleged to be a "serious good faith effort" must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention.

5.72 Regarding the unilateral nature of the design and application of the original measure which did not allow for the particular situation of each exporting country to be taken into account, we recall that the Appellate Body noted that the Inter-American Convention provided for *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined to be suitable for a particular party's maritime areas*. This is, in our view, an application to the specific context of the negotiation of an agreement on sea turtles of the requirement more generally recalled by the Appellate Body in its findings on arbitrary and unjustifiable discrimination that the United States should have taken into account the situation prevailing in the other negotiating countries.[216]

5.73 The consequence of this is, in our view, that the standard of serious good faith efforts to negotiate an agreement on the protection and conservation of sea turtles has to be understood in line with the finding of the Appellate Body that the United States should have taken into account the situation of each exporting country. Thus, efforts to negotiate should be made taking into account the situations prevailing in the other negotiating countries. We agree that, normally, it is the very *raison d'être* of a negotiation to allow all parties to try to have their situations taken into account and that adding such a requirement could seem to be superfluous. We consider, however, that this requirement is essential in the particular context at issue. We note that Section 609 has been applied to the whole world since 1996. Since then, any country exporting shrimp to the United States and entering into negotiations has done so while being subject to the requirements Section 609. The Appellate Body noted that the original measure, in its application, was 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.[217] We consider that, in that context, negotiators may have found themselves constrained to accept conditions that they may not have accepted had Section 609 not been applied. Even if Section 609 as currently applied takes more into account the existence of different conservation programmes,

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[214] Underlining added.

[215] As of 15 May 2001, the Convention has nine parties: Brazil, Costa Rica, Ecuador, Honduras, Mexico, The Netherlands, Peru, Venezuela, and the United States.

[216] See, e.g., Appellate Body Report, paras. 161, 163, 164, 165, 172 and 177.

[217] Appellate Body Report, para. 165.

it can still influence the outcome of negotiations. This is why the Panel feels it is important to take the reality of international relations into account and considers that the standard of review of the efforts of the United States on the international plane should be expressed as follows: whether the United States made serious good faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries.

5.74 At this stage we wish to clarify that, in our opinion, the Appellate Body perceived the Inter-American Convention not as what is *required* in the field of protection of sea turtles, but as an example of an action which would meet the criteria of the chapeau of Article XX in terms of balance between the right of a Member to invoke Article XX and the duty of that same Member to respect the treaty rights of other Members. As a result, an agreement of that type would be more consistent with the objective of the chapeau of Article XX to avoid abuse or misuse of rights than a unilaterally designed import ban. This can be deduced from the comparison made by the Appellate Body between the Inter-American Convention and "an import prohibition [which] is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures."[218]

5.75 However, even though this may be only one way of dealing with the protection of sea turtles in a manner consistent with Article XX, it appears to us that, in the context of this case, it has a particular strength: the Inter-American Convention is evidence that it is feasible to negotiate a binding agreement imposing the adoption of measures comparable to those applied in the United States. Contrary to what the United States seems to claim, the conclusion of the Inter-American Convention demonstrates that the standard of serious good faith efforts imposed in relation to the negotiation of an international agreement in the field of protection and conservation of sea turtles may be quite demanding.

(iv) Conclusion

5.76 We understand the Appellate Body findings as meaning that the United States has an obligation to make serious good faith efforts to address the question of the protection and conservation of sea turtles at the international level. We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality. We note, however, that in the present case a number of guideposts are available. The fact that sea turtles are migratory species and that they are on the verge of extinction is unanimously acknowledged. Objectives in terms of protection and conservation of sea turtles are quite clear and largely uncontested. The means of reaching them have been identified by scientists, discussed in seminars and included in negotiation documents. The nature of sea turtles as migratory species is also important, in light of the preference expressed in a number of international conventions for a multilateral approach to the conservation of migratory species. The United States is a *demandeur* in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts. Indeed, the capacity of persuasion of the United States is illustrated by the successful negotiation of the Inter-American Convention.

5.77 Of course, no single standard may be appropriate. Moreover, the particular factual circumstances prevailing in a particular negotiation may change the degree of achievement which may be expected. This is why this Panel sought to obtain as much information as possible on the negotiation of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia[219], in the negotiation of which Malaysia and the United States have been involved.

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[218] Appellate Body Report, para. 171.
[219] July 2000, hereafter the "MOU".

5.78 In addition, the United States, even though it is *demandeur* in this field, may not be held exclusively responsible for reaching an agreement on the protection and conservation of sea turtles. Indeed, while it may be responsible for the absence of agreement, e.g. by blocking the negotiations, it may also share the responsibility or bear no responsibility at all.

(b) Assessment of the consistency of the implementing measure

(i) Serious good faith efforts by the end of the reasonable period of time

5.79 Both parties have provided us with a description of their efforts to negotiate an agreement on the protection and conservation of sea turtles since 1996. The Panel notes that the first tangible evidence of a good faith effort of the United States toward the conclusion of an international agreement on the protection and conservation of sea turtles is the document communicated by the US Department of State to a number of nations of the Indian Ocean and to the four original complainants in this dispute on 14 October 1998. This document contained possible elements of a regional convention for the conservation of sea turtles in the Indian Ocean. The United States subsequently contributed to the Symposium and Workshop on Sea Turtle Conservation and Biology held in Sabah, Malaysia, on 15-17 July 1999. The Sabah Symposium led to the adoption of a Declaration calling for "the negotiation and implementation of a wider regional agreement for the conservation and management of marine turtle populations and their habitat throughout the Indo-Pacific and Indian Ocean region". Finally, at the Perth Conference in October 1999, the participating governments committed themselves to develop an international agreement on sea turtle conservation for the region.

5.80 The Panel, having regard to the criteria identified by the Appellate Body, concludes that, by the end of the reasonable period of time, the United States had made substantial efforts. However, these efforts were still continuing at that time. This Panel was established only on 23 October 2000. Between the end of the reasonable period of time and that date, new events have occurred which cannot be disregarded in assessing whether serious good faith efforts have actually been made. This is why we refrain, in this particular case, from taking a position on the existence of serious good faith efforts as of the end of the reasonable period of time and prefer to determine whether good faith efforts had actually taken place at the date of establishment of this Panel under Article 21.5 of the DSU.[220]

(ii) Serious good faith efforts as of the date the matter was referred to this Panel

5.81 The major event since the end of the reasonable period of time has been the conduct of a first round of negotiations toward the conclusion of a regional agreement on the conservation of sea turtles in Kuantan, Malaysia, from 11 to 14 July 2000, in which the United States participated. At Kuantan, 24 countries adopted the text of the South-East Asian MOU. The Final Act of the meeting provides that, before the MOU can be finalised, a Conservation and Management Plan must be negotiated and annexed to the MOU. The MOU, however, will not be a legally binding instrument for the time being.

5.82 The Panel is of the view that the contribution of the United States to the steps that led to the Kuantan meeting and its contribution to the Kuantan meeting itself could be considered to constitute serious good faith efforts. As mentioned above, the standard set by the Inter-American Convention is quite high. However, the factual circumstances have to be kept in mind.

5.83 First, the Inter-American Convention was negotiated as a legally binding instrument. It is the understanding of the Panel that the United States was in favour of a legally binding agreement for the Indian Ocean and South-East Asian region too. However, it appears that a number of other parties were in favour of a non-binding text. As mentioned above, the United States' efforts must be assessed

[220] This does not mean that the United States did not have to bring its legislation into conformity by the end of the reasonable period of time.

in the light of the factual context. The United States cannot be held liable for the fact that a number of other parties in the Kuantan meeting were not in favour of a binding text. This, however, cannot detract from the United States continuing obligation to make serious good faith efforts towards a binding agreement. The Panel notes, moreover, that the remaining negotiations in relation to the South-East Asian MOU could be concluded in the course of 2001.

5.84 Second, the content of the final agreement will depend on the content of the Conservation and Management Plan, which is to be annexed to the MOU but was still being drafted as this Panel was proceeding. In this respect, the Panel cannot assume that the United States, in the light of its own policy towards protection and conservation of sea turtles, would be in favour of an international agreement which would impose or promote – in the case of a non-binding agreement – insufficient protection and conservation programmes. We believe that, at least until the Conservation and Management Plan to be attached to the MOU is completed, 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. In that context it seems reasonable to consider that the United States had, as of the date of establishment of this Panel, made serious good faith efforts to conclude a multilateral agreement.

5.85 The Panel notes the argument of the United States that the progress made in multilateral negotiations in the Indian Ocean and South-East Asian region will not necessarily translate into the achievement of the environmental goal of the US measure. In other words, according to the United States, the negotiations may, or may not, result in multilaterally agreed steps that will save sea turtles from extinction.

5.86 The Panel would like to recall that what is required from the United States according to the Appellate Body reasoning is serious good faith efforts in the negotiation of an agreement aiming at the protection and conservation of sea turtles, taking into account the situation of the other negotiating parties. In other words, the United States, in the present case, has an obligation to make efforts commensurate with its position as the country seeking the protection and conservation of sea turtles. Moreover, the obligation borne by the United States is a continuing one. In the present case, it is because the United States has demonstrated that it was making serious good faith efforts that it is, in our opinion, *provisionally* entitled to apply the implementing measure, which may be subject to further control under Article 21.5 of the DSU.

(c) Conclusion

5.87 As mentioned above, our understanding of the Appellate Body findings is that the United States would be entitled to maintain the implementing measure if it were demonstrated that it was making serious good faith efforts to conclude an international agreement on the protection and conservation of sea turtles. The Panel is of the view that the US efforts since 1998 meet the standard established by the Appellate Body Report. In this respect, the Panel notes the sustained pace of the negotiations and the prospect of their conclusion in 2001, as well as the effective contribution of the United States in the context of these negotiations. The Panel also notes the significant contrast between the situation reviewed by the Original Panel and the Appellate Body and the situation today. Finally, the Panel notes that Malaysia did not submit convincing evidence that the United States had not made serious good faith efforts in relation to the negotiation of an international agreement on the protection and conservation of sea turtles since the adoption of the reports of the Original Panel and the Appellate Body.

5.88 Finally, the Panel would like to clarify that, in a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, or if they were taken further to the completion of serious good faith efforts to reach a multilateral

agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a *provisional* measure allowed for emergency reasons than as a definitive "right" to take a permanent measure. The extent to which serious good faith efforts continue to be made may be reassessed at any time. For instance, steps which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage.

4. Other requirements related to arbitrary or unjustifiable discrimination between countries where the same conditions prevail

(a) Claims relating to the findings of "unjustifiable discrimination" in the Appellate Body Report

(i) Introduction

5.89 The parties seem to agree that the findings of the Appellate Body as to the existence of "unjustifiable discrimination", beyond those concerning multilateral negotiations, relate to four main aspects of the application of Section 609, namely: (i) the insufficient flexibility of the 1996 Guidelines, in particular the absence of consideration of the different conditions that may exist in the exporting nations; (ii) the prohibition of importation of shrimp caught in uncertified countries, including when that shrimp had been caught using TEDs; (iii) the length of the "phase-in" period; and (iv) the differences in the level of efforts made by the United States to transfer successfully TED technology to exporting countries.

(ii) The insufficient flexibility of the 1996 Guidelines, in particular the absence of consideration of the different conditions that may exist in the territories of exporting nations

5.90 The Appellate Body considered that Section 609 as implemented through the 1996 Guidelines constituted unjustifiable discrimination insofar as its certification process lacked flexibility. In particular, the measure should have taken into consideration the different conditions that may exist in the territories of the exporting Members. Because of the complexity of the issue addressed, the Appellate Body findings on this issue deserve to be quoted extensively:

> "161. […] 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. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. 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. [Footnote omitted] 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 through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) 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. [Footnote omitted] Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States program.[Footnote omitted] Furthermore, the harvesting country must have in place a "credible enforcement effort". [Footnote omitted] 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 under Section 609(b)(2)(A) and (B). 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" [footnote omitted], 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. [Footnote omitted]

163. 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, in practice, by the administrators making the comparability determination. [Footnote omitted]

164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. 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."[221]

5.91 The Appellate Body opposed the text of Section 609 on the one hand and the implementing guidelines and the practice of the United States authorities on the other hand; the former only providing that conservation programmes be *comparable*, whereas the latter required them to be *essentially the same* as the US programme. The Appellate Body also opposed the application of a uniform standard throughout the US territory, which was acceptable, and the application of the same uniform standard to exporting countries, which was not.[222]

5.92 In addition, in paragraph 165, the Appellate Body seems to suggest that the essential reason that Section 609 was applied in a manner which constituted "unjustifiable discrimination" was because the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.

5.93 The Appellate Body, in paragraph 165 of its Report, also found that the original measure:

> "in its application, [was] 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." (Emphasis added)

It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries."[223] We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.

5.94 The first step in determining whether the implementing measure does not share the same flaw as the original measure reviewed by the Appellate Body is to assess whether the United States no longer requires that the conservation programmes of exporting countries be "essentially the same" as that of the United States but only "comparable in effectiveness". We note that Section II.B.(a)(1)(i) of the Revised Guidelines provides, with respect to those programmes which require the use of TEDs, that:

> "[…] a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all time. TEDs *must be comparable in effectiveness* to those used in the United States. Any exception to this requirement *must be comparable to those of the US program* described above."[224]

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[221] Italics in the original.
[222] See para. 5.72 above.
[223] Appellate Body Report, para. 161.
[224] Revised Guidelines, p. 36950; Annex to this Report: para. 18 (emphasis added).

As implicitly acknowledged by the Appellate Body[225], it is not enough that the Revised Guidelines no longer provide for the "essentially the same" test. The actual practice of the US authorities must also be considered. In this respect, the United States drew the attention of the Panel to the review of the TED-based programme put into place by Australia in its Northern Prawn Fishery. The United States reviewed the information submitted by Australia and proceeded to site visits and discussions with Australian officials and industry representatives. As stated by Australia in the course of the proceedings[226], the visits and discussions "confirm[ed] that a small number of technical differences between the [Northern Prawn Fisheries] TED regulations and the US TED regulations did not render the Australian TEDs less than comparable in effectiveness to the US TEDs." Australia did not argue that the "comparable effectiveness" test found in the Revised Guidelines was applied by US officials in a restrictive manner. We therefore conclude that, having regard to the example of Australia's Northern Prawn Fishery and in the absence of other evidence to the contrary, the actual application of the "comparable effectiveness" test contained in the Revised Guidelines provides for greater flexibility than the "essentially the same" test previously applied under the 1996 Guidelines and is not applied restrictively by the US authorities responsible for assessing TED-based programmes.

5.95 We next proceed to determine whether the Revised Guidelines allow an implementation of Section 609 that provides for "inquiry into the appropriateness of that regulatory programme for the conditions prevailing in the exporting countries". We consider that a measure which would allow a Member to demonstrate that:

(a) it has a programme comparable with the US programme without providing for the mandatory use of TEDs; or

(b) that other conditions exist on its territory

would meet the requirements of the DSB recommendation in this respect. We do not consider that the term "inquiry" in the Appellate Body findings necessarily means that the United States should take the initiative of an investigation in each country applying for certification, but that it should be prepared to investigate any claim made by a harvesting country seeking certification.

5.96 First, we note that the Revised Guidelines provide for the possibility to certify programmes which do not require the use of TEDs. The Revised Guidelines, Section II.B.(a.), provide that "The Department of State shall assess regulatory programs, as described in any documentary evidence provided by the governments of harvesting nations, for comparability with the US program". We also note that Section II.B.(a)(2) provides that:

> "If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TED, that nation will also be eligible for certification."[227]

5.97 The Revised Guidelines provide that such a demonstration would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. The Revised Guidelines further state that:

> "in reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp

[225] Appellate Body Report, paras. 161 and 162.
[226] Australia's third party written submission, para. 13.
[227] Revised Guidelines, p. 36950; Annex to this Report: Section II.B.(a)(2).

> fishing conditions in the United States and those of other nations, as well as information available from other sources."[228]

5.98 We recall that the Revised Guidelines also mention that "The Department of State is presently aware of no measure or series of measures that can minimize the capture and drowning of sea turtles in [standard otter trawl nets used in shrimp fisheries] that is comparable in effectiveness to the required use of TEDs". However, this "presumption" is limited in scope to the use of trawl nets and does not cover other ways of protecting sea turtles such as, e.g., fishing prohibition. It therefore appears to us that, on its face, the implementing measure provides for "inquiry into the appropriateness of that regulatory programme for the conditions prevailing in the exporting countries" when it comes to assess programmes that do not require the use of TEDs.

5.99 Second, we also note that the Revised Guidelines include a new category which allows the importation of "shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultations with the NMFS [National Marine Fisheries Service], does not pose a threat of the incidental taking of sea turtles."[229] Consequently, it appears that the Revised Guidelines provide for the possibility of taking into account situations where turtles are not endangered by shrimp trawling.

5.100 However, as for the assessment of TED-based programmes, we nonetheless need to determine whether, *in practice*, the implementing measure is applied so as to allow for "inquiry into the appropriateness of that regulatory programme for the conditions prevailing in the exporting countries" in relation to non TED-based programmes and to situations where shrimp trawling does not pose a threat of incidental taking of sea turtles. We recall that the United States gave the example of Pakistan, which had been certified on the basis of a programme combining the use of TEDs and shrimp trawling prohibition. We also note the example given by Australia of shrimp caught in the Spencer Gulf. The United States excluded shrimp from the Spencer Gulf from the field of application of the prohibition on the basis of the clause mentioned in the preceeding paragraph, once the extremely low incidence of sea turtles in the fishery had been established by Australia.

5.101 We also note the statement of the representative of the United States in reply to a question of the Panel that "there is no element in the Malaysian programme, […], that would make it impossible for the United States to certify Malaysia pursuant to Section 609."[230] We also note that Malaysia has not sought certification on the basis of its programme, which does not include the use of TEDs.

5.102 We consider that we have evidence that the United States has applied effectively the Revised Guidelines in a way that allowed for "inquiry into the appropriateness of that regulatory programme for the conditions prevailing in the exporting countries" in relation to non TED-based programmes and to situations where shrimp trawling does not pose a threat of incidental taking of sea turtles.

5.103 We also recall that Malaysia claimed that the United States, by imposing a unilaterally defined standard of protection, violates the sovereign right of Malaysia to determine its own sea turtles protection and conservation policy. We are mindful of the problem caused by the type of measure applied by the United States to pursue its environmental policy objectives. We recall that Principle 12 of the Rio Declaration on Environment and Development states in part that:

> "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global

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[228] *Ibid.*
[229] Revised Guidelines, p. 36949; Annex to this Report: para. 5(d).
[230] See reply of the United States, footnote 105 above.

> environmental problems should, as far as possible, be based on international consensus."[231]

However, it is the understanding of the Panel that the Appellate Body Report found that, while a WTO Member may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own. At present, Malaysia does not have to comply with the US requirements because it does not export to the United States. If Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances. While we cannot, in light of the interpretation of Article XX made by the Appellate Body, find in favour of Malaysia on this "sovereignty" issue, we nonetheless consider that the "sovereignty" question raised by Malaysia is an additional argument in favour of the conclusion of an international agreement to protect and conserve sea turtles which would take into account the situation of all interested parties.

5.104 We therefore conclude that the United States has established a *prima facie* case that the implementing measure complies with the findings of the Appellate Body concerning the insufficient flexibility of the 1996 Guidelines. We also note that Malaysia did not provide sufficient evidence to rebut this presumption.

(iii) The prohibition of importation of shrimp caught in uncertified countries, including when that shrimp had been caught using TEDs

5.105 In its Report, the Appellate Body found that:

> "165. 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."

[231] See also para. 2.22(i) of Agenda 21. The Appellate Body made reference to these international instruments in its Report (see para. 168).

5.106 This condition is addressed separately from the broader category concerning the lack of flexibility and insufficient consideration of the conditions prevailing in the exporting countries because, in our opinion, it required a specific solution, while the other findings left more discretion to the United States.

5.107 We note that, under the Revised Guidelines, the importation of shrimp harvested by vessels using TEDs is allowed, even if the exporting nation has not been certified pursuant to Section 609. The United States has also provided evidence of instances where imports of TED-caught shrimp have been allowed even though the country of origin has not been certified. [232]

5.108 Malaysia does not contest the fact that importation of shrimp harvested by vessels using TEDs may be allowed, even when the exporting nation is not certified pursuant to Section 609. Malaysia expressed concerns that this part of the Revised Guidelines has been found illegal in a judgement of the US Court of International Trade (CIT).[233] Malaysia claims that the United States is responsible for actions of all its branches of government, including courts, and refers to the finding of the Appellate Body in paragraph 173 of its Report.

5.109 We first note that in its judgement, the CIT, while ruling that the interpretation of the Department of State was not compatible with the terms of Section 609, refrained from granting an injunction that the US Department of State modify its guidelines. As a result, the Panel is satisfied that the United States does not, for now, have to modify its Revised Guidelines. The decision has been appealed before the Court of Appeals for the Federal Circuit. At our request, the United States confirmed that the Court of Appeals could require that the Revised Guidelines be modified in accordance with the interpretation of Section 609 made by the CIT. However, until a decision is reached by the Court of Appeals, the Revised Guidelines remain applicable. Moreover, no judgement is likely to be issued for several months and an appeal before the US Supreme Court cannot be excluded. As was recalled by the Appellate Body[234], we are not supposed to interpret domestic law, which we are to treat as a fact. Even if the possibility cannot be excluded that the Revised Guidelines be modified[235], the situation before us is, for the moment, the one provided for in the Revised Guidelines, which on this point are not contested by Malaysia.

5.110 Second, we do not consider that Malaysia appropriately referred to the Appellate Body finding in paragraph 173. A State is to be presumed to act in good faith and in conformity with its international obligations. The CIT itself did not require that the Revised Guidelines be modified. There is no reason to consider that this situation *will* inevitably change in the near future.

5.111 Therefore, we consider that the United States, by modifying its guidelines and adjusting its practice so as to permit import of TED-caught shrimp from non-certified countries complies, as long as that situation remains unchanged, with the DSB recommendations and rulings in this respect. We do not consider that Malaysia submitted sufficient evidence to rebut the *prima facie* case established by the United States in this respect.

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[232] The United States gave the examples of Australia and Brazil. Exports from the northern shrimp fisheries of Brazil have been authorized even though Brazil does not qualify for certification due to the lack of TED use in the southern Brazilian fisheries. Import of shrimp harvested in the Australian Northern Prawn Fisheries has also been allowed because the use of Turtle Excluder Devices has been mandatory since April 2000, even though Australia is not certified due to the lack of TED use in other fisheries.

[233] United States Court of International Trade (CIT): *Turtle Island Restoration Network et al. v. Robert L. Mallett et al*., 19 July 2000, 2000 WL 1024797 (CIT).

[234] See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, paras. 65-68.

[235] The Revised Guidelines themselves note the possibility that they may be revised as a result of pending domestic litigation (see p. 36951; Annex to this Report: para. 24)

(iv) Phase-in period

5.112 The Appellate Body found that the United States had discriminated between exporting countries in terms of the phase-in period granted as follows:

> "173. The application of Section 609, through the implementing guidelines together with administrative practice, also resulted in other differential treatment among various countries desiring certification. Under the 1991 and 1993 Guidelines, to be certifiable, fourteen countries in the wider Caribbean/Western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries 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. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996.[236] On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, 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. […]
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> 174. 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. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/Western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of governments in putting together and enacting the necessary regulatory programs and "credible enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels. [Footnote omitted]"

5.113 On this issue, the United States claims that the difference in phase-in periods has been corrected by the passage of time and that Malaysia had more than four years between the first US court ruling and the end of the reasonable period of time to adopt a TED-based programme or other

[236] *Earth Island Institute* v. *Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

comparable programmes. Malaysia generally claims that the United States should have lifted its import ban whilst it engaged in negotiations for the protection and conservation of marine turtles.

5.114 We are of the opinion that this finding of the Appellate Body has to be considered in the context in which it was made, i.e. that of assessing whether unjustifiable discrimination existed at the time. We agree with the United States that it cannot travel back in time in order to grant the same phase-in period to Malaysia as it had granted the Caribbean/Western Atlantic countries. Interpreting the Appellate Body findings as requiring such a thing would be tantamount to making any compliance impossible in this case. Rather, we believe that the issue which remains relevant is that, by providing for a shorter phase-in period for the complainants, the United States made any attempt to comply more onerous in terms of "administrative and financial costs" and in terms of the difficulties for governments to put together and enact the necessary regulatory programmes and "credible enforcement effort".

5.115 We note that Malaysia has not yet attempted to be certified. It is therefore impossible to determine whether it incurred any particularly serious cost in that respect. This as such should not be a reason for concluding that the United States has complied with its obligations in this respect. However, there are elements which should allow us to assess whether Malaysia would have actually incurred such costs. More particularly, we note that Malaysia claims that it has a comprehensive programme of protection and conservation of sea turtles and that the scientific experts consulted by the Original Panel also have made reference to Malaysia's efforts at sea turtle conservation.[237] We recall that the United States stated that there were no elements in the Malaysian programme that would make it impossible for the United States to certify Malaysia pursuant to Section 609. In this respect, we have noted the changes introduced in the Revised Guidelines, which allow the US authorities to consider certain programmes that do not provide for the mandatory use of TEDs. We therefore consider that if Malaysia sought to be certified, there is no evidence that it would incur any of the costs which the Appellate Body identified as the major issue with the difference of phase-in period between the complainants in the original case and the Caribbean/Western Atlantic countries.

5.116 We therefore conclude that, for the above-mentioned reasons, the United States has made a *prima facie* case that its practice addressed the DSB recommendations and rulings with respect to the phase-in period. We also note that Malaysia did not provide sufficient evidence to rebut this *prima facie* case.

(v) Transfer of technology

5.117 On the issue of transfer of technology, the Appellate Body found that:

> "175. 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, including the appellees. [Footnote omitted] 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,

[237] See para. 3.162 above and Original Panel Report, Annex IV, Transcript of the Meeting with the Experts, statement of Dr. Eckert, para. 69, p. 378.

> 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."

5.118 The United States argues that it has repeatedly offered technical assistance and training in the design, construction, installation and operation of TEDs to any government that requested it. The United States has provided technical assistance and training to a number of governments and other organizations in the Indian Ocean and South-East Asian region. The US National Marine Fisheries Service (NMFS) presented a paper on TEDs and technology transfer at the Sabah Symposium in July 1999. US officials assisted the government of Bahrain and conducted training and workshops in Pakistan (January 2000) and Australia (July 2000). In April 2000, NMFS hosted a training session on TEDs for technical experts from the South-East Asian Fisheries Development Center. Malaysia contends that the US offer of technical assistance was of no consequence for it in light of the efficiency of its own conservation programme.

5.119 We note that the Appellate Body Report draws a link between the phase-in period and the transfer of technology: the longer the phase-in period, the higher the possible level of efforts at technology transfer. The United States proceeded to transfer technology under various forms as early as July 1999 (Sabah Symposium), providing assistance to Bahrain and Pakistan and training in Australia. We note that these countries have since been certified or allowed to export part of their production to the United States. The Panel notes that there was no discrimination *vis-à-vis* Malaysia since Malaysia did not seek any transfer of technology.

5.120 We therefore conclude that, for the above-mentioned reasons, the United States has made a *prima facie* case that its practice addressed the DSB recommendations and rulings with respect to the transfer of technology. We also note that Malaysia did not provide sufficient evidence to rebut this *prima facie* case.

(b) Claims relating to "arbitrary discrimination"

(i) Lack of flexibility

5.121 The Appellate Body found that:

> "[…] We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) 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. [Footnote Omitted] Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. [Footnote omitted] In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau."[238]

5.122 We have already addressed the question of the rigidity and inflexibility of the 1996 Guidelines and of the administrative practices of that time in relation to the identification of "unjustifiable discrimination". From the Appellate Body Report, we understand that what caused the application of Section 609 to be considered "arbitrary discrimination" was that:

[238] Appellate Body Report, para. 177.

(a) It imposed a single, rigid and unbending requirement that countries applying for certification adopt a comprehensive regulatory programme that is essentially the same as the United States' programme; and

(b) that this programme was imposed without inquiring into the appropriateness of that programme for the conditions prevailing in the exporting countries.

5.123 We have already found that the United States no longer requires the exporting countries' programmes to be essentially the same as the US programme, and that the United States acknowledges that other programmes may be comparable.[239] Malaysia contests the requirement of a "comparable programme" as an interference with its sovereign right to determine its environmental policy. The Panel does not read the Appellate Body Report as supporting Malaysia's view. In our opinion, the Appellate Body did not contest the right of the United States to restrict imports of shrimp for environmental reasons; it is the requirement that other Members adopt essentially the same programme as the United States which was found to constitute arbitrary discrimination because it did not take into account the appropriateness of that programme for the countries concerned.

5.124 Having regard to the ordinary meaning of the word "arbitrary" most suitable in the context[240] of the chapeau of Article XX, i.e. "capricious, unpredictable, inconsistent"[241], we note that, with the implementation of the Revised Guidelines, the United States ought to be in a better position to avoid "arbitrary" decisions. A Member seeking certification seems to have the possibility to demonstrate that its programme - even though not requiring the use of TEDs, is comparable to that of the United States. On the face of it, the implementing measure is no longer primarily based on the application of certain methods or standards, but on the achievement of certain objectives, even though the term "objective" may, in this case, have a relatively broad meaning. Some evidence of the actual degree of flexibility of the Revised Guidelines can be found in the authorisation granted to Australia to export shrimp from the Northern Prawn Fisheries and the Spencer Gulf even though Australia as such is not certified under Section 609.

5.125 We conclude that the United States has made a *prima facie* case that the implementing measure complies with the relevant DSB recommendations and rulings. We note in this respect that Malaysia did not provide sufficient evidence to the contrary.

(ii) Due process

5.126 With respect to due process, the Appellate Body found, *inter alia*, that:

> "181. The certification processes followed by the United States thus appears 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, in particular, the 1996 Guidelines, 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."

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[239] See, e.g., Revised Guidelines, p. 36950-51; Annex to this Report: paras. 15, 16, 18, and Section II.B.(a)(2).

[240] In this sentence, the word "context" is not used within the legal meaning of that term in the Vienna Convention, but in its more common meaning.

[241] The New Shorter Oxford Dictionary (1993), p. 107.

5.127 The Appellate Body has criticised the absence, with respect to any type of certification under Section 609(b)(2), of a transparent, predictable certification process that is followed by the competent United States government officials. In particular, the Appellate Body has contested:

(a) The *ex parte* nature of the inquiries and certifications;

(b) the absence of formal opportunity for the country under investigation to be heard or to respond to any arguments made against it;

(c) the absence of formal written reasoned decision, whether of acceptance or of rejection. In particular, countries denied certification do not receive notice of the denial; and

(d) the absence of procedure for review of, or appeal from, a denial of an application.[242]

5.128 The United States argues that it has modified its Guidelines to take these findings of the Appellate Body into account. In order to assess the changes made by the United States, we compare the findings of the Appellate Body with the text of the Revised Guidelines and the administrative practice under those Revised Guidelines.

5.129 With regard to the *ex parte* nature of investigations and to the absence of formal opportunity for the country under investigation to be heard or to respond to any arguments made against it under the 1996 Guidelines, we note that the Revised Guidelines not only provide for visits by US officials of those nations requesting certification under Section 609(b)(2)(A) and (B), but also that:

> "Each visit will conclude with a meeting between the US officials and governments officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing."[243]

5.130 Moreover, the Revised Guidelines provide for two assessments by the Department of State of the exporting country programme: a "preliminary" one by 15 March of each year and a formal one by 1 May of each year. The Revised Guidelines state that, after the "preliminary" assessment,

> "If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant US officials and officials of the harvesting nation to discuss the situation."[244]

5.131 We therefore conclude that the Revised Guidelines address the Appellate Body concerns in terms of the *ex parte* nature of the investigation and absence of formal opportunity for the country under investigation to be heard or to respond to any arguments made against it.

5.132 With respect to the Appellate Body findings on the absence of formal written reasoned decision, whether of acceptance or of rejection, we note that the Revised Guidelines provide, with respect to the "preliminary" assessment, that:

> "By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis

[242] Appellate Body Report, para. 180.
[243] Revised Guidelines, p. 36951; Annex to this Report: para. 26.
[244] Revised Guidelines, p. 36951; Annex to this Report: para. 27.

> of available information, including information gathered during [the visits mentioned in para. 5.129 above], does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April 15, any further information."[245]

and also that:

> "By May 1 of each year the Department of State will make formal decisions on certification. The governments of all nations that have requested certification will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denials and steps necessary to receive a certification in the future."[246]

5.133 We consider that these provisions of the Revised Guidelines address the problems of notification and statement of reasons identified by the Appellate Body.

5.134 Moreover, concerning the absence of procedure for review of, or appeal from, a denial of an application, we note that the Revised Guidelines provide that:

> "The government of any nation that is denied a certification by May 1 may, at any time thereafter, request reconsideration of that decision."[247]

At our request, the United States also confirmed that, as a general matter, judicial review of a final decision by the US Department of State regarding certification of a country may be had in the US court system pursuant to the Administrative Procedure Act.[248] Thus, it is our understanding that the Revised Guidelines, together with the relevant US legislation, address the DSB recommendations and rulings on review procedures and appeal.

5.135 Finally, instances of actual application of the Revised Guidelines also tend to demonstrate that they now comply with the findings of the Appellate Body. The information provided by the United States and Australia with regard to the process which led the United States to authorize the importation of shrimp caught in the Spencer Gulf fisheries and the Northern Prawn Fisheries show that, in those particular instances, the United States appears to have applied its Revised Guidelines in conformity with the wording of those guidelines. We also note that Australia did not mention that it was at any stage deprived of the possibility to make its views known to the US investigating authorities.

5.136 We therefore conclude that evidence available supports the view that due process appears to have been respected so far.

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[245] *Ibid.*
[246] Revised Guidelines, p. 36951; Annex to this Report: para. 29.
[247] Revised Guidelines, p. 36951; Annex to this Report: para. 30.
[248] 5 U.S.C. 701 *et seq.*

(c) Conclusion

5.137 We therefore conclude that the United States has made a *prima facie* case that Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination, as identified by the Appellate Body in its Report. We note that Malaysia did not submit sufficient evidence to the contrary.

5. Disguised restriction on international trade

5.138 The Panel notes that it is instructed by Article 21.5 of the DSU to review "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The fact that the Appellate Body did not have to make a finding that the original measure was a disguised restriction on trade does not mean that the measure adopted to implement the DSB recommendations and rulings is not a disguised restriction on trade. The Panel also recalls that, as the party invoking Article XX, the United States bears the burden of proving that its implementing measure meets *all* the relevant requirements of the chapeau. This implies that the United States make a *prima facie* case that the implementing measure is not a disguised restriction on trade.

5.139 We first note that the United States argued that the implementing measure is narrowly tailored to achieve a *bona fide* conservation goal. The United States has also mentioned that it has expended substantial efforts to disseminate TEDs technology worldwide, thus assisting many countries in obtaining certification under Section 609. Malaysia states that the three conditions of the chapeau of Article XX, including that according to which the implementing measure must not be applied so as to constitute a disguised restriction on international trade, have to be complied with by the United States.

5.140 The Panel notes that the fact that, on its face, a law has been narrowly tailored to achieve a *bona fide* conservation plan does not mean that, when applied, it does not constitute a disguised restriction on trade. As stressed by the Appellate Body:

> "149. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. […] it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau. To accept the argument of the United States would be to disregard the standards established by the chapeau."

5.141 Second, the Panel notes that, in the *United States - Gasoline* case, the Appellate Body concluded that:

> "The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[249]

5.142 The Panel is of the view that there would be an abuse of Article XX(g) "if [the compliance with Article XX(g) was] in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[250] As mentioned by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*[251], the protective application of a measure can most often be discerned from its design, architecture and

[249] Appellate Body Report on *United States – Gasoline*, *Op. Cit.*, p. 25.

[250] Panel Report on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, adopted on 5 April 2001, WT/DS135/R, para. 8.236. This finding was neither reversed nor modified by the Appellate Body.

[251] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8; DS10; DS11/AB/R, p. 29.

revealing structure. We therefore proceed to determine whether, beyond the protection which automatically results from the imposition of a ban, the design, architecture and revealing structure of Section 609 together with the Revised Guidelines, as actually applied by the US authorities, demonstrate that the implementing measure constitutes a disguised restriction on international trade. An examination of the text of Section 609 and of the Revised Guidelines does not show any element leaning in that direction.

5.143 We nonetheless recall that, before the Original Panel, the question of whether Section 609 was applied so as to constitute a disguised restriction on international trade was addressed by the parties. First, the Panel recalls that the case which led to the CIT judgement which extended the scope of application of Section 609 beyond the United States and the Caribbean/Western Atlantic countries was initiated by environmental groups.[252] The attention of the Original Panel was drawn to the legislative history of Section 609.[253] The Panel notes that US fishermen harvesting shrimp are subject to constraints comparable to those imposed on exporting countries' fishermen insofar as they have to use TEDs at all times. Even though, when the application of Section 609 was extended to the whole world, US fishermen were probably in favour of a measure imposing the same requirements on foreign fishermen, they are likely to incur little commercial gain from a ban since the Revised Guidelines make it easier to export shrimp to the United States under Section 609, compared with the situation under the 1996 Guidelines. Indeed, the United States has demonstrated that the mandatory use of TEDs in certain circumstances is no longer a condition *sine qua non* for certification if other comparable programmes are applied. The Panel considers that, by allowing exporting countries to apply programmes not based on the mandatory use of TEDs, and by offering technical assistance to develop the use of TEDs in third countries, the United States has demonstrated that Section 609 is not applied so as to constitute a disguised restriction on trade.

5.144 The Panel therefore concludes that the implementing measure does not constitute a disguised restriction on international trade within the meaning of the chapeau of Article XX of the GATT 1994.

VI. CONCLUSIONS

6.1 In light of the findings above, the Panel reaches the following conclusions:

(a) The measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994;

(b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the US authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.

6.2 The Panel notes that should any one of the conditions referred to in sub-paragraph 6.1(b) above cease to be met in the future, the recommendations of the DSB may no longer be complied with. This Panel believes that, in such a case, any complaining party in the original case may be entitled to have further recourse to Article 21.5 of the DSU.

[252] United States Court of International Trade: *Earth Island Institute v. Warren Christopher*, 913 Fed. Supp. 559 (CIT 1995).

[253] See e.g., Original Panel Report, paras. 3.272; 3.278 and 3.281.

VII. CONCLUDING REMARKS

7.1 The Panel reaffirms its concluding remarks in the Original Panel Report:

> "The best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development, would be to reach cooperative agreements on integrated conservation strategies covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned."[254]

7.2 The Panel urges Malaysia and the United States to cooperate fully in order to conclude as soon a possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment.[255]

[254] Original Panel Report, para. 9.1.
[255] Principle 7 of the Rio Declaration.

ANNEX

Revised Guidelines pursuant to Section 609, 8 July 1999[256]

1. For the sake of clarity, the 28 August 1998 guidelines are restated below as modified to reflect the changes proposed in the Federal Register notice issued 25 March 1999, and the comments received on those proposed changes.

1. Introductory Material

A. THE US PROGRAM

2. Since certification decisions under Section 609(b)(2)(A) and (B) are based on comparability with the US program governing the incidental taking of sea turtles in the course of shrimp harvesting, an explanation of the components of that program follows. The US program requires that commercial shrimp trawl vessels use TEDs approved in accordance with standards established by the US National Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles. The goal of this program is to protect sea turtle populations from further decline by reducing the incidental mortality of sea turtles in commercial shrimp trawl operations.

3. The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all US commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas. The only exceptions to this requirement are as follows:

(a) Vessels equipped exclusively with wing nets, skimmer trawls, and pusher-head trawls when used in conjunction with certain restricted tow times are not required to use TEDs because their operations do not pose a threat to sea turtles. Vessels equipped with barred beam trawls and/or barred roller trawls are not required to use TEDs. Single try nets (with less than a twelve foot headrope and fifteen foot rope) are not required to use TEDs.

(b) Vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs because the lack of a mechanical retrieval system necessarily limits tow times to a short duration so as not to pose a threat of the incidental drowning of sea turtles. This exemption applies only to vessels that have no power or mechanical-advantage trawl retrieval system.

(c) In exceptional circumstances, where NMFS determines that the use of TEDs would be impracticable because of special environmental conditions such as the presence of algae, seaweed, or debris, or that TEDs would be ineffective in protecting sea turtles in particular areas, vessels are permitted to restrict tow times instead of using TEDs. Such exceptions are generally limited to two periods of 30 days each. In practice, NMFS has permitted such exceptions only rarely.

4. With these limited exceptions, all other commercial shrimp trawl vessels operating in waters subject to US jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at

[256] This Annex contains the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, US Department of State, Federal Register, Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36949-36952. For ease of reference, the paragraphs of the Revised Guidelines have been numbered in this Annex.

all times. For more information on the US program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting, see 50 CFR 227.17 and 50 CFR 227.72(e).

B. SHRIMP HARVESTED IN A MANNER NOT HARMFUL TO SEA TURTLES

5. The Department of State has determined that the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtle species:

(a) Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in pond prior to being harvested.

(b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

(c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, such as winches, pulleys, power blocks or other devices providing mechanical advantage, or by vessels using gear that, in accordance with the US program described above, would not require TEDs.

(d) Shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. The Department of State shall publish any such determinations in the Federal Register and shall notify affected foreign governments and other interested parties directly.

C. SHRIMP EXPORTER'S/IMPORTER'S DECLARATION

6. The requirement that all shipments of shrimp and products of shrimp imported into the United States must be accompanied by a declaration (DSP–121, revised) became effective as of 1 May 1996 and remains effective. The DSP–121 attests that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter. The declaration must accompany the shipment through all stages of the export process, including any transformation of the original product and any shipment through any intermediary nation. As before, the Department of State will make copies of the declaration readily available. Local reproduction of the declarations is fully acceptable.

7. The requirement that a government official of the harvesting nation currently certified pursuant to Section 609 must also sign the DSP–121 asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles species remains effective. In order to protect against fraud, the Department will continue to conduct periodic reviews of the systems that such foreign governments have put in place to verify the statements made on the DSP–121 form.

Date of Export

8. Import prohibitions shall not apply to shipments of shrimp and products of shrimp with a date of export falling at a time in which the harvesting nation is currently certified pursuant to Section 609.

Country of Origin

9. For purposes of implementing Section 609, the country of origin shall be deemed to be the nation in whose waters the shrimp is harvested, whether or not the harvesting vessel is flying the flag of another nation.

E. REVIEW OF INFORMATION

10. The government of any harvesting nation may request that the Department of State review any information regarding the particular shrimp fishing environment and conditions in that nation, or within a distinct geographic region of that nation, in making decisions pursuant to Section 609. Such information may be presented to demonstrate, *inter alia*:

(1) That some portion of the shrimp intended to be exported from that nation to the United States is harvested under one of the conditions identified above as not adversely affecting species of sea turtles;

(2) that the government of that nation has adopted a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl fishing that is comparable to the US program and, therefore, that the nation is eligible for certification under Section 609(b)(2)(A) and (B); or

(3) that the fishing environment in that nation does not pose a threat of the incidental taking of sea turtles and, therefore, that the nation is eligible for certification under Section 609(b)(2)(C).

11. Such information should be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In addition, information submitted to support a request for any such determination should include available biological data regarding the resources in question and operational information relating to the activities of the fishing fleet that are relevant to determining whether or not the fishing environment of the harvesting nation is likely to pose a threat to sea turtles. Studies intended to show the rate of incidental taking of sea turtles in a given shrimp fishery should, at a minimum, contain data for an entire fishing season. Upon request, the United States will review and provide comments on a planned or existing study with respect to sample size, scientific methodology and other factors that affect whether such a study provides a sufficient basis for making a reliable determination.

12. The Department will fully review and take into consideration all such information and, in consultation with the NMFS, respond in writing to the government of the harvesting nation within 120 days from the date on which the information is received.

13. The Department, in consultation with the NMFS, will also take into consideration information on the same subjects that may be available from other sources, including but not limited to academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter.

II. GUIDELINES FOR MAKING CERTIFICATION DECISIONS

A. CERTIFICATION PURSUANT TO SECTION 609(b)(2)(C)

14. Section 609(b)(2)(C) authorizes the Department of State to certify a harvesting nation if the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Accordingly, the Department shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation:

(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

(b) any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means;

(c) any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

B. CERTIFICATION PURSUANT TO SECTION 609(b)(2)(A) AND (B)

15. Under Section 609(b)(2), the Department of State shall certify any other harvesting nation by May 1st of each year if ''the government of (that) nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States'' and if ''the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.''

(a) Regulatory Program

16. The Department of State shall assess regulatory programs, as described in any documentary evidence provided by the governments of harvesting nations, for comparability with the US program.

17. Where standard otter trawl nets are used in shrimp fisheries in waters where sea turtles are present, sea turtles will inevitably be captured and drowned. The Department of State is presently aware of no measure or series of measures that can minimize the capture and drowning of sea turtles in such nets that is comparable in effectiveness to the required use of TEDs.

(1) If the government of the harvesting nation seeks certification on the basis of having adopted a TEDs program, certification shall be made if a program includes the following:

(i) Required Use of TEDs

18. A requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the US program described above; and

(ii) Enforcement

19. A credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

(2) If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification. As described above, such a demonstration would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources.

(b) Incidental Take

20. Average incidental take rates will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the US program or, as described above, otherwise demonstrates that it has implemented a comparably effective program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs.

(c) Additional Considerations

(i) Form

21. A regulatory program may be in the form of regulations promulgated by the government of the harvesting nation and having the force of law. If the legal system and industry structure of the harvesting nation permit voluntary arrangements between government and the fishing industry, such an arrangement may be acceptable so long as there is a governmental mechanism to monitor compliance with the arrangement and to impose penalties for non-compliance, and reliable confirmation that the fishing industry is complying with the arrangement.

(ii) Documentary Evidence

22. Documentary evidence may be in the form of copies of the relevant laws, regulations or decrees. If the regulatory program is in the form of a government-industry arrangement, then a copy of the arrangement is required. Harvesting nations are encouraged to provide, to the extent practicable, information relating to the extent of shrimp harvested by means of aquaculture.

(iii) Additional Sea Turtle Protection Measures

23. The Department of State recognizes that sea turtles require protection throughout their life cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting. In making certification determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles. In assessing any information provided by the governments of harvesting nations in this respect, the Department of State will rely on the technical expertise of NMFS and, where appropriate, the US Fish and Wildlife Service to evaluate threats to sea turtles and the effectiveness of sea turtle protection programs.

(iv) Consultations

24. The Department of State will engage in ongoing consultations with the governments of harvesting nations. The Department recognizes that, as sea turtle protection programs develop, additional information will be gained about the interaction between sea turtle populations and shrimp fisheries. These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the US program. These Guidelines may also be revised as a result of pending domestic litigation. In addition, the Department will continue to welcome public input on the best ways to implement both these Guidelines and Section 609 as a whole and may revise these guidelines in the future accordingly.

C. TIMETABLE AND PROCEDURES FOR CERTIFICATION DECISIONS

25. Each year the Department will consider for certification: (a) any nation that is currently certified, and (b) any other shrimp harvesting nation whose government requests such certification in a written communication to the Department of State through diplomatic channels prior to 1 September

of the preceding year. Any such communication should include any information not previously provided that would support the request for certification, including the information specified above under Review of Information.

26. Between 1 September and 1 March, US officials will seek to visit those nations requesting certifications pursuant to Section 609(b)(2)(A) and (B). Each visit will conclude with a meeting between the US officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing.

27. By 15 March, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by 15 April, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant US officials and officials of the harvesting nation to discuss the situation.

28. Between 15 March and 1 May, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

29. By 1 May of each year the Department of State will make formal decisions on certification. The governments of all nations that have requested certification will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

30. The government of any nation that is denied a certification by 1 May may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, US officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

D. SPECIAL TIMETABLE FOR 1999

31. The United States and the four nations that brought the WTO complaint have agreed that the United States would implement the recommendations and rulings of the DSB within 13 months of the adoption of the WTO Appellate Body report by the DSB, i.e., by 6 December 1999.

32. Accordingly, the Department of State hereby establishes the following timetable to apply in 1999 only:

33. After the date of publication of the revised guidelines, the government of any harvesting nation that was denied certification by 1 May 1999, may request to be certified in accordance with these guidelines in a written communication to the Department of State through diplomatic channels prior to 1 September 1999.

34. Not later than 15 October 1999, US officials will seek to visit to those nations requesting such certifications. Each visit will conclude with a meeting between the US officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified

deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing.

35. By 1 November 1999, the Department of State will notify in writing through diplomatic channels the government of any nation that, on the basis of available information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by 15 November 1999, any further information.

36. Between 15 November and 6 December 1999, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

37. By 6 December 1999, the Department of State will make formal decisions on certification. The governments of all nations that have requested certification under the special 1999 timetable will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

38. The government of any nation that is denied a certification by 6 December 1999, may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, US officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

39. The Department of State recognizes that a government seeking certification on the basis of the revised guidelines may not, by 1 September 1999, be able to gather sufficient information necessary to support such a request. To meet this concern, and in accordance with its existing practice, the Department will accept requests for certification at any time in 1999 and will process them as expeditiously as possible. However, the Department can only commit to making a certification determination by 6 December 1999 if it has received the necessary information by 1 September 1999.

E. RELATED DETERMINATIONS

40. As noted above, any harvesting nation that is not certified on 1 May of any year may be certified prior to the following 1 May at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on 1 May of any year may have its certification revoked prior to the following 1 May at such time as the harvesting nation no longer meets those criteria.

41. As a matter relating to the foreign affairs function, these guidelines are exempt from the notice, comment, and delayed effectiveness provisions of the Administrative Procedures Act. This action is exempt from Executive Order 12866, and is not subject to the requirements of the Regulatory Flexibility Act.

Dated: 29 June 1999.
Stuart E. Eizenstat, *Under Secretary of State for Economic, Business and Agriculture Affairs.*
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