WORLD TRADE ORGANIZATION

WT/DS58/R
15 May 1998

(98-1710)

UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

REPORT OF THE PANEL

The report of the Panel on United States - Import prohibition of certain shrimp and shrimp products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 15 May 1998 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, and that 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. In a letter dated 8 October 1996, India, Malaysia, Pakistan and Thailand, acting jointly, requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") regarding the ban imposed upon importation of certain shrimp and shrimp products from the respective countries by the United States under Section 609 of U.S. Public Law 101-162[1] ("Section 609") and the "Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations"[2] (WT/DS58/1). Consultations were held on 19 November 1996 without resulting in a satisfactory solution of the matter.

1.2. In a communication dated 9 January 1997, Malaysia and Thailand requested the Dispute Settlement Body ("DSB") to establish a panel to examine, under Article XXIII:2 of GATT 1994 and Article 6 of the DSU, the partial embargo on the importation of certain shrimp and shrimp products implemented through a series of actions, including enactment of Section 609, promulgation of regulations and issuance of judicial decisions interpreting the law and regulations (WT/DS58/6). In a communication dated 30 January 1997, Pakistan made the same request to the DSB (WT/DS58/7). On 25 February 1997, the DSB established a panel pursuant to the request of Malaysia and Thailand. At the same meeting, the DSB established a panel in accordance with the request made by Pakistan. The DSB also agreed that the two panels would be consolidated into a single panel, pursuant to Article 9 of the DSU, with standard terms of reference (WT/DSB/M/29).

1.3. In a communication dated 25 February 1997, India requested the DSB to establish a panel pursuant to Article XXIII of GATT 1994 and 6 of the DSU (WT/DS58/8). At its meeting on 10 April 1997, the DSB established a panel in accordance with the request made by India. The DSB also agreed that this Panel would be consolidated with the Panel already established at the request of Malaysia, Thailand and Pakistan on 25 February 1997, pursuant to Article 9 of the DSU (WT/DSB/M/31).

1.4. The parties to the dispute agreed that the Panel should have standard terms of reference (Article 7 of the DSU):

> "To examine, in the light of the relevant provisions of the covered agreements cited by Malaysia and Thailand in document WT/DS58/6, Pakistan in document WT/DS58/7 and India in document WT/DS58/8, the matter referred to the DSB by Malaysia, Thailand, Pakistan and India in these documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5. On 15 April 1997, the parties to the dispute agreed on the following composition of the Panel (WT/DS58/9):

Chairman:	Mr. Michael Cartland
Members:	Mr. Carlos Cozendey
	Mr. Kilian Delbrück

1.6. Australia, Colombia, Costa Rica, Ecuador, El Salvador, the European Communities, Guatemala, Hong Kong (since 1 July 1997, "Hong Kong, China"), Japan, Mexico, Nigeria, the Philippines,

[1]Codified at 16 U.S.C. 1537 note, amending the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*

[2]61 Fed. Reg. 17342, (19 April 1996).

Senegal, Singapore, Sri Lanka and Venezuela reserved their third-party rights in accordance with Article 10 of the DSU.

1.7. The Panel met with the parties to the dispute on 17-19 June 1997 and on 15-16 September 1997. It met with the interested third parties on 19 June 1997.

1.8. In a communication dated 22 September 1997, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months. The reasons for that delay are stated in document WT/DS58/10.

1.9. A meeting with scientific experts selected by the Panel, at which the parties were present, was held on 21 and 22 January 1998.

1.10. The Panel issued its interim report to the parties on 2 March 1998. The Panel issued its final report to the parties on 6 April 1998.

II. FACTUAL ASPECTS

1. Basic Facts About Sea Turtles

2.1. Seven species of sea turtles are currently recognized: the 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*).

2.2. Most species of sea turtles are distributed around the globe, in subtropical or tropical areas. Sea turtles spend their lives at sea, where they migrate between their foraging and their nesting grounds, but reproduce on land. Adult females nest in multi-year cycles, coming ashore to lay clutches of about 100 eggs in nests they dig on the beach. After about 50 to 60 days of incubation, the hatchlings dig their way out of the nest and head for the sea. Few survive and reach the age of reproduction (10-50 years, depending on the species). While maturing, they move through a variety of habitats. Little is known about the existence of sea turtles at seas.

2.3. Sea turtles have been adversely affected by human activity, either directly (sea turtles have been exploited for their meat, shells and eggs), or indirectly (incidental captures in fisheries, destruction of their habitats, pollution of the oceans). Presently, all species of sea turtles are included in Appendix I of the 1973 Convention on International Trade in Endangered Species ("CITES"). All species except the Australian flatback are listed in Appendices I and II of the 1979 Convention on Migratory Species of Wild Animals ("CMS") and appear in the IUCN Red List as endangered or vulnerable.

2. The US Endangered Species Act (ESA) and Related Legislation

2.4. All sea turtles that occur in US waters are listed as endangered or threatened species under the Endangered Species Act of 1973 ("ESA"). The ESA prohibits take of endangered sea turtles within the United States, within the US territorial sea, and the high seas, except as authorized by the Secretary of Commerce (for sea turtles in marine waters) or the Secretary of the Interior (for sea turtles on land).

2.5. Research programmes in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States led to the conclusion that incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles.[3] Within the context of a programme aiming at reducing the mortality of sea turtles in shrimp trawls, the National Marine Fisheries Service ("NMFS") developed turtle excluder devices ("TEDs"). A TED is grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net. In 1983, NMFS began a formal programme to encourage shrimp fishermen to use TEDs voluntarily, so as to reduce the incidental catch and mortality of sea turtles associated with shrimp trawling. As part of the voluntary TED programme, NMFS delivered TEDs to volunteer shrimp fishermen and showed them how to properly install and use the TEDs. However, this voluntary programme did not turn out to be successful because an insufficient number of fishermen used TEDs on a regular basis.

2.6. In 1987, the United States issued regulations, pursuant to the ESA, whereby all shrimp trawlers were required to use TEDs or tow time[4] restrictions in specified areas where there was a significant

[3]National Research Council, National Academy of Sciences, (1990), *Decline of the Sea Turtles: Causes and Prevention*, Washington D.C.

[4]Tow time is the interval from trawl doors entering the water to trawl doors being removed from the water. Tow times were restricted to 90 minutes or less, period of time which is determined to result in fewer drowning of sea turtles in shrimp trawls. Tow time restrictions were an alternative to TEDs in some areas and for some categories of shrimp trawlers.

mortality of sea turtles in shrimp trawls. In offshore waters, all shrimp trawlers 25 feet and longer were required to use qualified TEDs and all shrimp trawlers smaller than 25 feet were required to restrict tow times to 90 minutes or less, or the use TEDs. In inshore waters, all shrimp trawlers were required to restrict tow times to 90 minutes or less. The rules, which became fully effective in 1990, further set forth specifications for TEDs, areas and seasons for which TEDs and/or tow times were required. They were subsequently modified so as to require the use of TEDs at all times and places where shrimp trawl fishing interacts in a significant way with sea turtles. Five species of sea turtles were identified as living in the areas concerned and, thus, falling under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).[5]

2.7. In 1989, the United States enacted Section 609 of Public Law 101-102[6] ("Section 609", see Annex I). 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 foreign governments of countries which are engaged in commercial fishing operations likely to affect adversely sea turtles. Section 609 further provides that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the President certified to Congress by 1 May 1991, and annually thereafter, that the harvesting nation has a regulatory programme and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.

2.8. In 1991, the United States issued guidelines ("1991 Guidelines") for assessing the comparability of foreign regulatory programmes with the US programme. To be found comparable a foreign nation's programme had to include, *inter alia*, a commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times for vessels under 25 feet), or, alternatively, a commitment to engage in a statistically reliable and verifiable scientific programme to reduce the mortality of sea turtles associated with shrimp fishing. Foreign nations were given three years for the complete phase-in of a comparable programme. The 1991 Guidelines also determined that the scope of Section 609 was limited to the wider Caribbean/western Atlantic region, and more specifically to the following countries: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil. It was also determined that the import restriction did not apply to aquaculture shrimp, whose harvesting does not adversely affect sea turtles.[7]

2.9. In 1993, the United States issued revised guidelines ("1993 Guidelines") providing that, to receive a certification in 1993, affected nations (those determined in the 1991 Guidelines) had to maintain their commitment to require TEDs on all commercial shrimp trawl vessels by 1 May 1994, and be able to demonstrate the use of TEDs on a significant number of shrimp trawl vessels by 1 May 1993.[8] To receive certification in 1994 and in subsequent years, affected nations were required to use TEDs on all their shrimp trawl vessels, subject to a limited number of exemptions.[9] The 1993 Guidelines

[5]52 Fed. Reg. 24244 (29 June 1987).

[6]Section 609 of Public Law 101-102, codified at 16 United States Code (U.S.C.) § 1537.

[7]56 Federal Register 1051 (10 January 1991).

[8]58 Federal Register 9015 (18 February 1993).

[9]In particular, vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs, because it is considered that the lack of a mechanical retrieval system necessarily restricts tow times to a short duration, thereby limiting the threats of incidental drowning of sea turtles.

eliminated the second option for certification which was contained in the 1991 Guidelines, i.e. the commitment to engage in a scientific programme to reduce the mortality of sea turtles in shrimp trawling.

2.10. In December 1995, the US Court of International Trade ("CIT") found that the 1991 and 1993 Guidelines were contrary to law in limiting the geographical scope of Section 609 to shrimp harvested in the wider Caribbean/western Atlantic region and directed the Department of State "to prohibit not later than May 1, 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 promulgated by the Secretary of Commerce ... ".[10] The Department of State requested the CIT to modify its judgement by allowing a one-year extension for the worldwide enforcement of Section 609. In its request, the States Department argued, *inter alia*, that many of the major shrimp exporting nations would likely be unable to implement a comparable programme by 1 May 1996. The CIT refused the requested extension and confirmed the 1 May 1996 deadline.[11]

2.11. In April 1996, the Department of State published revised guidelines ("1996 Guidelines") to comply with the CIT order of December 1995.[12] The new guidelines extended Section 609 to shrimp harvested in all foreign nations. The Department of State further determined that, as of 1 May 1996, all shipments of shrimp and shrimp products into the United States were to be accompanied by a declaration ("Shrimp Exporter's Declaration form") attesting that the shrimp or shrimp product in question was 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".

2.12. The 1996 Guidelines define "shrimp or shrimp products harvested in conditions that does not affect sea turtles" to include: "(a) Shrimp harvested in an aquaculture facility ... ; (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; (d) Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur".

2.13. The 1996 Guidelines further determine the criteria for certifying a harvesting nation whose particular fishing environment "does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting" (Section 609 (b)(2)(C)) as follows: "(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g. any nation that harvests shrimp exclusively by artisanal means; (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur".

2.14. The 1996 Guidelines also provide that "other certifications" can be granted by 1 May 1996, and annually thereafter, to other harvesting nations "only if the government of that nation has provided documentary evidence of the adoption of a regulatory program 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

[10]Earth Island Institute v. Warren Christopher, 913 F. supp. 559 (CIT 1995).

[11]Earth Island Institute v. Warren Christopher, 922 Fed. Supp. 616 (CIT 1996).

[12]61 Fed. Reg. 17342 (19 April 1996).

the average take rate of incidental taking of sea turtles by United States vessels in the course of such harvesting." For the purpose of these "other certifications", a regulatory programme shall 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 in the United States ...". Moreover, the average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the US program ...". The 1996 Guidelines contain additional considerations to be taken into account in determining the comparability of foreign programmes, such as "other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitats, 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."

2.15. In October 1996, the CIT ruled that the embargo on shrimp and shrimp products enacted by Section 609 applied to all "shrimp or shrimp products harvested in the wild by citizens or vessels of nations which have not been certified". The Court found that the 1996 Guidelines were contrary to Section 609 when allowing, with a Shrimp Exporter's Declaration form, imports of shrimp from non-certified countries, if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles.[13] The CIT later clarified that shrimp harvested by manual methods, which did not harm sea turtles, could continue to be imported even from countries which had not been certified under Section 609. The CIT also refused to postpone the worldwide enforcement of Section 609.[14]

2.16. As of 1 January 1998, the following 19 countries had been certified as having adopted programmes to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the US programme: Belize, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Fiji, Guatemala, Guyana, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, the People's Republic of China, Thailand, Trinidad and Tobago, and Venezuela. The following 16 nations have been certified as having shrimp fisheries in only cold waters where there was essentially no risk of taking sea turtles: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom and Uruguay. The following 8 countries have been certified on grounds that their fishermen only harvested shrimp using manual rather than mechanical means to retrieve nets: the Bahamas, Brunei, the Dominican Republic, Haiti, Jamaica, Oman, Peru and Sri Lanka.

[Parties' arguments in Sections III and IV and Panel's consultations with experts in Section V deleted from this version]

[13]Earth Island Institute v. Warren Christopher, 942 Fed. Supp. 597 (CIT 1996). The US Administration has appealed this ruling to the US Court of Appeals for the Federal Circuit.

[14]Earth Island Institute v. Warren Christopher, 948 Fed. Supp. 1062 (CIT 1996).

VI. INTERIM REVIEW

6.1. On 16 March 1998, Malaysia submitted comments regarding the interim report in accordance with Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"). Malaysia added that, in the event the United States would provide any comments on the interim report, Malaysia, together with the other co-complainants, reserved their rights to respond to such comments and to request a further meeting with the parties to discuss those comments. India, Pakistan and Thailand did not request a review. On 16 March 1998, the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, the interim report that had been issued to the parties on 2 March 1998. The United States also requested the Panel to hold a meeting with the parties to discuss the issues raised in its comments. We met with the parties on 31 March 1998, reviewed the entire range of arguments presented by the parties, and finalized our report, taking into account the specific aspects of these arguments we considered to be relevant.

6.2. With respect to the comments made by Malaysia on the descriptive part, we have taken a number of them into account and accordingly modified paragraph 2.2, paragraph 3.9(f), footnote 80 to paragraph 3.38, and paragraphs 3.84, 3.131, 3.221 and 3.286.

6.3. With respect to the findings, Malaysia and the United States make several specific comments. We have accepted most of them and accordingly have made the appropriate changes in paragraphs 7.2, 7.5, 7.6, 7.19 and 7.48. However, we have not modified paragraph 7.46, as requested by the United States. We agree with the United States that none of the parties cited or discussed the 1952 *Belgian Family Allowances* case[610], but in our view a reference to that case is relevant to our findings because, even though it did not relate to Article XX, it addressed a situation similar to this case, where a country had imposed conditions on access to its market based on the existence in the exporting countries of a family allowance system meeting specific requirements. Finally, we cannot agree with the comment of the United States on paragraph 7.52 that we should review the statement that the 1992 Rio Declaration "stresses the diversity of environmental situations and responsibilities". When we refer to diversity of responsibilities, we do not base ourselves on Principle 2 only, to which the United States seems to refer exclusively, but also to Principle 11 as well. Both Principles are quoted in footnote 661 and our purpose is to illustrate the right of States to design their own environmental policies on the basis of their particular environmental and developmental situations and responsibilities. We have clarified the relevant part of paragraph 7.52 accordingly.

6.4. The United States also makes comments of a more general nature. We address them successively hereafter. First, the United States considers that the findings of the Panel never identified or analysed the particular terms of the chapeau of Article XX and disregarded the relevant language of the GATT 1994. In response, we have expanded the discussion of the terms of the chapeau in paragraphs 7.33 and 7.34.

6.5. The United States also claims that the Panel adopted a new test based on the Panel's view of the object and purpose of the Article XX chapeau. However, this mischaracterizes our findings, which do not rely solely on the object and purpose of Article XX. They are based on an analysis, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (1969), of the ordinary meaning of the terms of the chapeau of Article XX, *taken in their context and in the light of the object and purpose of the WTO Agreement*. Moreover, in our reasoning, we rely also on general principles of public international law such as *pacta sunt servanda*. Consequently, our findings are the result of the application of interpretative methods required by Article 3.2 of the DSU. In our view, our process of

[610] Adopted on 7 November 1952, BISD 1S/59.

interpretation of Article XX in this case does not add to Members' obligations in contravention of Article 3.2 of the DSU.

6.6. The United States further claims that the Panel has adopted a so-called "threat to the multilateral trading system" test that is tautological and undermines Article XX. In our view, the concept of "threat to the multilateral trading system" is an application in this case of the principle according to which Members should not deprive the WTO Agreement of its object and purpose. This concept is elaborated in paragraphs 7.44 and 7.45. We have not imposed a new test, but merely found that the type of measure at issue in this case deprives the WTO Agreement of its object and purpose and, thus, is beyond the scope of Article XX. The analysis is not tautological, since it elaborates on the function of Article XX in the WTO framework. As the United States put it in its request for interim review: "A measure meeting the provisions of Article XX, by definition, cannot be a 'threat to the multilateral trading system'." Thus, where a panel believes that a measure does constitute such a threat, it is appropriate to interpret Article XX so as not to permit it. We do not believe that the notion of "threat to the multilateral trading system" entrusts panels with unfettered discretion as to what measure would satisfy the conditions of Article XX. On the contrary, it preserves the right of Members to implement the environmental policies of their choice through trade measures, as long as those trade measures do not affect the multilateral system to the point where the WTO Agreement is deprived of its object and purpose.

6.7. The United States argues in addition that "the interim report contains troubling language indicating that under the object and purpose of the WTO, trade concerns outweigh environmental concerns" and that the Panel's categorical language according to which measures are only allowed if they do not undermine the WTO system is much broader than necessary for the resolution of this dispute. We do not believe that our findings reflect such a view. Our examination of the object and purpose of the WTO Agreement led us to conclude that the central focus of that agreement is the promotion of economic development through trade. That means that there is room for other concerns, and, in particular, environmental concerns, as underlined by the wording of the preamble and the existence of exceptions. Moreover, we have not in any way passed judgement on the relative importance of trade and environmental policies.

6.8. Finally, we reject the US assertion that we have used unnecessarily broad language in our findings. Indeed, our findings have been written narrowly to address certain specific attributes of the US measure at issue, attributes which we do not believe would typically be found in environmental regulations. Indeed, as the United States concedes in its request for interim review, we stated that "there should not be nor need be any policy contradiction between upholding and safeguarding an open, equitable and non-discriminatory multilateral trading system on the one hand and acting for the protection of the environment on the other". In light of such statements, we see no scope for a future panel to misconstrue our narrowly drafted findings in this case.

VII. FINDINGS

A. INTRODUCTION

7.1 We note that the dispute arose from the following facts.[611] Most sea turtles are distributed around the world, in sub-tropical or tropical areas. Sea turtles are affected by human activity. They have been exploited for their meat, shell and eggs but they are also affected by the pollution of the oceans and the destruction of their habitats. In addition, they are subject to incidental capture in fisheries. Presently,

[611]For a more detailed presentation of the factual aspects of this case, see Section II of this Report.

most populations of sea turtles are considered to be endangered or threatened. In this respect, all marine turtles are included in Appendix I to the 1973 Convention on International Trade in Endangered Species (hereafter "CITES")[612] as species threatened with extinction.

7.2 Pursuant to the US Endangered Species Act of 1973 (hereafter "ESA"), all sea turtles that occur in US waters are listed as endangered or threatened species. Research programmes carried out by the United States have led to the conclusion that incidental capture and drowning of sea turtles by shrimp trawlers is a significant source of mortality for sea turtles. The United States National Marine Fisheries Service (hereafter "NMFS") has developed, within a programme aimed at reducing the mortality of sea turtles in shrimp trawls, turtle excluder devices (hereafter "TEDs").[613] In 1987, the United States issued regulations under the ESA whereby shrimp fishermen are required to use TEDs or tow time restrictions in specified areas where there is a significant mortality of sea turtles in shrimp trawls. Since December 1994, these regulations have eliminated the option for small trawl vessels to restrict tow times in lieu of using TEDs.

7.3 In 1989, the United States enacted Section 609 of Public Law 101-162 (hereafter "Section 609"). 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. Section 609 further provides that shrimp harvested with technology that may adversely affect certain sea turtles protected under US law may not be imported into the United States, unless the President annually certifies to the Congress 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, 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 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.

7.4 The United States issued guidelines in 1991 and 1993 for the implementation of Section 609. 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 (hereafter "CIT") found the 1991 and 1993 guidelines illegal 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.

7.5 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

[612]Done at Washington, on 3 March 1973, 993 UNTS 243, 12 ILM 1085 (1973), entered into force on 1 July 1975.

[613]A TED is a grid trapdoor installed inside a trawling net that is designed to allow shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

pursuant to Section 609." 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 ...; (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; (d) Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur". 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 program 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 time. 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.

7.6 In October 1996, the CIT 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." The CIT found that the 1996 guidelines are contrary to Section 609 when allowing, with a shrimp exporter declaration form, imports of shrimp from non-certified countries, if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles. The CIT later clarified its decision in ruling that shrimp harvested by manual methods which do not harm sea turtles, by aquaculture and in cold water, could continue to be imported even from countries which have not been certified under Section 609.

B. RULINGS MADE BY THE PANEL IN THE COURSE OF THE PROCEEDINGS

7.7 In the course of the proceedings, we received two documents called *amicus briefs* and submitted by non-governmental organizations. These documents were also communicated by their authors to the parties to the dispute. In a letter dated 1 August 1997 and at the second substantive meeting of the Panel, India, Malaysia, Pakistan and Thailand requested us not to consider the content of these documents in our examination of the matter under dispute. At the second substantive meeting of the Panel, the United States, stressing that the Panel could seek information from any relevant source under Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"), urged us to avail ourselves of any relevant information in the two documents, as well as in any other similar communications.

7.8 We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute

wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.

7.9 None of the parties to the dispute requested the Panel to consult experts. However, we noted that parties had submitted a number of studies by experts and often quoted the same scientific documents to support opposite views. Under those circumstances, we decided, acting on our own initiative, to seek scientific and technical advice pursuant to paragraph 1 and paragraph 2, first sentence of Article 13 of the DSU.[614]

7.10 Parties to the dispute were given time to comment in writing on the replies of the experts to the questions of the Panel. However, before and during the hearing of the experts, we recalled that parties should limit their intervention to questions and comments strictly related to the issues raised by the experts. Accordingly, we decided not to take into account in our findings any comment or question raised in relation with the consultation of the experts which would not be strictly related to the scientific issues under discussion with the experts.

C. VIOLATION OF ARTICLE XI:1 OF GATT 1994[615]

7.11 We note that all four complainants[616] raise claims regarding the violation of Article XI GATT 1994. India, Pakistan and Thailand submit that the scope of Article XI:1, which provides for general elimination of quantitative restrictions, is comprehensive and applies to all measures instituted or maintained by a Member prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges. Measures prohibited by Article XI:1 include outright quotas and quantitative restrictions made effective through import or export licences. The embargo applied by the United States on the basis of Article 609 constitutes a prohibition or restriction on the importation of shrimp or shrimp products from the complainants and is not in the nature of a "duty, tax, or other charges" within the meaning of Article XI:1. India, Pakistan and Thailand consider that the 1991 and 1994 reports on *United States - Restrictions on Imports of Tuna*[617] involve a measure virtually identical to the restriction on imports of shrimp and shrimp products at issue in this case. In those cases, the embargo was applied by the United States to imports of tuna from countries that had not implemented conservation programmes comparable to those of the United States to protect dolphins incidentally taken by commercial fishermen harvesting tuna. In both cases, the panels found that the restriction constituted a violation of Article XI.

7.12 Malaysia argues that the import prohibition imposed by the United States under Section 609 falls under Article XI as it bans import of shrimp or shrimp products from any country not meeting certain policy conditions, and are not duties, taxes or other charges. The findings of the *Tuna I* and *Tuna II* cases are equally applicable to the facts of this case. The US prohibition on imports of shrimp and

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[614]For a detailed account of the Panel's consultation with scientific experts, see Section V of this Report.

[615]For a more detailed presentation of the main arguments of the parties, see Section III of this Report.

[616]India, Pakistan, Malaysia and Thailand are hereafter referred to as the "complainants".

[617]Panel Report on *United States - Restrictions on Imports of Tuna*, 3 September 1991, DS21/R, not adopted (hereafter *"Tuna I"*), and Panel Report on *United States - Restrictions on Imports of Tuna*, 16 June 1994, DS29/R, not adopted (hereafter *"Tuna II"*).

shrimp products is therefore contrary to Article XI:1 and cannot be justified under Article XI:2, as this provision does not address the situation at issue.

7.13 The United States argues that since under Article XX nothing in GATT 1994 is to be construed to prevent the adoption or enforcement of the measures at issue, it need not address Article XI. The United States also considers that the complainants have the burden of establishing any alleged violation of GATT 1994. However, the United States does not dispute that, with respect to countries not certified under Section 609, Section 609 amounts to a restriction on the importation of shrimp within the meaning of Article XI:1 of GATT 1994.

7.14 The arguments put forward by the parties raise the general question of the burden of proof, in terms of who bears this burden and in terms of how much has to be proved in the circumstances of this case. Regarding who bears the burden of proof, we recall the well established general principle of law referred to by the Appellate Body in its report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*[618]: "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". We consequently consider that it is up to the complainants to demonstrate that the US measure at issue violates Article XI:1 of GATT 1994. The arguments of the parties also raise the question of when a panel should consider that a party has provided sufficient evidence in support of a particular claim or defence. We recall that the Appellate Body in the *Wool Shirts* case found that "precisely how much and precisely what kind of evidence will be required to establish [a presumption that a claim is valid] will necessarily vary ... from case to case".[619] We therefore have to assess the evidence before us in the light of the particular circumstances of this case. This implies that we may consider any type of evidence, and also that we may reach our conclusions regarding a particular claim on the basis of the level of evidence that we consider sufficient.

7.15 In this respect, we note that the United States, in reply to one of our questions, "does not dispute that with respect to countries not certified under Section 609, Section 609 amounts to a restriction on the importation of shrimp within the meaning of Article XI:1 of GATT 1994".[620] This statement of the United States creates a particular situation where the defendant basically admits that a given measure amounts to a restriction prohibited by GATT 1994. It is usual legal practice for domestic and international tribunals, including GATT panels[621], to consider that, if a party admits a particular fact, the judge may be entitled to consider such fact as accurate.

7.16 Even if the above-mentioned US declaration does not amount to an admission of a violation of Article XI:1, we consider that the evidence made available to the Panel is sufficient to determine that the

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[618]Adopted on 23 May 1997, WT/DS33/AB/R (hereafter *"Wool Shirts"*), p. 14.

[619]Op. Cit., p. 14.

[620]See para. 3.143 of this Report.

[621]See Panel Report on *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, where the panel, at para. 4.9, *inter alia* "noted the assertion by the representative of the Community that this system was a system which fell within the purview of Article XI and XI alone ... Having noted the foregoing, the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction 'other than duties, taxes or other charges' within the meaning of Article XI:1". In *EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, the panel noted, in para. 31, that the EC itself referred to the products concerned as subject to quantitative restrictions. The panel further noted that "no GATT justification had been advanced for the quantitative restrictions referred to in paragraph 31 above" and concluded that "the relevant provisions of Article XI were not complied with".

United States prohibition of imports of shrimp from non-certified Members violates Article XI:1. Article XI:1 reads in part as follows:

> "No prohibitions or restrictions other that duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

We note that Section 609(b)(1) provides that:

> "The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited no later than May 1, 1991, except as provided in paragraph (2) [i.e. the exporting country is certified]".

Thus, Section 609 expressly requires the imposition of an import ban on imports from non-certified countries. We further note that in its judgement of December 1995, the CIT directed the US Department of State to prohibit, no later that 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.[622] Furthermore, the CIT ruled that the US Administration has to apply the import ban, *including to TED-caught shrimp*, as long as the country concerned has not been certified. In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be "prohibitions or restrictions" within the meaning of Article XI.[623]

7.17 Therefore, we find that the United States admits that, with respect to countries not certified under Section 609, the measures imposed in application of Section 609 amount to "prohibitions or restrictions" on the importation of shrimp within the meaning of Article XI:1 of GATT 1994. Even if one were to consider that the United States has not admitted that it imposes an import prohibition or restriction within the meaning of Article XI:1, we find that the wording of Section 609 and the interpretation made of it by the CIT are sufficient evidence that the United States imposes a "prohibition or restriction" within the meaning of Article XI:1. We therefore find that Section 609 violates Article XI:1 of GATT 1994.

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[622]United States Court of International Trade: *Earth Island Institute v. Christopher*, ruling of 29 December 1995 (913 F. Supp. 559).

[623]See Panel Report in the *Tuna I* case, Op. Cit., para. 5.17-5.18, and Panel Report in the *Tuna II* case, Op. Cit., para. 5.10. Speaking of the relevance for panels of previous reports, the Appellate Body has stated, with respect to adopted panel reports:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute". (Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8, DS10, DS11/AB/R, p. 14)

Regarding unadopted panel reports, the Appellate Body agreed with the panel in the same case that:

> "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant". (Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, Op. Cit., p. 15)

D. VIOLATION OF ARTICLE XIII:1 AND OF ARTICLE I:1 OF GATT 1994[624]

7.18 India, Pakistan and Thailand claim that the import prohibition on shrimp and shrimp products from non-certified countries is inconsistent with the most-favoured-nation principle embodied in Article I:1 GATT 1994 because physically identical shrimp and shrimp products from different Members are treated differently by the United States upon importation. This differentiated treatment is based solely on the method of harvest and the conservation policies of the government under whose jurisdiction the shrimp is harvested. Further, even if one were to assume *arguendo* that the method of harvest does affect the nature of the shrimp, the embargo violates Article I:1 because, pursuant to the embargo, wild shrimp harvested by use of TEDs are forbidden entry into the United States if harvested by a national of a non-certified country, while shrimp harvested by the same method by a national of a certified country is permitted entry into the United States.

7.19 India, Pakistan and Thailand also claim that the embargo as applied is also inconsistent with Articles I:1 and XIII:1 of the GATT 1994 because initially affected countries were given a phase-in period of three years, while newly affected nations were not given a similar period of time. Malaysia further argues that, while newly affected nations generally received only a four month notice, Malaysia actually was given three months (i.e., until 1 April 1996) to adopt a programme complying with the US requirements. For Malaysia, this differential treatment is also discriminatory and inconsistent with Article XIII:1. According to India, Pakistan and Thailand, initially affected countries were given the opportunity to implement the required use of TEDs without substantially interrupting shrimp trade to the United States. Products from these countries have therefore been given an "advantage, favour, privilege or immunity" over like products originating in the territories of other Members, in violation of Article I:1. Likewise, importation of like products from initially affected countries was not similarly prohibited, in violation of Article XIII:1.

7.20 India, Pakistan and Thailand also argue that Section 609 is inconsistent with Article XIII:1 of GATT 1994 because it restricts the importation of shrimp and shrimp products from countries which have not been certified, while like products from other countries which have been certified can be imported freely into the United States. The United States denies entry of shrimp and shrimp products based on the method of harvest, even though it does not affect the nature of the product. Indeed, all foreign shrimp and shrimp products have the same physical characteristics, end-uses and tariff classifications and are perfectly substitutable. Thus, shrimp products which may be imported into the United States pursuant to Section 609 are like shrimp products from non-certified countries which are denied entry. The differential treatment of like products from certified and non-certified countries violates Article XIII:1. Even assuming that the method of harvest does affect the nature of the product, the embargo violates Article XIII because wild shrimp harvested by use of TEDs are forbidden entry into the United States if harvested by a national of a non-certified country, while shrimp harvested by use of TEDs by a national of a certified country are permitted entry into the United States.

7.21 The United States does not agree with the complainants' claims under Articles I and XIII, particularly since, in the US view, the US measure applies equally to all harvesting Members. The United States further argues that, if the Panel makes a finding with respect to Article XI, there will be no need to reach the claims under Articles I and XIII.

7.22 Given our conclusion in paragraph 7.17 above that Section 609 violates Article XI:1, we consider that it is not necessary for us to review the other claims of the complainants with respect to Articles I:1 and XIII:1. This is consistent with GATT[625] and WTO[626] panel practice and has been

[624]For a more detailed presentation of the main arguments of the parties, see Section III of this Report.

[625]See, e.g., Panel report on *Canada - Administration of the Foreign Investment Review Act*, adopted on 7 February 1984, BISD 30S/140, para.

confirmed by the Appellate Body in its report in the *Wool Shirts* case, where the Appellate Body mentioned that "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[627]

7.23 Therefore we do not find it necessary to review the allegations of the complainants with respect to Articles I:1 and XIII:1. On the basis of our finding of violation of Article XI:1, we move to address the defence of the United States under Article XX.

E. ARTICLE XX OF GATT 1994[628]

1. Preliminary remarks

7.24 The United States claims that the measures at issue adopted pursuant to Section 609, which were found to be inconsistent with Articles XI:1 GATT 1994, are justified under Article XX(b) and (g) of GATT 1994. India, Pakistan and Thailand argue that Article XX(b) and (g) cannot be invoked to justify a measure which applies to animals not within the jurisdiction of the Member enacting the measure. Malaysia contends that, since Section 609 allows the United States to take actions unilaterally to conserve a shared natural resource, it is therefore in breach of the sovereignty principle under international law. The United States responds that Article XX(b) and (g) contain no jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved and that, under general principles of international law relating to sovereignty, States have the right to regulate imports within their jurisdiction.

7.25 The relevant parts of Article XX provide as follows:

> Article XX
> General exceptions
>
> Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (b) necessary to protect human, animal or plant life or health;
>
> ...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> ...

7.26 The arguments of the parties raise the general question of whether Article XX(b) and (g) apply

(..continued)
5.16.

[626]See, e.g., Panel Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/R, para. 293.

[627]Op. Cit., p. 19.

[628]For a more detailed presentation of the main arguments of the parties, see Section III of this Report.

at all when a Member has taken a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s). We note that Article XX can accommodate a broad range of measures aiming at the conservation and preservation of the environment.[629] At the same time, by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures. We therefore consider it important to determine first whether the *scope* of Article XX encompasses measures whereby a Member conditions access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s).

7.27 Pursuant to Article 3.2 of the DSU and in accordance with Appellate Body decisions[630], we should, when trying to clarify the scope of Article XX, have recourse to customary rules of interpretation of public international law. We note that Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (hereafter the "Vienna Convention") provides that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

Therefore, in order to determine the scope of Article XX, it is necessary to consider not only the terms in their ordinary meaning, but also their context and the object and purpose of GATT 1994 and the WTO Agreement itself.[631]

7.28 Article XX contains an introductory provision, or *chapeau*, and a number of specific requirements contained in successive paragraphs. As mentioned by the Appellate Body in its report in the *Gasoline* case[632], in order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX.

7.29 We also recall that the Appellate Body considered, in the *Gasoline* case[633], that the chapeau by its express terms addresses, not so much the questioned measure or its specific contents, but rather the

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[629]See, e.g., Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline* (hereafter "*Gasoline*"), WT/DS2/AB/R, adopted on 20 May 1996, which provides, at p. 30:

> "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements".

[630]See, e.g., Appellate Body Report in the *Gasoline* case, Op. Cit., p. 17-18.

[631]See Appellate Body report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R, p. 15. Where appropriate, we must also consider GATT and WTO panel and Appellate Body reports. See footnote 623 above.

[632]Op. Cit., p. 22.

[633]Ibid., p. 22.

manner in which that measure is applied.[634] The Appellate Body further underscored that "the purpose and object of the introductory clause of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX]'". Hence, the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of Article XX. Therefore, we shall first determine whether the measure at issue satisfies the conditions contained in the chapeau. If we find this to be the case, we shall then examine whether the US measure is covered by the terms of Article XX(b) or (g).

7.30 Finally, we keep in mind the well-established practice according to which when an affirmative defence, such as Article XX, is invoked, the burden of proof should rest on the party asserting it.[635] We therefore consider that the burden of proving that the measure at issue is justified under Article XX rests on the United States, as the party asserting this affirmative defence.

2. Chapeau of Article XX

7.31 India, Pakistan and Thailand argue that the embargo applied by the United States is implemented in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail insofar as the newly affected nations, including India, Pakistan and Thailand, have been given substantially less notice than the other countries, whether the United States or initially affected countries, before being forced to comply with TEDs requirements. They maintain that there is not only a discrimination between exporting countries, but also between exporting countries and the United States. Furthermore, India, Pakistan and Thailand consider that, before requiring TEDs application from them, the United States should have demonstrated that the same conditions do not prevail between India, Pakistan or Thailand and the countries with no TEDs requirement. Moreover, for these complainants, the legislative history of Section 609, which includes discussions of this section in terms of the competitive position of the US shrimp industry, further supports the conclusion that the embargo is a disguised restriction on international trade. The effect of the restriction was not so much reduced importation as the additional cost on the foreign industry, making it less competitive, and the risk that the right to export might be revoked. Malaysia claims that disguised restrictions include disguised discrimination in international trade, and that it has been subject to such discrimination because it was given only a few months to comply with the US requirements as opposed to three years in the case of the initially affected countries.

7.32 The United States argues that the measures related to import of shrimp were carefully and justifiably tied to the particular conditions of each country exporting shrimp to the United States. All exporting nations with the same shrimp harvesting conditions are treated equally, with no discrimination. For the United States, the evidence is overwhelming that the conservation measures under Section 609 are not some artifice intended to protect the US fishing industry. The United States argued that the strong and growing international consensus regarding sea turtle conservation and the mandatory use of TEDs belies any claim that the US measures are some sort of disguised restriction on trade. In addition, the United States maintains that the extension of the application of Section 609 to other countries than the

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[634]See also the panel report on *United States - Imports of Certain Automotive Spring Assemblies*, adopted on 26 May 1983, BISD 30S/107, which specified, at para. 56, that "the preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined."

[635]See Appellate Body Report in the *Wool Shirts* case, Op. Cit., p. 16, and the GATT cases cited in footnote 23 to that report. In that case, the Appellate Body mentioned that "Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it". Therefore, we shall apply this principle when we review the US arguments under Article XX.

United States and the wider Caribbean/Western Atlantic area has not led to a decrease in the quantities imported nor to an increase in prices.

7.33 In order to apply Article XX in this case, we must, as mentioned in paragraph 7.27 above, interpret it in line with Article 31(1) of the Vienna Convention. More particularly, the chapeau of Article XX must be interpreted on the basis of the ordinary meaning of its terms, in their context and in the light of the object and purpose of GATT 1994 and the WTO Agreement. We consider first if the terms of the chapeau of Article XX explicitly address the issue of whether Article XX contains any limitation on a Member's use of measures conditioning market access to the adoption of certain conservation policies by the exporting Member. In this connection, we note that the chapeau prohibits such application of the measure at issue as would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. We note that the US measure at issue applies to all Members seeking to export to the United States wild shrimp retrieved mechanically from waters where sea turtles and shrimp occur concurrently. We consider those Members to be "countries where the same conditions prevail", within the meaning of Article XX. We further note that some of those countries have been "certified" and can export shrimp to the United States whereas some have not and are subject to an import ban. Consequently, discriminatory treatment is applied to shrimp from non-certified countries. Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an "arbitrary" or unjustifiable" manner.

7.34 We therefore move to consider whether the US measure conditioning market access on the adoption of certain conservation policies by the exporting Member could be considered as "unjustifiable" discrimination. As was recalled by the Appellate Body in the *Gasoline* case, "the text of the chapeau of Article XX is not without ambiguity". The word "unjustifiable" has never actually been subject to any precise interpretation.[636] The ordinary meaning of this term is susceptible to both narrow and broad interpretations. While the ordinary meaning of "unjustifiable" confirms that Article XX is to be applied within certain boundaries, it does not explicitly address the issue of whether Article XX should be interpreted to contain any limitation on a Member's use of measures conditioning market access on the adoption of certain conservation policies by the exporting Member. For that reason, it is essential that we interpret the term "unjustifiable" within its context and in the light of the object and purpose of the agreement to which it belongs.

7.35 Turning to an examination of the context of the terms and the object and purpose of the WTO Agreement, we note that the notion of "context", on the one hand, and of "object and purpose", on the other hand, are intimately linked. Indeed, Article 31(2) of the Vienna Convention provides that the context for the purpose of treaty interpretation comprises the text of the agreement, including its preamble and annexes. By the same token, determining the object and purpose of an agreement implies an examination of the text of the agreement and of its preamble. Consequently, we consider that the context of the chapeau of Article XX cannot be distinguished from that of Article XX as a whole. Furthermore, as the WTO Agreement is an integrated system including GATT 1994[637], we shall consider as the context of the chapeau and of Article XX as a whole not only the other relevant provisions of GATT 1994 together with its preamble and annexes, but also the WTO Agreement, including its preamble and its other annexes. For the same reasons, the object and purpose to be considered is not only that of GATT 1994, but that of the WTO Agreement as a whole.

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[636]Previous panels considered situations of discrimination related to import prohibitions. The Panel Report on *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, considered, at para. 4.8, that the measure had been taken exclusively against imports from Canada, but that *similar actions* had been taken against imports from other countries, and then for similar reasons. The panel concluded that if Canada had been discriminated against, it might not necessarily have been in an arbitrary or unjustifiable manner.

[637]See Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, Op. Cit., pp. 11-12.

7.36 GATT panels had the occasion to address the context and the object and purpose of Article XX. The 1989 panel on *United States - Section 337 of the Tariff Act of 1930* considered that:

> " ... Article XX is entitled 'General Exceptions' ... Article XX(d) thus provides for a *limited and conditional exception* from obligations under other provisions".[638]

Referring, *inter alia*, to the above-mentioned report, the panel in the *Tuna I* case found that:

> " ... previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and *not a positive rule establishing obligations in itself*. Therefore, the practice of panels has been to interpret Article XX narrowly ... ."[639]

7.37 The Appellate Body also described Article XX in very similar language. In the *Wool Shirts* case, it found that:

> "Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves".[640]

7.38 The Appellate Body has also discussed the relationship of Article XX(g) to GATT as a whole, in terms that would apply to the relationship to GATT of Article XX taken in its entirety:

> "... Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner *as to give effect to the purposes and objects of the General Agreement*. The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning *within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis*, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[641]

7.39 While the Appellate Body has noted that the rights that Members do have under Article XX must, of course, be respected, it has also noted the existence of limits and conditions on the scope of

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[638]Adopted on 7 November 1989, BISD 36S/345, para. 5.9 (emphasis added).

[639]Op. Cit., para. 5.22 (emphasis added, footnote omitted). See, also, Panel Report on *Canada - Administration of the Foreign Investment Review Act*, Op. Cit., para. 5.20.

[640]Op. Cit., p. 16.

[641]Appellate Body Report in the *Gasoline* case, Op. Cit., p. 18 (emphasis added).

Article XX. It has expressed those limits and conditions as follows in respect of its analysis of the object and purpose of the chapeau of Article XX:

> "... while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions [contained in Article XX] are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[642]

7.40 We note that the chapeau to Article XX provides that "nothing in [GATT 1994] shall be construed to prevent the adoption or enforcement ... of measures" otherwise in conformity with Article XX conditions. However, we consider that this wording is not affected by the findings quoted above. As the Appellate Body also put it, Article XX "needs to be read in its context and in such a manner as to give effect to the purposes and objects of the General Agreement" and "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of ... [Article XX]'."[643] We deduce from this that, when invoking Article XX, a Member invokes the right to derogate to certain specific substantive provisions of GATT 1994 but that, in doing so, it must not frustrate or defeat the purposes and objects of the General Agreement and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX.

7.41 We consider this finding of the Appellate Body to be an application of the international law principle according to which international agreements must be applied in good faith, in light of the *pacta sunt servanda* principle.[644] The concept of good faith is explained in Article 18 of the Vienna Convention which states that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty".[645]

7.42 We consequently turn to the consideration of the object and purpose of the WTO Agreement, of which GATT 1994 and Article XX thereof are an integral part. We note that the preamble of an agreement may assist in determining its object and purpose.[646] On the one hand, the first paragraph of the Preamble of the WTO Agreement acknowledges that the optimal use of the world's resources must be pursued "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development". On the other hand, the

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[642]Ibid., p. 22.

[643]Ibid., referring to EPTC/C.11/50, p. 7; quoted in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995), Volume I, p. 564.

[644]Good faith in the application of treaties is generally considered as a fundamental principle of treaty law. See Article 26 (*Pacta Sunt Servanda*) of the Vienna Convention, which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See judgement of the International Court of Justice of 27 August 1952 in the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, ICJ Report 1952, p. 176, at p. 212, where the Court stated that "The power of making the valuation [a power granted by the 1906 Act of Algesiras] rests with the customs authorities, but it is a power *which must be exercised reasonably and in good faith*" (emphasis added).

[645]This rule, which applies to the period between the moment when a State has expressed its consent to be bound by a treaty and its entry into force, nevertheless seems to express a generally applicable principle. See Patrick Daillier & Alain Pellet, Droit International Public (1994), p. 216.

[646]See, e.g., Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd edition (1984), p. 130.

second paragraph of the Preamble of GATT and the third paragraph of the WTO Preamble refer to "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment" in international trade relations. While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.

7.43 We also note that, by its very nature, the WTO Agreement favours a multilateral approach to trade issues. The Preamble to the WTO Agreement provides that Members are "resolved ... to develop an integrated, more viable and durable *multilateral trading system* [and] ... determined to preserve the basic principles and to further the objectives underlying this *multilateral trading system*" (emphasis added). Article III:2 of the WTO Agreement also mentions that:

> "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide for a forum for further negotiations among its Members concerning their multilateral trade relations ...".[647]

This approach is also expressed in Article 23.1 of the DSU which stresses the primacy of the *multilateral* system and rejects unilateralism as a substitute for the procedures foreseen in that agreement.

7.44 Therefore, we are of the opinion that the chapeau Article XX, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX. Such undermining and abuse would occur when a Member jeopardizes the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible. As was recalled by previous panels, GATT rules "are not only to protect current trade but also to create the predictability needed to plan future trade".[648] The protection of expectations of Members as to the competitive relationship between their products and the products of other Members is therefore an important principle to be taken into account by panels when reviewing a particular measure. We are of the view that a type of measure adopted by a Member which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.

7.45 In our view, if an interpretation of the chapeau of Article XX were to be followed which would

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[647]The emphasis on multilateralism is also found in the General Agreement on Trade in Services, where the second paragraph of its Preamble states that Members wish to "establish a *multilateral* framework of principles and rules for trade in services ... " (emphasis added). Similarly, the Preamble to the Agreement on Trade-Related Aspects of Intellectual Property Rights stresses the need for a multilateral approach (TRIPS Agreement, Preamble, paras. 3 and 7). See also Marrakesh Declaration, 15 April 1994, para. 2.

[648]Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. If that happened, it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements. Indeed, as each of these requirements would necessitate the adoption of a policy applicable not only to export production (such as specific standards applicable only to goods exported to the country requiring them) but also to domestic production, it would be impossible for a country to adopt one of those policies without running the risk of breaching other Members' conflicting policy requirements for the same product and being refused access to these other markets. We note that, in the present case, there would not even be the possibility of adapting one's export production to the respective requirements of the different Members. Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.[649]

7.46 We find support for our reasoning in the *Tuna II* case[650] where the panel considered a similar issue and found as follows:

> "5.26 The Panel observed that Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement.[651] If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties."[652]

The principle underlying our interpretation of Article XX of GATT 1994 was apparently also at the origin of the findings of the 1952 panel on *Belgian Family Allowances*. This panel addressed a charge

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[649]We note that the United States referred to Article XX(e) as evidence that GATT refutes any argument that trade measures generally should not have effects on the internal affairs of exporting countries. We note however that this provision does not permit a Member to make entry of imported goods into its territory conditional upon the exporting Member's policy on prison labour. This paragraph only refers to the products of prison labour.

[650]Op. Cit.

[651]The footnote in the report referred to the Panel Report on *Canada - Administration of the Foreign Investment Review Act*, Op. Cit., para. 5.20 and to the Panel Report on *United States - Section 337 of the Tariff Act of 1930*, Op. Cit., para. 5.27.

[652]The report of the panel in the *Tuna II* case was not adopted. We nonetheless recall the findings of the Appellate Body in its report on *Japan - Taxes on Alcoholic Beverages*, Op. Cit., that unadopted panel reports have no legal status in the GATT or WTO system but that a panel can nevertheless *find useful guidance in the reasoning of an unadopted panel report that it considers to be relevant.* We consider that the reasoning of the panel in the *Tuna II* case, in the light of the similarities between the issues addressed by that panel and the present Panel, is relevant in the present case and provides useful guidance.

imposed by Belgium on imported products purchased by public bodies when these goods originated in a country whose system of family allowances did not meet specific requirements. In that context, the panel considered that "the Belgian legislation on family allowance was not only inconsistent with the provisions of Article I ... , but was based on a concept which was difficult to reconcile with the spirit of the General Agreement".[653]

7.47 In light of this analysis of the terms and context of the chapeau of Article XX in the light of the object and purpose of the WTO Agreement, we turn to a consideration of whether the US measure challenged in this case falls within the scope of Article XX.

7.48 The United States argues that the intent of Section 609 is to protect and conserve the life and health of sea turtles by requiring that shrimp imported into the United States has not been harvested in a manner that will harm sea turtles. As a result of judgements of the US Court of International Trade, the US Administration currently has to apply the import ban, including on TED-caught shrimp, as long as the country concerned has not been certified.[654] In addition, certification is only granted if comprehensive requirements regarding use of TEDs by fishing vessels are applied by the exporting country concerned, or if the shrimp trawling operations of the exporting country take place exclusively in waters in which sea turtles do not occur. Consequently, Section 609, as applied, is a measure[655] conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.

7.49 Accordingly, it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement,[656] the US measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX. However, before making a definitive finding on this issue, we must consider several arguments put forward by the United States that relate generally to our analysis of Article XX.

7.50 The United States argues that the Panel should consider the many examples of import bans under various international agreements that show that Members may take actions to protect animals, whether they are located *within or outside their jurisdiction*. We are of the view that these treaties show that environmental protection through international agreement - as opposed to unilateral measures -have for a long time been a recognized course of action for environmental protection.[657] We note that this US argument addresses the issue of a potential jurisdictional scope of Article XX. However, we consider that this argument bears no direct relation to our finding, which rather addresses the inclusion of certain

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[653]Adopted on 7 November 1952, BISD 1S/59, para. 8.

[654]United States Court of International Trade: *Earth Island Institute v. Christopher*, rulings of 8 October (942 F. Supp. 597) and 25 November 1996 (948 F. Supp. 1062).

[655]As described in para. 7.45.

[656]See paragraph 7.34.

[657]We note in this respect that the WTO Committee on Trade and Environment 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. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both". (Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171).

unilateral measures within the scope *ratione materiae* of Article XX. In addition, in the present case, we are not dealing with measures taken by the United States in application of an agreement to which it is party, as the United States does not claim that it is allowed or required by any international agreement (other than GATT 1994) to impose an import ban on shrimp in order to protect sea turtles. Rather, we are limiting our finding to measures - taken independently of any such international obligation - conditioning access to the US market for a given product on the adoption by the exporting Member of certain conservation policies. In this regard, we note that banning the importation of a particular product does not *per se* imply that a change in policy is required from the *country* whose exports are subject to the import prohibition. For instance, a Member may ban a product on the ground that it is dangerous, and accept a similar product that is safe. This is clearly different from adopting a policy pursuant to which only countries that adopt measures restricting all of their production to products considered safe by a particular Member may export to the market of that Member. We note that a judgement of the CIT interpreting Section 609[658] ruled that the US Administration has to apply the import ban, including on TED-caught shrimp, as long as the country concerned has not been certified. Currently, certification is only granted if *comprehensive requirements* regarding use of TEDs by fishing vessels are applied by the exporting country concerned.

7.51 The United States further argues that the complainants confuse the difference between extrajurisdictional application of a country's law and the application by a country of its law, within its jurisdiction, in order to protect resources located outside its jurisdiction. However, we note that we are not basing our finding on an extra-jurisdictional application of US law. Many domestic governmental measures can have an effect outside the jurisdiction of the government which takes them. What we found above was that a measure cannot be considered as falling within the scope of Article XX if it operates so as to affect other governments' policies in a way that threatens the multilateral trading system, as described in paragraph 7.45 above. For instance, a US requirement, that US norms regarding the characteristics of a given product be met for that product to be allowed on the US market, would not constitute such a threat. Such types of measures are contemplated by the WTO Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures. However, requiring that other Members adopt policies comparable to the US policy for their domestic markets and all other markets represents a threat to the WTO multilateral trading system. As affirmed by the Appellate Body in its report in the *Gasoline* case, "Members have a large measure of autonomy to determine their own policies on the environment ..., their environmental objectives and the environmental legislation they enact and implement"[659], circumscribed only, so far as concerns the WTO, by the need to respect the requirements of the General Agreement and the other covered agreements. Therefore, a Member's measure which conditions access to its market on the adoption by the exporting Member of certain conservation policies is a denial of such autonomy.

7.52 The United States argues that the right of WTO Members to take measures under Article XX to conserve and protect natural resources is reaffirmed and reinforced by the Preamble to the WTO Agreement. Although we do not disagree in general with this statement, we are not persuaded that this argument is a reason to change our finding. Whilst the central focus of that Agreement is to promote economic development through trade, we note that the Preamble acknowledges that the optimal use of the world's resources must be pursued "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development". Thus the Preamble endorses the fact that environmental policies must be designed taking into account the situation of each Member, both in terms of its actual needs and in terms of its economic means.

[658]United States Court of International Trade: *Earth Island Institute v. Christopher*, rulings of 8 October and 25 November 1996, Op. Cit.

[659]Op. Cit., p. 30.

Moreover, the record before us and, in particular, the answers of the experts to the questions of the Panel, strongly suggest that the environmental issues at stake in this case should be evaluated to a large degree in light of local and regional conditions. They also suggest that conservation measures should be adapted, *inter alia*, to the environmental, social and economic conditions prevailing where they are to be applied. We further note that the 1992 Rio Declaration on Environment and Development[660] recognises the right of States to design their own environmental policies on the basis of their particular environmental and developmental situations and responsibilities.[661] It also stresses the need for international cooperation[662] and for avoiding unilateral measures. In this light, we consider that the Preamble does not justify interpreting Article XX to allow a Member to condition access to its market for a given product on the adoption of certain conservation policies by exporting Members in order to bring them into line with those of the importing Member. On the contrary, the diversity of the environmental and development situations underlined by the Preamble can best be taken into account through international cooperation. The Preamble also implies that attempts to generalize standards of environmental protection would require multilateral discussion, especially when, as here, developing countries are involved. Therefore, we do not consider that the wording of the Preamble referred to by the United States should lead us to a different conclusion than the one reached above.

7.53 The United States further claims that sea turtles are a shared global resource and that, therefore, it has an interest and a right to impose the measures at issue. Firstly, the United States argues that sea turtles are a shared global resource because they are highly migratory creatures which travel through large expanses of sea, within the range of thousands of kilometres, from the jurisdiction of one Member to those of other Members. Secondly, the United States also argues that, even if sea turtles were not migratory at all, they may still represent a shared global resource in terms of biological diversity in the protection of which the United States may have a legitimate interest. Information brought to the attention of the Panel, including documented statements from the experts, tends to confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea. This said, even assuming that sea turtles were a shared global resource, we consider that the notion of "shared" resource implies a common interest in the resource concerned. If such a common interest exists, it would be better addressed through the negotiation of international agreements than by

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[660]See Rio Declaration on Environment and Development, The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil.

[661]Rio Declaration on Environment and Development, Op. Cit., Principle 2:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their *own* environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Emphasis added)

Principle 11 states that:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

In this respect, we note that whilst incidental drowning in shrimp nets may be the single most important source of turtle mortality along the East coast of the United States, in other countries egg harvesting and direct sea turtle harvest are factors affecting significantly the survival of sea turtles.

[662]Rio Declaration on Environment and Development, Op. Cit., Principle 12: "Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus".

measures taken by one Member conditioning access to its market to the adoption by other Members of certain conservation policies. We note in this respect that Article 5 of the 1992 Convention on Biological Diversity provides that:

> "each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity." [663]

We consider that this provision is evidence that "matters of mutual interest" have normally to be addressed primarily through international cooperation.[664] Therefore, we find that if, as alleged by the United States, sea turtles are shared global resources, that would not call for a change in our finding. Instead, it suggests that the United States should have entered into international cooperation with the aim of developing internationally accepted conservation methods, including with the complainants.

7.54 In addition, the United States argues that nothing in Article XX requires a Member to seek negotiation of an international agreement instead of, or before adopting unilateral measures. In any event, the United States claims it offered to negotiate but the complainants did not reply.

7.55 Regarding whether there is an obligation for a Member to negotiate, we recall our finding in paragraph 7.45 above that the WTO multilateral trading system would be undermined if Members were allowed to adopt measures making access of other Members to their market conditional upon the adoption by the exporting Members of certain conservation policies because it would not be possible for Members to meet conflicting requirements of such a nature. This is clearly a situation where elaboration of international standards would be desirable. We note in that respect that the WTO Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures promote the use of international standards.[665] We also recall our consideration in paragraph 7.52. The nature of the measures that the United States was seeking to obtain from the exporting countries concerned and the principles recalled in several international environmental agreements[666] imply that a country seeking to promote environmental concerns of such a nature should engage into international negotiations. The negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.

7.56 We note that Section 609 contains provisions calling upon the US Secretary of State to initiate negotiations as soon as possible for the development of bilateral or multilateral agreements for the

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[663]We also note that the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (to which some parties to this dispute are not parties) lists the relevant species of sea turtles in Annex I as "Endangered Migratory Species" and provides in its preamble as follows:

> "The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle;"

[664]It appears that WTO bodies support this multilateral approach. See footnote 657 to para. 7.50 above.

[665]See, e.g., Agreements on Technical Barriers to Trade, fourth preambular paragraph and Articles 2 and 9, Agreement on Sanitary and Phytosanitary Measures, Article 3.

[666]See, e.g., the 1992 Convention on Biological Diversity, the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. See, also, the 1992 Rio Declaration on Environment and Development.

protection and conservation of the species of sea turtles covered by that Section.[667] The judgement of the CIT which was handed over on 29 December 1995 required the US Administration to apply Section 609 on a world-wide basis (and no longer only to the Wider Caribbean/Western Atlantic region) by no later than 1 May 1996. This implied that, unless the exporting countries decided to use TEDs in their shrimp trawling activities - either of their own initiative or through negotiations - the import ban on wild shrimp would be applied to them as of that date. The United States told us of its efforts to have the deadline set in the CIT judgement postponed. However, we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants *before* the imposition of the import ban as a result of the CIT judgement. From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban.[668] As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.

7.57 Finally, we note that the United States argues that the use of TEDs has become a recognized multilateral environmental standard. In support of this, the United States firstly contends that the international community has long recognized the need to protect endangered species such as sea turtles. Secondly, several international conventions require parties to adopt conservation policies and urge them to ensure, through proper conservation measures, the maintenance of living resources, including non-target species caught in fishing operations. In support of these statements, the United States refers to the 1982 United Nations Convention on the Law of the Seas[669] and to paragraph 17.46(c) of the 1992 Agenda 21.[670] Thirdly, the United States claims that, either as a result of the Inter-American Convention on the Protection and Conservation of Sea Turtles or of their own initiative, 19 countries currently require TEDs on shrimp trawl vessels subject to their jurisdiction.

7.58 Moving to examine whether international obligations exist with regard to the protection of sea turtles, we first note that both the United States and the complainants have elaborated at length on the policies they have developed to protect sea turtles. Both the United States and the complainants have referred to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Parties to the dispute are all parties to CITES and the turtles species covered by the US measures at issue are all listed in Appendix I (Species threatened with extinction). The endangered nature of the species of sea turtles mentioned in Appendix I as well as the need to protect them are

[667]Section 609(a)(1) to (4).

[668]We note in this respect that, in the *Gasoline* case, the Appellate Body considered that a strong implication arose from the fact that the United States had not pursued the possibility of entering into cooperative arrangements, which would have been a means of alleviating the discrimination suffered by foreign refiners *vis-à-vis* US refiners. In that case, the Appellate Body concluded that the discrimination was not "inadvertent or unavoidable" and that the measure at issue constituted "unjustifiable discrimination" and a "disguised restriction on international trade".

[669]UN Doc.A.CONF.62/122, Articles 61(2), 61(4) and 119(1)(b).

[670]Agenda 21: Programme of Action for Sustainable Development, United Nation Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil.

consequently not contested by the parties to the dispute. However, CITES is about *trade in endangered species* and the subject of the US import prohibition (shrimp) is not the endangered species whose protection is sought through the import ban. We also note that the United States has mentioned that CITES neither authorizes nor prohibits the sea turtles conservation measures which are at issue in this dispute.[671] Therefore, we consider that CITES, even though its object is to contribute to the protection of certain species, does not impose on its members specific methods of conservation such as TEDs.

7.59 We also note that the development of the use of TEDs is the result of regional agreements or voluntary individual practices of States. In our opinion, the existence of regional agreements and individual practices may not as such suffice to reach the conclusion that the use of TEDs has become a recognized multilateral environmental standard applicable to the complainants. We derive from the submissions of the United States that the application of TEDs based on a convention is only regional. Moreover, if the provisions of the multilateral agreements referred to by the United States (the 1982 United Nations Convention on the Law of the Seas and the 1992 Agenda 21) effectively address the objective of limiting by-catches of non-target species in trawling operations, they do not require the application of specific methods nor, *a fortiori*, the use of TEDs.[672] Finally, even if a number of countries individually require TEDs on their shrimp trawlers, the fact that the complainants and third parties have objected to their use makes it difficult to conclude that the mandatory use of TEDs has been customarily accepted as a multilateral environmental standard applicable to the complainants.[673]

7.60 In conclusion, we do not consider that any of the arguments raised by the United States would justify a finding different from that reached in paragraph 7.49 above. We consider that our findings do not question the legitimacy of environmental policies, including those promoted through multilateral conventions.[674] We consider our findings to be in line with the principles embodied in many international agreements pursuant to which international cooperation is to be sought before having recourse to unilateral measures. Furthermore, the risk of a multiplicity of conflicting requirements clearly is reduced when requirements are decided in multilateral fora. Moreover, we do not suggest that import

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[671]See para. 3.168 of this Report.

[672]One of the experts referred to the FAO *Code of Conduct for Responsible Fisheries*, unanimously adopted on 31 October 1995 by the FAO Conference. This non-binding text provides for a broad range of guidelines for governments and those involved in fisheries activities with the aim of promoting responsible, sustainable fisheries. We note that the provisions of this document promote, *inter alia*, the further development and application of selective and environmentally safe fishing gear and practices in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems. Existing proper selective and environmentally safe fishing gear and practices should be recognized and accorded a priority in establishing conservation and management measures. Catches of non-target species, both fish and non fish species, should be minimized (Article 6.6). The Code also provides that its provisions should be interpreted and applied in accordance with the principles, rights and obligations established in the WTO Agreement (Article 11.2.1) and mentions that States should cooperate to develop internationally acceptable rules or standards for trade in fish and fishery products in accordance with the principles, rights and obligations established in the WTO Agreement (Article 11.2.13). Finally, the Code also provides that when a State introduces changes to its legal requirements affecting trade in fish and fishery products with other States, sufficient information and time should be given to allow the States and producers affected to introduce, as appropriate, the changes needed in their processes and procedures. In this connection, consultations with affected States on the time frame for implementation of the changes would be desirable (Article 11.3.4). This Code, even though it is not binding, is evidence of the methods currently favoured for the promotion and development of conservation methods (see, *inter alia*, the 1992 Convention on Biodiversity or the 1982 Convention on the Law of the Seas).

[673]See Article 38.1(b) of the Statute of the International Court of Justice and Brownlie, Principles of Public International Law, 4th edition (1990), pp. 4-5, quoting Brierly: "what is sought for [a custom to be considered as a general practice accepted as law] is a general recognition among States of a certain practice as obligatory".

[674]We do not question either the fact generally acknowledged by the experts that TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles.

markets must exist as an incentive for the destruction of natural resources. Rather, we address a particular situation where a Member has taken unilateral measures which, by their nature, could put the multilateral trading system at risk.

7.61 In reaching our conclusions, we based ourselves on the current status of the WTO rules and of international law. As far as the WTO Agreement is concerned, we considered that certain unilateral measures, insofar as they could jeopardize the multilateral trading system, could not be covered by Article XX. Our findings with respect to international norms confirm our reasoning regarding the WTO Agreement and GATT. General international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence a negotiated solution is clearly to be preferred, both from a WTO and an international environmental law perspective. However, our findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted. Nevertheless, in the present case, even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied without any serious attempt to reach, beforehand, a negotiated solution.

7.62 We therefore find that the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX.

3. Article XX(b) and (g)

7.63 In line with our approach described in para. 7.29 above, we do not find it necessary to examine whether the US measure is covered by the terms of Article XX(b) or (g).

F. ARTICLE XXIII:1(a) OF GATT 1994

7.64 We note that India, Pakistan and Thailand claim that the measure at issue represents a clear infringement of Articles I, XI and XIII of GATT 1994 and that it is well established that "in cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT ... the action would, *prima facie*, constitute a nullification or impairment ..." within the meaning of Article XXIII of GATT.[675]

7.65 We have found that the US measure at issue violates Article XI and is not justified under Article XX. We therefore conclude that there is a presumption of nullification or impairment within the meaning of Article 3.8 of the DSU, and that it is for the United States to rebut it. We do not consider that the United States has succeeded in rebutting the presumption that its breach of GATT has nullified or impaired benefits accruing to the complainants under GATT 1994.

VIII. CONCLUSIONS

8.1 In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.

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[675]The complainants referred to the Panel Report on the *Uruguayan Recourse to Article XXIII*, adopted on 16 November 1962, BISD 11S/95, para. 15.

8.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement.

IX. CONCLUDING REMARKS

9.1 We note that the issue in dispute was not the urgency of protection of sea turtles. The matter we have been asked to review is Section 609 as interpreted by the CIT and as applied by the United States on the date this Panel was established. It was not our task to review generally the desirability or necessity of the environmental objectives of the US policy on sea turtle conservation. In our opinion, Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose. We recall the statement contained in the 1996 report of the Committee on Trade and Environment for the Singapore Ministerial Conference to the effect that there should not be nor need be any policy contradiction between upholding and safeguarding an open, equitable and non-discriminatory multilateral trading system on the one hand and acting for the protection of the environment on the other.[676] We also note that we are bound to make findings on the basis of the existing norms, without prejudice to any potential developments in the relevant fora. In our view, and based on the information provided by the experts, the protection of sea turtles throughout their life stages is important and TEDs are one of the recommended means of protection within an integrated conservation strategy. We consider that the best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development[677], 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.

[676]See Report (1996) of the Committee on Trade and Environment, Op. Cit., para. 167.

[677]See para. 7.42.