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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.

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

[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

[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.

[Parties' arguments in Sections III and IV deleted from this version]

[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.

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

[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

[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

[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]

[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.

[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.