

**UNITED STATES - IMPORT PROHIBITION OF
CERTAIN SHRIMP AND SHRIMP PRODUCTS**

AB-1998-4

Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY

**United States – Import Prohibition of Certain
Shrimp and Shrimp Products**

United States, *Appellant*
India, Malaysia, Pakistan, Thailand, *Appellees*

Australia, Ecuador, the European Communities,
Hong Kong, China, Mexico and Nigeria, *Third
Participants*

AB-1998-4

Present:

Feliciano, Presiding Member
Bacchus, Member
Lacarte-Muró, Member

I. Introduction : Statement of the Appeal

1. This is an appeal by the United States from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.¹ Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8 October 1996², Malaysia and Thailand requested in a communication dated 9 January 1997³, and Pakistan asked in a communication dated 30 January 1997⁴, that the Dispute Settlement Body (the "DSB") establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 of Public Law 101-162⁵ ("Section 609") and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), with standard terms of reference.⁶ On

¹WT/DS58/R, 15 May 1998.

²WT/DS58/1, 14 October 1996.

³WT/DS58/6, 10 January 1997.

⁴WT/DS58/7, 7 February 1997.

⁵16 United States Code (U.S.C.) §1537.

⁶WT/DSB/M/29, 26 March 1997.

10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997⁷, and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997.⁸ The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

2. The relevant factual and regulatory aspects of this dispute are set out in the Panel Report, in particular at paragraphs 2.1-2.16. Here, we outline the United States measure at stake before the Panel and in these appellate proceedings. The United States issued regulations in 1987 pursuant to the Endangered Species Act of 1973⁹ requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting.¹⁰ These regulations, which became fully effective in 1990, were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions.

3. Section 609 was enacted on 21 November 1989. Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia*, to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of ... sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;" Section 609(b)(1) imposed, not later than 1 May 1991, an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations that are certified. Two kinds of annual certifications are required for harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993

⁷WT/DS58/8, 4 March 1997.

⁸WT/DSB/M/31, 12 May 1997.

⁹Public Law 93-205, 16 U.S.C. 1531 *et. seq.*

¹⁰52 Fed. Reg. 24244, 29 June 1987 (the "1987 Regulations"). Five species of sea turtles fell under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).

and 1996¹¹: First, certification shall be granted to countries with a fishing environment which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.¹² According to the 1996 Guidelines, the Department of State "shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation: (a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, *e.g.*, any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur."¹³

4. Second, certification shall be granted to harvesting nations that provide documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of United States vessels.¹⁴ According to the 1996 Guidelines, the Department of State assesses the regulatory program of the harvesting nation and certification shall be made if the program includes: (i) the required use of TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program ... "; and (ii) "a credible

in the waters of a nation currently certified under Section 609 or "under conditions that do not adversely affect sea turtles", that is: (a) "Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested"; (b) "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States"; (c) "Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program ... , would not require TEDs"; and (d) "Species of shrimp, such as the pandalid species, harvested in areas where sea turtles do not occur."¹⁹ On 8 October 1996, the United States Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 in allowing the import of shrimp from non-certified countries if accompanied by a Shrimp Exporter's Declaration form attesting that they were caught with commercial fishing technology that did not adversely affect sea turtles.²⁰ A 25 November 1996 ruling of the United States Court of International Trade clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported from non-certified countries.²¹ On 4 June 1998, the United States Court of Appeals for the Federal Circuit vacated the decisions of the United States Court of International Trade of 8 October and 25 November 1996.²²

19 April 1996, the United States issued the 1996 Guidelines, extending Section 609 to shrimp harvested in *all* foreign countries effective 1 May 1996.

II. Arguments of the Participants and Third Participants

A. Claims of Error by the United States – Appellant

1. Non-requested Information from Non-governmental Organizations

9. The United States claims that the Panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to the United States, there is nothing

thereby endanger sea turtles, and those countries whose shrimp industries do employ TEDs in the course of harvesting shrimp.

12. The Panel, the United States believes, did not address the rationale of the United States for differentiating between shrimp harvesting countries. Rather, the Panel asked a different question: would the United States measure and similar measures taken by other countries "undermine the multilateral trading system"? The distinction between "unjustifiable discrimination" -- the actual term used in the GATT 1994 -- and the Panel's "threat to the multilateral trading system" test is crucial, in the view of the United States, and is posed sharply in paragraph 7.61 of the Panel Report, where the Panel states: "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" An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*³³ (the "WTO Agreement") acknowledges that the rules of trade should be "in accordance with the objective of sustainable development", and should seek to "protect and preserve the environment". Moreover, Article XX neither defines nor mentions the "multilateral trading system", nor conditions a Member's right to adopt a trade-restricting measure on the basis of hypothetical effects on that system.

13. In adopting its "threat to the multilateral trading system" analysis, the Panel fails to apply the ordinary meaning of the text: whether a justification can be presented for applying a measure in a manner which constitutes discrimination. Instead, the Panel expands the ordinary meaning of the text to encompass a much broader and more subjective inquiry. As a result, the Panel would add an entirely new obligation under Article XX of the GATT 1994: namely that Members may not adopt measures that would result in certain effects on the trading system. Under the ordinary meaning of the text, there is sufficient justification for an environmental conservation measure if a conservation purpose justifies a difference in treatment between Members. Further inquiry into effects on the trading system is uncalled for and incorrect.

14. In the view of the United States, the Panel also fails to take account of the context of the term "unjustifiable discrimination". The language of the Article XX chapeau indicates that the chapeau was intended to prevent the abusive application of the exceptions for protectionist or other discriminatory aims. This is consistent with the approach of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*³⁴ ("*United States – Gasoline*") and with the

³³Done at Marrakesh, 15 April 1994.

³⁴Adopted 20 May 1996, WT/DS2/AB/R.

preparatory work of the GATT 1947. In context, an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.

15. In the context of the GATT/WTO dispute settlement system, measures within the scope of Article XX can be expected to result in reduced market access or discriminatory treatment. To interpret the prohibition of "unjustifiable discrimination" in the Article XX chapeau as excluding measures which result in "reduced market access" or "discriminatory treatment" would, in effect, erase Article XX from the GATT 1994. The Panel's "threat to the multilateral trading system" analysis erroneously confuses the question of whether a measure reduces market access with the further and separate question arising under the chapeau as to whether that measure is nevertheless "justifiable" under one of the general exceptions in Article XX. The proper inquiry under the Article XX chapeau is whether a non-protectionist rationale, such as a rationale based on the policy goal of the applicable Article XX exception, could justify any discrimination resulting from the measure. Here, any "discrimination" resulting from the measure is based on, and in support of, the goal of sea turtle conservation.

16. The United States also argues that the Panel incorrectly applies the object and purpose of the *WTO Agreement* in interpreting Article XX of the GATT 1994. It is legal error to jump from the observation that the GATT 1994 is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules. The very language of Article XX indicates that the state interests protected in that article are, in a sense, "pre-eminent" to the GATT's goals of promoting market access.

17. Furthermore, the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for "optimal use of the world's resources in accordance with the objective of sustainable development", and should seek "to protect and preserve the environment". The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.

18. The additional bases, the United States continues, invoked by the Panel to support its "threat to the multilateral trading system" analysis -- i.e. the protection of expectations of Members as to the competitive relationship between their products and the products of other Members; the application

of the international law principle according to which international agreements must be applied in good faith; and the *Belgian Family Allowances*³⁵ panel report -- are without merit.

19. The United States submits that Section 609 does not threaten the multilateral trading system. The Panel did not find Section 609 to be an *actual* threat to the multilateral trading system. Rather, the Panel found that if other countries in other circumstances were to adopt the same type of measure here adopted by the United States *potentially*

25. The essential claim of the United States is that Section 609 meets each element required under Article XX(g). Sea turtles are important natural resources. They are also an exhaustible natural resource since all species of sea turtles, including those found in the appellees' waters, face the danger of extinction. All species of sea turtles have been included in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna³⁸ (the "CITES") since 1975, and other international agreements also recognize the endangered status of sea turtles.³⁹ In paragraph 7.58 of the Panel Report, the Panel noted: "The endangered nature of the species of sea turtles mentioned in [CITES] Annex I as well as the need to protect them are consequently not contested by the parties to the dispute."

26. The United States maintains Section 609 "relates to" the conservation of sea turtles. A "substantial relationship" exists between Section 609 and the conservation of sea turtles. Shrimp trawl nets are a major cause of human-induced sea turtle deaths, and TEDs are highly effective in preventing such mortality. The Panel noted that "TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles."

to protect and conserve the life and health of sea turtles, by requiring that shrimp imported into the United States shall not have been harvested in a manner harmful to sea turtles. Section 609 is "necessary" in two different senses. First, efforts to reduce sea turtle mortality are "necessary" because all species of sea turtles are threatened with extinction. Second, Section 609 relating to the use of TEDs is "necessary" because other measures to protect sea turtles are not sufficient to allow sea turtles to move back from the brink of extinction.

B. *India, Pakistan and Thailand – Joint Appellees*

1. Non-requested Information from Non-governmental Organizations

29. Joint Appellees submit that the Panel's ruling rejecting non-requested information is correct and should be upheld. According to Joint Appellees, the United States misinterprets Article 13 of the DSU in arguing that nothing in the DSU prohibits panels from considering information merely

31. Joint Appellees point to Appendix 3 of the DSU, which sets out Working Procedures for panels, and especially paragraphs 4 and 6 thereof, which limit the right to present panels with written submissions to parties and third parties. Thus, Joint Appellees argue, Members that are not parties or third parties cannot avail themselves of the right to present written submissions. It would be unreasonable, in the view of Joint Appellees, to interpret the DSU as granting the right to submit an unsolicited written submission to a non-Member, when many Members do not enjoy a similar right.

32. Joint Appellees maintain that, if carried to its logical conclusion, the appellant's argument

supported by the *WTO Agreement*, past GATT/WTO practice, and the accepted rules of interpretation set forth in the Vienna Convention on the Law of Treaties⁴² (the "Vienna Convention").

35. Joint Appellees argue that the flaw in Section 609, and in the appellant's argument, is the appellant's failure to accept that conditioning access to markets for a given product upon the adoption of certain policies by exporting Members, can violate the *WTO Agreement*. A Member must seek multilateral solutions to trade-related environmental problems. The threat to the multilateral trade system cited by the Panel is unrelated to the appellant's support for TEDs or turtle conservation. The threat is much simpler: the United States has abused Article XX by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down the multilateral path. The multilateral trade system is based on multilateral cooperation. If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist. By preventing the abuse of Article XX, the chapeau protects against threats to the multilateral trading system. The prevention

37. In the view of Joint Appellees, the Panel's decision mirrors the Appellate Body's reasoning in *United States – Gasoline*⁴⁴ and is therefore correct. The Appellate Body made three pronouncements in *United States – Gasoline* that influenced the Panel's ruling: first, that the chapeau, by its express terms, addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which the measure is applied⁴⁵; second, that it is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of Article XX⁴⁶; and, third, that the Appellate Body cautioned against the application of Article XX exceptions so as to "frustrate or defeat" legal obligations of the holder of rights under the GATT 1994.⁴⁷

38. Joint Appellees state that, in examining Section 609, the Panel paid particular attention to the manner in which the embargo is applied, and the Panel noted that the appellant conditioned market access on the adoption by exporting Members of conservation policies comparable to its own. The Panel also found that the United States did not enter into negotiations before it imposed its import ban. The Panel concluded that Section 609 abused Article XX and posed a threat to the multilateral

Article XX exception is being abused so as to frustrate or defeat the substantive rights of the appellees under the GATT 1994.

40. Joint Appellees submit that, even leaving aside the "threat to the multilateral trading system" language of the Panel, there is "compelling evidence" in the record that the appellant abused Article XX and its exceptions. Joint Appellees maintain that this abuse takes several forms, each instance "grave", and, by itself, adequate to support a finding that Section 609 has been applied in an abusive manner so as to frustrate the substantive rights of the appellees under the *WTO Agreement*.

41. First, Section 609 was applied without a serious attempt to reach a cooperative multilateral solution with Joint Appellees. The importance of multilateralism should be clear to the United States because it is an integral provision of Section 609, has been emphasised at numerous GATT and WTO meetings, is reflected in Article 23.1 of the DSU and in Principle 12 of the Rio Declaration on Environment and Development⁵¹, and was underscored by the Appellate Body in *United States - Gasoline*.⁵² The chapeau violation that the United States committed in *United States - Gasoline* is, Joint Appellees believe, the same violation committed by the United States in this dispute.

42. Second, the United States discriminated impermissibly among exporting countries, and between exporting countries and the United States in, *inter alia*, the following ways: (a) "[t]he Panel found that the Appellant negotiated an agreement to protect and conserve sea turtles with some WTO Members, but did not propose the negotiation of such an agreement with the ... Appellees until after having concluded its negotiations with the other Members. The Panel also found that Section 609 was already in effect against the Appellees by the time such negotiations were proposed"; (b) "[p]hase-in periods for the use of TEDs differed depending on the countries involved. 'Initially affected countries'

Body Report in *United States - Gasoline*⁵³ stands for the proposition that "unjustifiable discrimination" has a meaning larger than "indirect protection". The appellant, in effect, suggests that justifiability should be determined by reference to the specific Article XX exception invoked. If discrimination were to be justified merely on the basis of the policy goals of the particular exception invoked, all trade measures that meet the requirements of an Article XX exception would, *ipso facto*, satisfy the requirements of the chapeau. The chapeau would be rendered meaningless -- in violation of the commonly accepted rule of treaty interpretation which requires that meaning and effect be given to all treaty terms. The principles enunciated in the Appellate Body Report in *United States - Gasoline* would also become null.

44. Joint Appellees argue that both the Appellate Body in *United States - Gasoline*⁵⁴ and the Panel in the present case, recognized that the Article XX chapeau must be interpreted in light of the object and purpose of the *WTO Agreement*. This does not mean re-incorporating substantive GATT provisions into the analysis through the chapeau; it means instead examining a proposed Article XX derogation from the perspective of the broader policy goals of the *WTO Agreement*. The Panel identified two such goals: endeavouring to find cooperative solutions to trade problems; and preventing the risk that a multiplicity of conflicting trade requirements, each justified by reference to Article XX, could emerge. Section 609 jeopardizes both goals and poses a threat to the multilateral trading system.

45. Should the Appellate Body decide to reverse the Panel's legal findings with respect to the chapeau of Article XX and rule that Section 609 meets the requirements of the chapeau, Joint Appellees request that the Appellate Body make legal findings on Article XX(b) and Article XX(g) of the GATT 1994. They incorporate by reference their submissions to the Panel with respect to the

C. *Malaysia - Appellee*

1. Non-requested Information from Non-governmental Organizations

46. Malaysia submits that the Panel ruled correctly on this issue and that its ruling should be upheld as there is nothing in the DSU that *permits* the admission of unsolicited briefs from non-

application of the interpretative methods required by Article 3.2 of the DSU and that its process of interpretation does not add to Members' obligations in contravention of Article 3.2 of the DSU.

49. It was also noted by Malaysia that the Panel found on the facts that the import ban is applied

D. *Arguments of Third Participants*

1. Australia

53. Australia states that with respect to unsolicited submissions to the Panel by non-governmental organizations, the United States appears to suggest that the Panel's legal interpretation of the provisions of the DSU would limit the discretion the DSU affords to panels in choosing the sources of information they should consider. However, in the view of Australia, nothing in the Panel Report suggests that the Panel saw any legal obstacles to its requesting information from the non-governmental sources, if it had so wished. The decision of the Panel not to seek such information would appear to reflect the exercise of its discretion as provided by the DSU, and was not the result of any perceived legal obstacles. Australia notes that the United States has not claimed that the Panel's exercise of its discretion in this matter was inappropriate or involved an error in law.

54. Australia believes that the Panel correctly found that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". However, Australia supports the appeal by the United States of the Panel's finding that Section 609 "is not within the scope of measures permitted under the chapeau of Article XX." Australia submits that the Appellate Body should complete the analysis under Article XX and find that the United States has not demonstrated that its measure is in conformity with Article XX, including the provisions of the chapeau. Australia's concerns are that the United States has sought to impose a unilaterally determined conservation measure through restrictions on trade, and has not explored the scope for working cooperatively with other countries to identify internationally shared concerns about sea turtle conservation issues and consider ways to address these concerns. Therefore, the United States has imposed Section 609 in a manner that constitutes unjustifiable discrimination between countries where the same conditions prevail and also a disguised restriction on international trade.

55. Australia agrees with the United States that the Panel failed to interpret the terms of the chapeau of Article XX requiring that measures not be applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in accordance with customary rules of interpretation of public international law, in particular, with its ordinary meaning and in context.

56. In Australia's view, the Panel's decision to examine first whether Section 609 met the

begin examination of the legal issues raised by Article XX by considering the policy objective of the measure, and the connection between the policy objective and the measure, before turning to the chapeau. This approach would enable the examination of all aspects of the case that may be relevant in determining whether a particular measure meets the requirements of the chapeau. There is nothing in the wording of Article XX, read in its context and in the light of the object and purposes of the GATT 1994 and the *WTO Agreement*, to suggest that it is intended to exclude particular classes or types of measures from its coverage. The Panel erred in law in conducting this generalized inquiry. By its terms, Article XX would seem capable of application only on a case-by-case basis.

57. Article XX contains a series of tests designed to ensure that its provisions cannot be abused. There must be a presumption that a measure which meets the requirements of Article XX will not "undermine the WTO multilateral trading system." According to Australia, there is no textual basis for interpreting "unjustifiable discrimination" in such a broad manner that it becomes an independent test of this issue. Under the Panel's interpretation, the chapeau of Article XX could serve to nullify the effects of the paragraphs of that Article, rather than acting as a safeguard against their abuse.

58. Australia agrees with the United States that the Panel's interpretation of "unjustifiable discrimination" is based on an incorrect interpretation and application of the object and purpose of the *WTO Agreement* in construing the GATT 1994. The Panel has projected a view of the relationship between the objectives of the WTO multilateral trading system and environmental considerations which is at odds with the Ministerial Decision on Trade and Environment.⁵⁸

59. At the same time, to Australia, the alternative interpretation of "unjustifiable discrimination" put forward by the United States -- i.e. that discrimination is not "unjustifiable" where the policy goal of the Article XX exemption being applied provides a rationale for the justification -- is in error. This interpretation would weaken the important safeguard represented by the chapeau of Article XX of avoiding the abuse or illegitimate use of the Article XX exceptions. This interpretation confuses the tests applied under the two tiers of Article XX, fails to give effect to all the terms of the treaty and is not based on the ordinary meaning of "unjustifiable discrimination" in its context and in the light of the object and purpose of the *WTO Agreement* and the GATT 1994.

60. Australia maintains that Section 609 is applied by the United States in a manner constituting an unjustifiable discrimination and a disguised restriction on international trade. Australia observes that the only justification the United States appears to offer for Section 609 is that it is required to

⁵⁸Adopted by Ministers at the Meeting of the Trade Negotiations Committee at Marrakesh, 14 April 1994.

enforce a unilaterally determined conservation measure. However, Australia argues that the United States has not demonstrated that it has adequately explored means of addressing its concerns about shrimp harvesting practices and turtle conservation in other countries through cooperation with the governments concerned.

61. It is the view of Australia that Section 609 does not reasonably and properly differentiate between countries based on the risks posed to sea turtles in the exporting country's shrimp fishery. The Panel focused on exports of wild shrimp, and it is misleading to suggest that the Panel drew conclusions about whether the same conditions prevailed in certain other circumstances with respect to shrimp not subject to the import prohibition. Furthermore, the United States has provided no evidence that it took into account the views of other countries about sea turtle conservation issues within their jurisdictions, or their respective national programs, in making its determination of "countries where the same conditions prevail". In particular, the United States has provided no evidence that it considered the possibility that other Members may have had sea turtle conservation programs in place which differed from that of the United States but which were comparable and appropriate for their circumstances. Australia argues that the United States refused to certify Australia under Section 609 even though Australia's sea turtle conservation regime "extends well beyond protecting turtles from shrimping nets and ... includes cooperative programs with the shrimp industry to limit turtle bycatch."

62. In Australia's view, the legal obligations of the United States under the chapeau of Article XX required the United States to explore adequately means of mitigating the discriminatory and trade restrictive application of its measure. In particular, given the transboundary and global character of the environmental concern involved in this dispute, the United States should have consulted with affected Members to see whether the discrimination imposed by the measure in dispute could have been avoided, whether the restrictions on trade were required, whether alternative approaches were available, and whether the incidence of any trade measures could have been reduced.

2. Ecuador

63. Ecuador endorses the Panel's finding that Section 609 is inconsistent with Article XI:1 of the GATT 1994 and cannot be justified under Article XX of the GATT 1994. Ecuador is participating as a third party in this case in order to defend basic principles, such as the principle reaffirming that relations among states should be established on the basis of international law -- since it is unacceptable that one state impose its domestic policy objectives upon other states -- as well as the observance of more specific principles and aspects set forth in the agreements governing the

multilateral trading system. These include non-discrimination in national treatment, the protection of the environment and the implementation of environmental policy.

64. According to Ecuador, this dispute does not concern the desirability of implementing some kind of conservation policy, to which Ecuador attaches the utmost importance, but rather the manner in which such a policy should be implemented. It is unacceptable that internal legislation is applied in an arbitrary manner, creating a high degree of uncertainty, and consequently prejudice, in a sector that is central to Ecuador's national economy. Ecuador endorses the Panel's view that Members are free to establish their own environmental policies in a manner consistent with their WTO obligations.

3. European Communities

65. With respect to unsolicited submissions to a panel by non-governmental organizations, the European Communities asserts that Article 13 of the DSU clearly gives a panel the "pro-active discretion" to "seek" certain information that the panel believes may be relevant to the case at hand. In addition, non-governmental organizations are free to publish their views so that their opinion is heard by the general public, which could include the parties to a dispute, the WTO Secretariat or the members of a panel. However, the European Communities "wonders whether the text of the DSU

Treaty Establishing the European Community⁵⁹ to ensure a harmonious and balanced development of economic activities with respect for the environment. The principle of sustainable development, also laid down in the first paragraph of the preamble to the *WTO Agreement*, as well as the precautionary principle, play an important role in the implementation of all EC policies. The EC position is mirrored in public international law by statements of the International Court of Justice, stressing the significance of respect for the environment.⁶⁰

68. The European Communities is convinced that international cooperation is the most effective means to address global and transboundary environmental problems, rather than unilateral measures which may be less environmentally effective and more trade disruptive. Economic performance and environmental performance are not necessarily incompatible. The European Communities asserts that "[w]hile countries have the sovereign right to design and implement their own environmental policies through the measures they consider appropriate to protect their domestic environment -- including the life and health of humans, animals and plants -- all countries have a responsibility to contribute to the solution of international environmental problems." Thus, the European Communities considers that, "in general, the most effective means to attain the shared objectives relating to the conservation of global resources is by proceeding through the process of international co-operation."

69. To the European Communities, the approach to Article XX developed by previous panels and followed by the Appellate Body in *United States - Gasoline*⁶¹ -- that is, first examining whether a measure falls under one of the exceptions set out in paragraphs (a) to (j) of Article XX and, then, making an inquiry under the chapeau -- makes logical sense and could reasonably have been applied by the Panel in this case.

70. The European Communities agrees with the United States that it would be wrong for trade concerns to prevail over all other concerns in all situations under WTO rules. Article XX should not be construed so that trade concerns always prevail over the non-trade concerns reflected in that Article, including environmental concerns and those related to health and other legitimate policy objectives. It is up to panels and the Appellate Body to judge each case on its own merits, taking into account Members' rights and obligations.

⁵⁹Done at Rome, 25 March 1957, as amended.

⁶⁰The European Communities refers to: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996), *I.C.J.Rep.* pp. 241-242, para. 29; *Case Concerning the Gabčíkovo-Nagymoros Project*, (1998) 37 *International Legal Materials* 162, para. 140.

⁶¹Adopted 20 May 1996, WT/DS2/AB/R.

71. The European Communities also agrees with the United States that the adoption of the Panel's "test" -- namely, whether a measure is of a type that would threaten the security and predictability of the multilateral trading system -- would make trade concerns paramount to all other concerns and is thus inconsistent with the object and purpose of the *WTO Agreement*.

72. In the view of the European Communities, certain species, in particular migratory species, may require application of protective measures beyond usual territorial boundaries. Sea turtles should be considered a globally shared environmental resource because they are included in Annex I of CITES and are a species protected under the Convention on the Conservation of Migratory Species of Wild Animals.⁶² The appropriate way for Members concerned with the preservation of globally shared environmental resources to ensure such preservation is through internationally agreed solutions. Measures taken pursuant to such multilateral agreements would in general be allowed under the chapeau of Article XX.

73. However, the European Communities would not want to exclude the possibility, as a last resort, for a WTO Member, on its own, to take a "reasonable" measure with the aim of protecting and preserving a particular global environmental resource. However, such a measure would only be justified under exceptional circumstances and if consistent with general principles of public international law on "prescriptive jurisdiction". The Member would have to demonstrate that its environmentally protective measure was "reasonable", that is, no more trade restrictive than required to protect the globally shared environmental resource. Such a measure should be directly connected to the environmental objective and not go beyond what was required to limit the environmental damage. Finally, in such a case, the Member should have made genuine efforts to enter into cooperative environmental agreements with other Members. This is consistent with Principle 12 of the Rio Declaration on Environment and Development.

74. Given the Panel's factual finding that the United States did not enter into negotiations with the appellees before it imposed the import ban, the European Communities concludes that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles could not be found.

4. Hong Kong, China

75. Hong Kong, China states that it would be a "serious misunderstanding of the role of the WTO" if the multilateral trading system were viewed as impervious to environmental concerns. The

⁶²Done at Bonn, 23 June 1979, 19 International Legal Materials 15.

WTO system does not, and should not, impede the adoption of non-arbitrary and justifiable measures to protect the environment. Hong Kong, China fully shares the Panel's concern that the chapeau of Article XX should not be interpreted in a way that will threaten the security and predictability of trade relations under the *WTO Agreement*. With reference to the Appellate Body Report in *United States – Gasoline*⁶³, Hong Kong, China contends that an examination under the chapeau should focus on the manner in which the measure is applied, and answer the key question of whether the manner of application constitutes an abuse of the exceptions. Questions pertaining to the policy objective of the measure concerned should be set aside in examining the consistency of a measure with the chapeau.

76. Hong Kong, China argues that in line with the views of the Appellate Body in *United States – Gasoline*⁶⁴

proven to be the sole means by which the stated objective can be achieved. Otherwise, it must be acknowledged that other means may exist whose effectiveness can be demonstrated to be comparable to TEDs, and the United States must give the same treatment to shrimp harvested with measures that exporters could demonstrate are comparable in effectiveness to TEDs. Failure to do so renders Section 609 a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail. If the Appellate Body finds it necessary to examine the measure in question under sub-paragraphs (b) and (g) of Article XX, Hong Kong, China invites the Appellate Body to consider its arguments submitted to the Panel and reflected in the Panel Report, in particular, at paragraphs 4.44 and 4.45.

5. Nigeria

78. Nigeria confirms its views expressed in paragraph

III. Procedural Matters and Rulings

A. *Admissibility of the Briefs by Non-governmental Organizations Appended to the United States Appellant's Submission*

79. The United States attached to its appellant's submission, filed on 23 July 1998, three Exhibits, containing comments by, or "*amicus curiae* briefs" submitted by, the following three groups of non-governmental organizations⁶⁶: 1. the Earth Island Institute; the Humane Society of the United States; and the Sierra Club; 2. the Center for International Environmental Law ("CIEL"); the Centre for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and 3. the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development. On 3 August 1998, CIEL *et al.* submitted a slightly revised version of their brief.

80. In their joint appellees' submission, filed on 7 August 1998, Joint Appellees object to these briefs appended to the appellant's submission, and request that the Appellate Body not consider these briefs. Joint Appellees argue that the appellant's submission, including its three Exhibits, is not in conformity with the stipulation in Article 17.6 of the DSU that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel", nor with Rule 21(2) of the *Working Procedures for Appellate Review*. They ask the Appellate Body to reject as irrelevant the factual assertions made in certain paragraphs of the appellant's submission, as well as the factual information presented in the Exhibits. In their view, because of the incorporation of unauthorized material through the attachment of the Exhibits, the appellant's submission could no longer be considered a "precise statement" as required by Rule 21(2) of the *Working Procedures for Appellate Review*.

not in conformity with Article 17.4 of the DSU, nor with Rule 28(1) of the *Working Procedures for Appellate Review*, which vests the discretion to request additional submissions with the Appellate Body. According to Joint Appellees, the decision of the appellant to attach the Exhibits to its submission gives rise both to contradictions and internal inconsistencies, and raises serious procedural

85. We asked the United States to respond in writing to these questions by 13 August 1998, and offered an opportunity to the appellees and the third participants to respond, by 17 August 1998, to the answer filed by the United States concerning which aspects of these briefs it accepted and endorsed as part of its appeal as well as to the legal arguments made in the briefs by the non-governmental

with this issue separately from the issues raised by the appellant and addressed in the succeeding portions of this Appellate Body Report.

89. We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie*

93. According to Joint Appellees, vague notices of appeal should not be tolerated for at least two reasons. First, considerations of fundamental fairness and good faith mandate that the appellant should not be permitted to gain a tactical advantage through its failure to fulfil the requirements of the *Working Procedures for Appellate Review*. Second, carefully considered and well-drafted submissions benefit the decision-making process of the Appellate Body.

94. The United States in turn submits that the notice of appeal provided just the type of "*brief*

appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.

96. In this instance, the notice of appeal does communicate the decision by the United States to appeal certain legal issues covered and certain legal interpretations developed in the Panel Report. The notice then refers to the two allegedly erroneous findings of the Panel being appealed from -- the finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX; and the finding that accepting non-requested information from non-governmental sources is incompatible with the DSU. The notice did not cite the numbered paragraphs of the Panel Report containing the above findings, but Joint Appellees do not assert that that is necessary. The references in the notice of appeal to these two findings of the Panel are terse⁶⁷, but there is no mistaking which findings or interpretations of the Panel the Appellate Body is asked to review. We accordingly hold that the notice of appeal by the United States meets the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*, and deny the request of Joint Appellees to dismiss the entire appeal summarily on the sole ground of insufficiency of the notice of appeal.

97. It remains only to recall that the right of a party to appeal from legal findings and legal interpretations reached by a panel in a dispute settlement proceeding is an important new right established in the DSU resulting from the Uruguay Round. We believe that the provisions of Rule 20(2) and other Rules of the *Working Procedures for Appellate Review* are most appropriately read so as to give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation. It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions.

⁶⁷The interpretation of the Panel concerning non-requested information, and its finding on the inconsistency of Section 609 with Article XX of the GATT 1994, are themselves cast in fairly terse language; Panel Report, paras. 7.8, fourth sentence, 7.49 and 7.62.

IV. Issues Raised in This Appeal

98. The issues raised in this appeal by the appellant, the United States, are the following:

- (a) whether the Panel erred in finding that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied; and
- (b) whether the Panel erred in finding that the 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 of the GATT 1994.

V. Panel Proceedings and Non-requested Information

99. In the course of the proceedings before the Panel, on 28 July 1997, the Panel received a brief from the Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL"). Both are non-governmental organizations. On 16 September 1997, the Panel received another brief, this time from the World Wide Fund for Nature. The Panel acknowledged receipt of the two briefs, which the non-governmental organizations also sent directly to the parties to this dispute. The complaining parties -- India, Malaysia, Pakistan and Thailand -- requested the Panel not to consider the contents of the briefs in dealing with the dispute. In contrast, the United States urged the Panel to avail itself of any relevant information in the two briefs, as well as in any other similar communications.⁶⁸ The Panel disposed of this matter in the following manner:

⁶⁸Panel Report, para. 3.129

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.⁶⁹(emphasis added)

100. We note that the Panel did two things. First, the Panel declared a legal interpretation of certain provisions of the DSU: i.e., that accepting non-requested information from non-governmental sources would be "incompatible with the provisions of the DSU as currently applied." Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties, in such case, two additional weeks to respond to the additional

submissions considered by, a panel.⁷¹ Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.

Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. *This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.* We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." *Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.*

...

In this case, we find that the *Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF.*⁷⁴ (emphasis added)

104. The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

105. It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports* while *not unduly delaying the panel process.*"(emphasis added)

⁷⁴Adopted 22 April 1998, WT/DS56/AB/R, paras. 84-86.

106. The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to

the Panel, they were free to do so." ⁷⁵ In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by

... [W]e are of the opinion that the *chapeau* [of] 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. ... 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.⁷⁷

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

... Section 609, as applied, is a measure 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.⁷⁹

... it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, *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.*⁸⁰

...

We therefore find that *the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX.*⁸¹ (emphasis added)

113. Article XX of the GATT 1994 reads, in its relevant parts:

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member 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;

114. The Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. As we have emphasized numerous

⁷⁹Panel Report, para. 7.48.

⁸⁰Panel Report, para. 7.49.

⁸¹Panel Report, para. 7.62.

times⁸², these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.⁸³

115. In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied". In *United States - Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied*."⁸⁴(emphasis added) The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself*. For instance, the Panel stressed that it was addressing "a particular situation where a Member has taken unilateral measures which, *by their nature*, could put the multilateral trading system at risk."⁸⁵(emphasis added)

116. The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau. The Panel failed to scrutinize the *immediate*

⁸²See, for example, the Appellate Body Reports in: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17; *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, paras. 45-46; *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 13 February 1998, WT/DS56/AB/R, para. 47; and *European Communities - Customs Classification of Certain Computer Equipment*, adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 85.

⁸³I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 130-131.

⁸⁴Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

⁸⁵Panel Report, para. 7.60. The Panel also stated, in paras. 7.33-7.34 of the Panel Report:
... Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner.

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* ... (emphasis added)

context of the chapeau: i.e., paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which "undermine the WTO multilateral trading system"⁸⁶ must be regarded as "not within the scope of measures permitted under the chapeau of Article XX."⁸⁷ Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. In *United States - Gasoline*, we stated that it is "important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of '*abuse of the exceptions of [Article XX]*'."⁸⁸(emphasis added) The Panel did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception*.

117. The above flaws in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis. The Panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau."⁸⁹ If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)."⁹⁰ The Panel attempted to justify its interpretative approach in the following manner:

As mentioned by the Appellate Body in its report in the *Gasoline* case, 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 appl.88 5*

118. In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*⁹²(emphasis added)

119.

materiae, fall outside the justifying protection of Article XX's chapeau.⁹⁴ In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori*

*Periodicals*⁹⁷, having reversed the panel's findings on the issue of "like products" under the first sentence of Article III:2 of the GATT 1994, we examined the consistency of the measure with the second sentence of Article III:2. And, in *United States – Gasoline*⁹⁸, having reversed the panel's findings on the first part of Article XX(g) of the GATT 1994, we completed the analysis of the terms of Article XX(g), and then examined the application of the measure at issue in that case under the chapeau of Article XX.

124. As in those previous cases, we believe it is our responsibility here to examine the claim by the United States for justification of Section 609 under Article XX in order properly to resolve this dispute between the parties. We do this, in part, recognizing that Article 3.7 of the DSU emphasizes that: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Fortunately, in the present case, as in the mentioned previous cases, we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute.

B. *Article XX(g): Provisional Justification of Section 609*

125. In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(b) is claimed only in the alternative; that is, the United States suggests that we should look at Article XX(b) only if we find that Section 609 does not fall within the ambit of Article XX(g).⁹⁹ We proceed, therefore, to the first tier of the analysis of Section 609 and to our

course, with its "chapeau-down" approach, did not make a finding on whether the sea turtles that Section 609 is designed to conserve constitute "exhaustible natural resources" for purposes of Article XX(g). In the proceedings before the Panel, however, the parties to the dispute argued this issue vigorously and extensively. India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources."¹⁰⁰ In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed."¹⁰¹ Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous.¹⁰² They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources.¹⁰³ For its part, Malaysia added that sea turtles, being living creatures, could only be considered under Article XX(b), since Article XX(g) was meant for "nonliving exhaustible natural resources".¹⁰⁴ It followed, according to Malaysia, that the United States cannot invoke both the Article XX(b) and the Article XX(g) exceptions simultaneously.¹⁰⁵

128. We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.¹⁰⁶

¹⁰⁰Panel Report, para. 3.237.

¹⁰¹*Ibid.*

¹⁰²*Ibid.*

¹⁰³Panel Report, para 3.238. India, Pakistan and Thailand referred, *inter alia*, to E/PC/T/C.II/QR/PV/5, 18 November 1946, p. 79.

¹⁰⁴Panel Report, para. 3.240.

¹⁰⁵*Ibid.*

¹⁰⁶We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet" World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

129. The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*"¹⁰⁷:

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand*

Sea¹¹⁰ ("UNCLOS"), in defining the jurisdictional rights of coastal states in their exclusive economic zones, provides:

Article 56
Rights, jurisdiction and duties of the coastal State in the
exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the *natural resources, whether living or non-living*, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, ...(emphasis added)

The UNCLOS also repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity¹¹¹ uses the concept of "biological resources". Agenda 21¹¹² speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources". In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites:

Conscious that an important element of development lies in the conservation and management of *living natural resources* and that migratory species constitute a significant part of these resources; ...¹¹³(emphasis added)

¹¹⁰Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261. We note that India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the United States stated: "... we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law." Also see, for example, W. Burke, *The New International Law of Fisheries* (Clarendon Press, 1994), p. 40:

[the] coastal state sovereign rights over fisheries in a 200-mile zone are now considered part of customary international law. The evidence of state practice supporting this derives not only from the large number of coastal states claiming an EEZ [exclusive economic zone] in which such rights are advanced, but also from the fact that many of those states not claiming an EEZ assert rights not appreciably different than those in an EEZ. The provision for sovereign rights of the coastal state in [Article 56.1(a) of] the 1982 Convention is also a part of this evidence, but has particular weight because of the uniformity of state practice outside the Convention.

¹¹¹Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818. We note that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

¹¹²Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff.

¹¹³Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15. We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.

131. Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.¹¹⁴ Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g).¹¹⁵ We hold that, in line with the principle of effectiveness in treaty interpretation¹¹⁶, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

132. We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species *threatened with extinction* which are or may be affected by trade."¹¹⁷(emphasis added)

133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said:

¹¹⁴Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude "living" natural resources from the scope of application of Article XX(g).

¹¹⁵*United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, para. 4.4.

¹¹⁶See the following Appellate Body Reports: *United States - Gasoline*, adopted 20 May 1996, WT/DS52/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; and *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 16. See also Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), pp. 1280-1281; M.S. McDougal, H.D. Lasswell and J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven/Martinus Nijhoff, 1994), p. 184; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 118; D. Carreau, *Droit International* (Editions A. Pedone, 1994), para. 369; P. Daillier and A. Pellet, *Droit International Public*, 5th ed. (L.G.D.J., 1994), para. 172; L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público* (Tipografica Editora Argentina, 1985), pp. 109-110 and M. Diez de Velasco, *Instituciones de Derecho Internacional Público*, 11th ed. (Tecnos, 1997), p. 169.

¹¹⁷CITES, Article II.1.

... 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.* ...¹¹⁸(emphasis added)

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.¹¹⁹ Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

134. For all the foregoing reasons, we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

2. "Relating to the Conservation of [Exhaustible Natural Resources]"

135. Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.¹²⁰ None of the parties to this dispute question the genuineness of the commitment of the others to that policy.¹²¹

136. In *United States - Gasoline*, we inquired into the relationship between the baseline establishment rules of the United States Environmental Protection Agency (the "EPA") and the

¹¹⁸Panel Report, para. 7.53.

¹¹⁹See Panel Report, para. 2.6. The 1987 Regulations, 52 Fed. Reg. 24244, 29 June 1987, identified five species of sea turtles as occurring within 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*). Section 609 refers to "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on 29 June, 1987."

¹²⁰There are currently 144 states parties to CITES.

¹²¹We note that all of the participants in this appeal are parties to CITES.

conservation of natural resources for the purposes of Article XX(g). There, we answered in the affirmative the question posed before the panel of whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.¹²² We held that:

... The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. ... We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).¹²³

The substantial relationship we found there between the EPA baseline establishment rules and the conservation of clean air in the United States was a close and genuine relationship of ends and means.

137. In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused. There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of conserving sea turtles. First, Section 609, as elaborated in the 1996 Guidelines, excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as *pandalid* shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries.¹²⁴ The harvesting of such shrimp clearly does not affect sea turtles. Second, under Section 609(b)(2), the measure exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.

¹²²Adopted 20 May 1996, WT/DS2/AB/R, p. 19.

¹²³*Ibid.*

¹²⁴See the 1996 Guidelines, p. 17343.

139. There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.

140. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States

142. In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

3. "If Such Measures are Made Effective in conjunction with Restrictions on Domestic Production or Consumption"

143. In *United States – Gasoline*, we held that the above-captioned clause of Article XX(g),

... is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.¹²⁹

In this case, we need to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught by United States shrimp trawl vessels.

144. We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls.¹³⁰ These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles"¹³¹, with certain limited exceptions.¹³² Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions.¹³³ The United States government currently relies on monetary sanctions and civil penalties for enforcement.¹³⁴ The government has the ability to seize

¹²⁹Adopted 20 May 1996, WT/DS2/AB/R, pp. 20-21.

¹³⁰52 Fed. Reg. 24244, 29 June 1987.

¹³¹See the 1996 Guidelines, p. 17343.

¹³²According to the 1996 Guidelines, p. 17343, the exceptions are: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Service determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs.

¹³³Endangered Species Act, Section 11.

¹³⁴Statement by the United States at the oral hearing.

shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations.¹³⁵ We believe that, in principle, Section 609 is an even-handed measure.

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

C. *The Introductory Clauses of Article XX: Characterizing Section 609 under the Chapeau's Standards*

146. As noted earlier, the United States invokes Article XX(b) only if and to the extent that we hold that Section 609 falls outside the scope of Article XX(g). Having found that Section 609 does come within the terms of Article XX(g), it is not, therefore, necessary to analyze the measure in terms of Article XX(b).

147. Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses -- the "chapeau" -- of Article XX, that is,

Article XX

General Exceptions

Subject to the requirement that such measures are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (emphasis added)

We turn, hence, to the task of appraising Section 609, and specifically the manner in which it is applied under the chapeau of Article XX; that is, to the second part of the two-tier analysis required under Article XX.

1. General Considerations

148. We begin by noting one of the principal arguments made by the United States in its appellant's submission. The United States argues:

¹³⁵Statement by the United States at the oral hearing.

In context, *an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.* If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection.¹³⁶

...

[A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception, rather than for protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception.*¹³⁷
(emphasis added)

149. We believe this argument must be rejected. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX(g), and the treaty interpreter may then and there declare the measure inconsistent with Article XX(g). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX. On the other hand, it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau. To accept the argument of the United States would be to disregard the standards established by the chapeau.

150. We commence the second tier of our analysis with an examination of the ordinary meaning of the words of the chapeau. The precise language of the chapeau requires that a measure not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade." There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to

¹³⁶United States appellant's submission, para. 28.

¹³⁷United States appellant's submission, para. 53.

be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.¹³⁸ Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.¹³⁹ Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.

151. In *United States – Gasoline*, we stated that "the purpose and object of the introductory clauses of Article

preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of "full use of the resources of the world" set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ...¹⁴³

153. We note once more¹⁴⁴ that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.¹⁴⁵

154. We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the "CTE"). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows:

... *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, ...¹⁴⁶

¹⁴³Preamble of the *WTO Agreement*, first paragraph.

¹⁴⁴*Supra*, para. 129.

¹⁴⁵*Supra*, para. 131.

¹⁴⁶Preamble of the Decision on Trade and Environment.

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development¹⁴⁷, Agenda 21¹⁴⁸, and "its follow-up in the GATT, as reflected in the statement of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992 ..."¹⁴⁹ We further note that this Decision also set out the following terms of reference for the CTE:

- (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
- (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
 - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
 - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
 - surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have

the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.¹⁵¹ This interpretation of the chapeau is confirmed by its negotiating

¹⁵¹This view is consistent with the approach taken by the panel in *United States – Section 337 of the United States Tariff Act of 1930*, which stated:

history.¹⁵² The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.¹⁵³ Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.¹⁵⁴ In November 1946, the United Kingdom proposed

exercised bona fide, that is to say, reasonably."

arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

2. "Unjustifiable Discrimination"

161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt

program.¹⁶⁰ Furthermore, the harvesting country must have in place a "credible enforcement effort".¹⁶¹ The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only*

government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

165. Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members. The relevant factual finding of the Panel reads:

... 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. 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.¹⁶⁵(emphasis added)

167. *A propos* this failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting

(5) provide to the Congress by not later than one year after the date of enactment of this section: ...

(C) a full report on:
(i) the results of his efforts under this section; ...
(emphasis added)

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles¹⁶⁶ (the "Inter-American Convention") which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.¹⁶⁷

168. Second, the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21.¹⁶⁸ Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states, in part:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*(emphasis added)

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in

Moreover, we note that Article 5 of the Convention on Biological Diversity states:

... 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.

The Convention on the Conservation of Migratory Species of Wild Animals, which classifies the relevant species of sea turtles in its Annex I as "Endangered Migratory Species", states:

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.

Furthermore, we note that WTO Members in the Report of the CTE, forming part of the Report of the

conservation and recovery of sea turtle populations and their habitats within such party's land territory and in maritime areas with respect to which it exercises sovereign rights or jurisdiction.¹⁷² Such measures include, notably,

[t]he reduction, to the greatest extent practicable, of the incidental capture, retention, harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities, as well as the development, improvement and use of appropriate gear, devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III [of the Convention].¹⁷³

Article XV of the Inter-American Convention also provides, in part:

Article XV
Trade Measures

1. *In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organization (WTO), as adopted at Marrakesh in 1994, including its annexes.*
2. *In particular, and with respect to the subject-matter of this Convention, the Parties shall act in accordance with the provisions of the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as Article XI of the General Agreement on Tariffs and Trade of 1994. ... (emphasis added)*

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

¹⁷²Inter-American Convention, Article IV.1.

¹⁷³Inter-American Convention, Article IV.2(h).

171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its

Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996.¹⁷⁶ On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs. We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.¹⁷⁷

174. The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of governments in putting together and enacting the necessary regulatory programs and "credible

¹⁷⁶*Earth Island Institute v. Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

¹⁷⁷See *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 28. Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.

enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels.¹⁷⁸

175. Differing treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries. Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other exporting countries, including the appellees.¹⁷⁹ The level of these efforts is probably related to the length of the "phase-in" periods granted -- the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

176. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX.

3. "Arbitrary Discrimination"

177. We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that

pursuant to these provisions.¹⁸¹ In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

178. Moreover, the description of the administration of Section 609 provided by the United States in the course of these proceedings highlights certain problematic aspects of the certification processes applied under Section 609(b). With respect to the first type of certification, under Section 609(b)(2)(A) and (B), the 1996 Guidelines set out certain elements of the procedures for acquiring certification, including the requirement to submit documentary evidence of the regulatory program adopted by the applicant country. This certification process also generally includes a visit by United States officials to the applicant country.¹⁸²

179. With respect to certifications under Section 609(b)(2)(C), the 1996 Guidelines state that the Department of State "shall certify" any harvesting nation under Section 609(b)(2)(C) if it meets the criteria in the 1996 Guidelines "without the need for action on the part of the government of the harvesting nation ...".¹⁸³ Nevertheless, the United States informed us that, in all cases where a country has not previously been certified under Section 609, it waits for an application to be made before making a determination on certification.¹⁸⁴ In the case of certifications under Section 609(b)(2)(C), there appear to be certain opportunities for the submission of written evidence, such as scientific documentation, in the course of the certification process.¹⁸⁵

180. However, with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service.¹⁸⁶ With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision,

¹⁸¹In the oral hearing, the United States stated that "as a policy matter, the United States government believes that all governments should require the use of turtle excluder devices on all shrimp trawler boats that operate in areas where there is a likelihood of intercepting sea turtles" and that "when it comes to shrimp trawling, we know of only one way of effectively protecting sea turtles, and that is through TEDs."

¹⁸²Statement by the United States at the oral hearing.

¹⁸³1996 Guidelines, p. 17343.

¹⁸⁴Statement by the United States at the oral hearing.

¹⁸⁵Statement by the United States at the oral hearing.

¹⁸⁶Statement by the United States at the oral hearing.

whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C).¹⁸⁷ Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied¹⁸⁸ also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial.¹⁸⁹ No procedure for review of, or appeal from, a denial of an application is provided.¹⁹⁰

181. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification.

182. The provisions of Article X:3¹⁹¹ of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

¹⁸⁷Statement by the United States at the oral hearing.

¹⁸⁸We were advised at the oral hearing by the United States that these include: Australia, Pakistan and Tunisia.

¹⁸⁹Statement by the United States at the oral hearing.

¹⁹⁰Statement by the United States at the oral hearing.

¹⁹¹Article X:3 states, in part:

(a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters

...

183. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

184. We find, accordingly, that the United States measure is applied in a manner which amounts to

international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.¹⁹²

VII. Findings and Conclusions

187. For the reasons set out in this Report, the Appellate Body:

- (a) reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU;
- (b) reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and
- (c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

¹⁹²Adopted 20 May 1996, WT/DS2/AB/R, p. 30.

Signed in the original at Geneva this 8th day of October 1998 by: