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UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MALAYSIA

AB-2001-4

Report of the Appellate Body

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the parties under Article 21.3(b) of the DSU expired.[4] At the DSB meeting of 23 October 2000, Malaysia informed the DSB that it was not satisfied that the United States had complied with the recommendations and rulings of the DSB, and announced that it wished to seek recourse to a panel under Article 21.5 of the DSU.[5] The DSB referred the matter to the original panel.

3. Malaysia's complaint relates to a measure taken by the United States in the form of an import prohibition to protect and conserve certain species of sea turtles, considered to be an endangered species. This original measure, Section 609 of the United States Public Law 101-162 ("Section 609"), and its application are described in detail in the Appellate Body Report in *United States – Shrimp*.[6] The Appellate Body found that Section 609 was provisionally justified under Article XX(g) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In implementing the recommendations and rulings of the DSB, the United States did not amend Section 609, with the

> (a) [t]he measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994;
>
> (b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied. [12]

9. The Panel urged "Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment."[13] (footnote omitted)

10. On 23 July 2001, Malaysia notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Malaysia – Appellant*

1. Terms of Reference

12. Malaysia submits that the Panel erred in its examination of the new measure taken by the United States to comply with the recommendations and rulings of the DSB in *United States – Shrimp*.

13. Malaysia submits that it is a legal principle that an implementing measure must be examined for conformity with the covered agreements rather than for conformity with the recommendations and rulings of the DSB. This principle is borne out in the case in *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("

consistent with the relevant covered agreement. In Malaysia's view, the alternative courses of conduct or alternative measures referred to by the Appellate Body were *dicta*, and, therefore, the Panel erred in interpreting these *dicta* as positive conditions for determining GATT-consistency.

2. The Chapeau of Article XX of the GATT 1994

16. Malaysia appeals certain of the Panel's conclusions under the chapeau of Article XX of the GATT 1994. In particular, Malaysia submits that the Panel erred in considering the obligation of the United States as an obligation to *negotiate*, as opposed to an obligation to *conclude* an international agreement.

17. Malaysia notes that the Appellate Body made pertinent observations and comments in its analysis of the chapeau of Article XX of the GATT 1994 with respect to "arbitrary or unjustifiable discrimination". In its treatment of "unjustifiable discrimination" the Appellate Body stated "[a]nother 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".[18] In Malaysia's view, these remarks of the Appellate Body emphasize the need for the *conclusion* of an international agreement.

18. Malaysia submits that these remarks of the Appellate Body constitute *dicta*. The Panel misunderstood these remarks to mean that alternative actions, in particular a demonstration of prior good faith negotiation, would "insulate" a unilateral measure from being characterized as "unjustifiable discrimination". It is further submitted that in the context of the new measure, the Panel failed to examine whether, in the circumstances, the United States acted in a manner constituting "unjustifiable discrimination".

19. Malaysia further contends that if the conclusion of the Panel is allowed to stand, it will lead to the "incongruous" result that any WTO Member would be able to offer to negotiate in good faith an agreement incorporating its "unilaterally defined standards" before claiming that its measure is justified under the pertinent exceptions of Article XX of the GATT 1994. According to Malaysia, the conclusion of the Panel will thus lead to the result that if a WTO Member fails to *conclude* an

[18] Appellate Body Report, *United States – Shrimp*, *supra*, footnote 3, para. 166.

agreement, it could still claim that its application of a unilateral measure does not constitute "unjustifiable discrimination".

20. In addition, Malaysia submits that the Panel erred in concluding that the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. The Panel did not provide any reasoning for taking this view. The Appellate Body cited the Inter-American Convention merely as an "example" of efforts made by the United States to reach a multilateral solution in relation to the conservation of sea turtles. In no 20.

the original measure. This is evident, *inter alia*, from the fact that the term "comparable in effectiveness" is the language of the 1996 Guidelines, which implemented the original measure. The Appellate Body was in no way authorizing importing Members to impose unilateral measures conditioning market access on an exporting Member having measures "comparable in effectiveness" to their own measures. The Panel, therefore, erred in assuming that the new measure, which imposed this requirement of measures "comparable in effectiveness to the United States regulatory programme", could not constitute unjustifiable discrimination.

24. Malaysia also submits that the Panel erred in finding that the Revised Guidelines allowed for

B.

31. The United States contends that it has proceeded to remedy this aspect of unjustifiable discrimination identified by the Appellate Body. In particular, the United States has made substantial efforts to negotiate a sea turtle conservation agreement in the Indian Ocean and South-East Asia region. The Panel found that these efforts did remedy this aspect of unjustifiable discrimination.

32. The United States submits that Malaysia does not contest the core findings of the Panel, namely, that the United States has engaged in serious, good faith efforts to negotiate a sea turtle conservation agreement with the countries in the Indian Ocean and South-East Asia region. The Panel considered whether the United States had addressed the effort-to-negotiate aspect of "unjustifiable discrimination" identified by the Appellate Body, and properly found that the United States had indeed remedied this aspect of discrimination.

33. The United States submits that, instead of addressing the pertinent findings of the Panel, Malaysia makes a number of arguments that are either based on mischaracterization of the Panel Report, or that amount to a request for a reversal of the key findings of the Appellate Body Report in *United States – Shrimp*. Malaysia argues that the Panel found that "a demonstration of prior good faith negotiation would insulate a unilateral measure from being characterized as unjustifiable discrimination."[21] In the United States view, this argument fails to take into account the context of the Panel's discussions of efforts to negotiate, and thus amounts to a mischaracterization of the findings of the Panel.

34. The United States submits that the discussions by the Appellate Body and the Panel concerning negotiations arise in the context of applying the Article XX chapeau to the specific facts of this case. The language of the chapeau of Article XX requires that the WTO Member imposing the measure demonstrates that a measure is not applied in a manner that constitutes a means of unjustifiable discrimination. In the view of the United States, no single aspect of the application of the measure can, as Malaysia puts it, "insulate" the measure from an examination of other aspects of alleged discrimination.

35. The United States contends that it has addressed the "unjustifiable discrimination" test of the chapeau by making the *prima facie* case that the United Statesu321w, this 196iscrimmination" test of the21

that it applies the import restrictions even-handedly with respect to all countries that engage in shrimp trawl fishing in waters inhabited by endangered sea turtles.

36. The United States notes Malaysia's argument that the Panel "erred" in concluding that the Inter-American Convention on sea turtle conservation "can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations."[22] The United States submits that Malaysia has cited the Panel Report out of context. The Panel properly considered the United States efforts to negotiate for the purpose of determining whether the United States had remedied this aspect of discrimination identified by the Appellate Body. In this context, the Panel examined the efforts to negotiate involved in concluding the Inter-American Convention, and compared them with the efforts made by the United States to negotiate a sea turtle conservation agreement for the Indian Ocean and South-East Asia region. It was only in this sense that the Panel considered the Inter-American Convention to be a "benchmark".

37. Regarding Malaysia's argument that the Panel erred in finding the United States measure to be consistent with the *WTO Agreement* because "the United States had not proven that the unilateral and non-consensual procedures of the import prohibition had been eliminated", the United States submits that this argument runs counter to the finding in the Appellate Body Report reaffirming that nothing in the text of Article XX requires the elimination of a measure simply by virtue of it being "unilateral".

38. The United States refers to Malaysia's argument that the Panel erred in finding the United States measure to be consistent with the *WTO Agreement* because the Indian Ocean and South-East Asia negotiations constitute an "alternative course of action for securing the legitimate goals of the United States measure which was less restrictive." According to the United States, this argument is based on the flawed premise that a WTO Member must exhaust all possibilities for achieving its goals in other ways. The *WTO Agreement* contains no such requirement, and the Appellate Body made no such finding.

39. The United States submits that the Panel was correct in finding that the United States had remedied the aspect of unjustifiable discrimination identified in the Appellate Body Report relating to flexibility and consideration of local conditions.

40. The Appellate Body found that the most conspicuous flaw in the application of Section 609 was an apparent requirement that all other exporting Members adopt essentially the same policy as

[22]Malaysia's appellant's submission, para. 3.13.

that applied to domestic shrimp trawlers of the United States. The Appellate Body noted that the statutory provisions of Section 609 do not, in themselves, require that other WTO Members adopt essentially the same policies and enforcement practices as the United States, but that the guidelines then in effect appeared to lack flexibility. The Appellate Body also found that the guidelines did not appear to allow for flexibility in the consideration of different conditions that may exist in different harvesting nations.

41. The United States argues that Malaysia does not take issue with the Panel's analysis of the language in the Revised Guidelines. In addition, Malaysia did not seek to test the flexibility of the guidelines in practice by seeking certification of the Malaysian programme for conserving sea turtles in shrimp trawl fisheries.

42. The United States refers to Malaysia's argument that the Revised Guidelines do not address Malaysia's claim that "Malaysia does not practise shrimp trawling and the incidental catch of sea turtles is due to fish trawling and not shrimp trawling."[23] According to the United States, this "vague, undeveloped argument" does not rebut the *prima facie* case that the revised United States guidelines do in fact allow for flexibility and consideration of local conditions.

43. In the view of the United States, Malaysia's argument that the Panel "erred in taking the view that the issue of municipal law is insulated from scrutiny by panels" mischaracterizes the Panel's findings, and is without merit. The Panel considered the record before it, and properly concluded that under the Revised Guidelines, the importation of shrimp harvested by vessels using TEDs is allowed, even if the exporting nation has not been certified pursuant to Section 609.

44. With respect to the *Turtle Island* case, the United States submits that Malaysia does not present any arguments as to why the Panel was incorrect in its reasoning with respect to the relevant domestic law. As the Panel noted, the domestic court expressly declined to order any change in the Revised Guidelines, and those provisions of the Revised Guidelines that allow the importation of TED-caught shrimp from non-certified countries remain in effect.

[23]Malaysia's appellant's submission, para. 3.21.

C. *Arguments of the Third Participants*

1. Australia

(a) Terms of Reference

45. Australia submits that, in accordance with the provisions of Article 21.5 of the DSU, a panel is required to examine the consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. This requires the relevant panel to conduct a fresh factual and legal analysis of the revised or new measure.

46. It is Australia's view that the Panel in this case did not examine the measures taken to comply on that basis. Had it done so, Australia submits that the Panel would not have had sufficient grounds to arrive at the finding that Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the United States authorities, is justified under Article XX of the GATT 1994.

(b) The Chapeau of Article XX of the GATT 1994

47. Australia argues that the Panel erred in its conclusion that engagement by the United States in good faith negotiations would, in itself, necessarily be sufficient to meet the requirement of the chapeau of Article XX that its measure not be applied in a manner involving unjustifiable discrimination. This approach is inconsistent with the text of the chapeau of Article XX, and misapplies the reasoning of the Appellate Body Report.

48. Australia is of the view that the Panel misconstrued the Appellate Body findings, and the requirements of the chapeau of Article XX, in Tf -0.162 Tc 2.06382.06382 Tw (on tpmext ofments9p a 063nmbac

(b) The Chapeau of Article XX of the GATT 1994

54. The European Communities believes that international cooperation and negotiation must be preferred over unilateral action, particularly in the area of the protection of the environment, for all the reasons set out in the original Appellate Body Report. The European Communities emphasizes that international cooperation by its own nature is a process and not a result. Such cooperation is necessarily based on reciprocal efforts to resolve a common concern in the mutual interest.

55. Under the circumstances of the present case, it appears to the European Communities that international cooperation requires as a minimum the exchange of data and readily available scientific knowledge between all interested parties. Under the Revised Guidelines, the United States would admit Malaysian shrimp to the United States market provided that Malaysia shows, on the basis of relevant data, that either its turtle conservation programme is "comparable in effectiveness" to the conservation method chosen by the United States or, in the alternative, that such conservation methods are unnecessary under the conditions prevailing in the waters in which Malaysia's trawlers are operating. The United States is thus apparently seeking Malaysia's participation in international cooperation in the form of an exchange of available data.

56. The application of the new measure has become more flexible in comparison with the application of the original measure, and this is the basis for the Panel's finding that the contested United States measure is currently not in conflict with the prohibition of "unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994.

57. With respect to the *Turtle Island* case, the European Communities submits that the Panel correctly concluded that it was not for it to second-guess the outcome of a domestic dispute on the correct interpretation of a United States statute where a certain interpretation had been chosen by a domestic court, and that interpretation was challenged by the United States administration on appeal in the domestic courts.

58. The European Communities contends that it flows from the findings of the Panel that the ruling of the domestic court did not oblige the United States to violate its WTO obligations under the circumstances of the present case, particularly because the ruling was not final and because requests for interim relief were rejected. This appears to be a correct reading of the situation under the domestic law of the United States. In particular, the Revised Guidelines continue to be fully applied and therefore represent the situation that prevails under United States law.

59. In conclusion, the European Communities reiterates its position before the Panel that the complaint by Malaysia in this case is somewhat premature. Malaysia has not yet applied for certification. It is, therefore, not yet clear how the contested legislation would apply to imports of shrimp and shrimp products from Malaysia.

3. Hong Kong, China

(a) Terms of Reference

60. Hong Kong, China recalls that in its submission to the Panel, it expressed the view that the issue before a panel acting pursuant to Article 21.5 of the DSU is whether a new measure is in itself consistent with the *WTO Agreement*, particularly with the specific provisions with which the original panel or Appellate Body found the original measure inconsistent.

61. In the view of Hong Kong, China, panels should limit their review to the new measure, that is the measure adopted after the original panel (or the Appellate Body, as the case may be) has pronounced on the WTO-inconsistency; examine the new measure's consistency with the *WTO Agreement*; and further, examine to what extent the WTO Member has adequately implemented the recommendations and rulings of the original panel or the Appellate Body in adopting the new measure.

62. With respect to the judgment of the CIT in the *Turtle Island* case, Hong Kong, China, notes that in the absence of a clear mandate given to international adjudicating bodies, they commonly interpret only international law and treat domestic law, whenever warranted, as a factual matter. The same approach seemed to have been adopted by the Panel in the present case. Accordingly, Hong Kong, China, is of the view that the Panel was not called upon to speculate on the results of the appeal of the CIT judgment and make a ruling on that basis. Further, Hong Kong, China is mindful that the CIT decision is under appeal and it could be upheld by the highest domestic United States court.

4. India

(a) Terms of Reference

63. India submits that, as the measures taken to comply with the recommendations and rulings of the DSB are, by definition, new and different measures, it is possible that the new implementing measures could be inconsistent with provisions of WTO covered agreements that were not examined by the original panel. Therefore, a panel "established" under Article 21.5 of the DSU would have to

address a new and different factual and legal situation. India, therefore, agrees with Malaysia that a correct reading of Article 21.5 of the DSU required the Panel to examine the alleged inconsistency also with regard to WTO provisions that were not relevant for the resolution of the dispute in the original proceedings.

64. With respect to the *Turtle Island* case, India agrees with Malaysia that the Panel erroneously refrained from examining municipal law by treating it as a fact. In order to evaluate the WTO-consistency of municipal law, the interpretation given by a domestic court is of prime importance. India also concurs with Malaysia that the United States bears responsibility for the actions of all branches of its government, including the judiciary. The CIT is a judicial organ of the United States.

68. Japan submits however, that as the notion of "serious" and "good faith" is subjective in nature, a more objective test, such as a common recognition by other negotiating countries on the necessity of the measure in question, may be needed in addition to the criterion of "serious good faith efforts". Japan considers that the Panel should have included explicitly in its Report such a test of support for, or recognition of, the measure in question by other negotiating countries as a part of the negotiation requirement.

6. Mexico

(a) Terms of Reference

69. Mexico agrees with Malaysia that the terms of reference of a panel "established" pursuant to Article 21.5 of the DSU are to examine whether the measures taken to comply with the recommendations and rulings are consistent with the covered agreements, rather than with its own recommendations and rulings.

70. Mexico submits that the Panel in this case should have paid particular attention to the question whether the United States measure could be justified under Article XX of the GATT 1994 because it was not applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, or a disguised restriction on international trade. Mexico considers that the Panel should also have paid greater attention to the legal provisions themselves rather than to the Report of the Appellate Body which considered the original measure. In Mexico's view, it is not valid to argue that a WTO Member is authorized to adopt measures that would otherwise be inconsistent with Article XX of the GATT 1994, basing itself on an interpretation of Article XX limited to the circumstances and reasoning in a previous dispute settlement case.

7. Thailand

(a) Terms of Reference

71. Thailand is of the view that, in accordance with Article 21.5 of the DSU, the Panel was bound to evaluate the consistency of the "measures taken to comply" with the covered agreement concerned, which in the present case is the GATT 1994. Thailand agrees with the Panel that this was to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body.

72. However, Thailand's view differs from that of the Panel with respect to the scope of the "measures taken to comply" by the United States. Thailand disagrees with the approach of the Panel of examining only the consistency with the GATT 1994 of the Revised Guidelines, and disregarding Section 609.

73. Thailand submits that had the Panel examined the consistency of Section 609 as part of the United States implementing measure, the Panel would have found that, with regard to the import of TED-caught shrimp from non-certified countries, Section 609 is inconsistent with the chapeau of Article XX of GATT 1994, read in the light of the Appellate Body's finding in *United States – Shrimp*. To examine the consistency of Section 609 in this regard, had the Panel decided to do so, it would be necessary for the Panel to "seek a detailed understanding" of the legislation. As it is not for the Panel to interpret Section 609 itself, such understanding must be based on an authoritative interpretation of the legislation under the United States domestic legal system, at least in cases where authoritative interpretation is available.

74. Thailand argues that the fact that the Revised Guidelines have not been modified following the CIT judgment does not remove the current inconsistency of Section 609 with the GATT 1994. A breach of a treaty obligation does not necessarily involve an act of the executive branch. It can also involve an act of the legislature or the judiciary, or, as in this case, both of these branches of government.

III. Preliminary Procedural Matter

75. On 13 August 2001, we received a brief from the American Humane Society and Humane Society International (the "Humane Society brief"). This brief was also attached as an exhibit to the appellee's submission filed by the United States in this appeal.

76. As we have previously stated in our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"),5 Tc 0Aed in oa7nited 02mjTw e Um r1r

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77. At the oral hearing in this appeal, held on 4 September 2001, we asked the United States to clarify the extent to which it adopted the arguments set out in the Humane Society brief. The United States stated: "[t]hose are the independent views of that organization. We adopt them to the extent they are the same as ours but otherwise they are their independent views. We submit them for your consideration but not like our arguments where, for example, the panel is expected to address each one." Accordingly, we focus our attention on the legal arguments in the appellee's submission of the United States.

78. On 20 August 2001, we received a brief from Professor Robert Howse, a professor of international trade law at the University of Michigan Law School in Ann Arbor, Michigan, in the United States. In rendering our decision in this appeal, we have not found it necessary to take into account the brief submitted by Professor Howse.

IV. Issues Raised in this Appeal

79. The measure at issue in this dispute consists of three elements: Section 609 of the United States Public Law 101-162 ("Section 609"); the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines")[26]; and the application of both Section 609 and the Revised Guidelines in the practice of the United States. Both the United States and Malaysia agree on this definition of the measure.[27] So does the Panel.[28] So do we.

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[26]United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 – 36952. The Revised Guidelines are attached to the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (the "Panel Report"), WT/DS58/RW, 15 June 2001.

[27]In response to our questions at the oral hearing, the United States submitted that:

> The measure at issue in this appeal would be Section 609 as currently applied through the [United States] guidelines currently in effect.

In response to the same question, Malaysia stated that:

> Malaysia's contention is that the measure at issue is the 1999 revised guidelines which are the guidelines to implement Section 609 and their application.

[28]The Panel stated:

> The "implementing measure" is composed of Section 609 of Public Law 101-162, of the revised guidelines pursuant to Section 609, dated 8 July 1999, Federal Register, Vol. 64, No. 130, Public Notice 3086, p. 36946 (hereafter the "Revised Guidelines"), as well as of any practice under those Revised Guidelines.

(Panel Report, footnote 154 to para. 5.1)

80. With respect to this measure, the following issues are raised in this appeal:

(a) whether the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency with the relevant provisions of the GATT 1994 of the United States measure that was taken to comply with the recommendations and

the relevant provisions of the GATT 1994. Malaysia argues as well that the Panel erroneously based its analysis entirely on our Report in *United States – Shrimp*.

84. Malaysia's appeal on this point goes to the heart of what a panel is required to do in proceedings under Article 21.5 of the DSU, which states, in pertinent part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

85. In *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*

We stated further that:

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.[35]

86. As we ruled in our Report in *Canada – Aircraft (21.5)*, panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measure[] taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."[36]

87. When the issue concerns the consistency of a new measure "taken to comply"[37], the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of panels under Article 21.5 forms part of the process of the "*Surveillance of Implementation of the Recommendations and Rulings*" of the DSB. Toward that end, the task of a panel under Article 21.5 is to examine the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding. It is not part of the task of a panel under Article 21.5 to address a claim that has not been made.

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[35]Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 41.

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

[37]As opposed to a debate on the "existence … of measures taken to comply", which is not at issue here.

92. In its analysis of the consistency of Section 609 in this new case, the Panel stated that:

> The Panel considers that two questions have to be addressed in order to determine whether the implementing measure meets the

same.[41] Rightly, when examining the United States measure, the Panel took into account the status of municipal law at the time. In particular, the Panel took note of the fact that the CIT ruling in the *Turtle Island* case has not altered the content of the Revised Guidelines, and has not prevented the United States government from authorizing the importation of TED-caught shrimp from uncertified countries. In response to our questions at the oral hearing, the United States confirmed that the Department of State has received no order from the CIT to change its practice, and, therefore, the Department of State continues to apply the Revised Guidelines as before.[42] Malaysia has not shown otherwise.

95. There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States.[43] It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".

96. As we see it, then, the Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect 0 TDb1c reconclud

"shall be" adopted by the DSB, by consensus, but also that such Reports "shall be … unconditionally accepted by the parties to the dispute. …" Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, "… unconditionally accepted by the parties to the dispute", and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".

98. Therefore, so far as the examination of the measure at issue in this appeal is concerned, the task of the Panel with respect to Section 609, as part of that new measure, was limited to examining its *application.* More specifically, the task of the Panel as it related to Section 609 was to decide whether Section 609 has been *applied* by the United States in a way that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in violation of the chapeau of Article XX of the GATT 1994. Thus, given the structure of the new measure, the task of the Panel was to determine whether Section 609 has been *applied* by the United States, through the Revised Guidelines, either on their face, or in their application, in a manner that constitutes "arbitrary or unjustifiable discrimination".

99. This is precisely what the Panel did in this case. Therefore, we consider what the Panel did to be an appropriate fulfilment of its task under the DSU.

100. Malaysia argues with respect to the terms of reference that the Panel confined itself inappropriately to an examination of whether the new measure complied with the rulings and recommendations of the DSB, and, more specifically, with the rulings of the Appellate Body that were adopted by the DSB in the previous case relating to the original measure. In support of this argument, Malaysia quotes various selected passages from the Panel Report.[44]

[44]Malaysia's appellant's submission, para. 3.2. Malaysia refers to footnote 211 of paragraph 5.66 and paragraphs 5.116, 5.120, 5.125 and 5.134 of the Panel Report.

101. In our view, a reading of the Panel Report as a whole does not provide support for Malaysia's contention. Indeed, the Panel appears to have done precisely the opposite of what Malaysia asserts. For example, we note that, in identifying its terms of reference, the Panel explicitly quoted the terms of Article 21.5 of the DSU [45] as well as our Report in *Canada – Aircraft (21.5)*.[46]

102. The Panel then stated:

> The terms of reference of this Panel do not differ from the standard terms of reference applied in other Article 21.5 cases. In light of the reasoning of the Appellate Body mentioned above, the Panel considers that it is fully entitled to address all the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings *provided*, as recalled by the panel on *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 21.5 of the DSU*, that the claims are identified in the request for referring the matter to a panel under Article 21.5 of the DSU.[47] (footnotes omitted)

[45]Panel Report, para. 5.7.

[46]*Ibid*., para. 5.8. After quoting our Report in *Canada – Aircraft (21.5)*, the Panel concluded that:

> In light of the reasoning of the Appellate Body [in *Canada – Aircraft (21.5)*], the Panel considers that it is fully entitled to address all the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings . . . .

(*Ibid*., para. 5.9)

We agree with the Panel. However, we do not agree with Malaysia's reading of our Report in *Canada – Aircraft (21.5)*. As the United States submits: "[t]he issue in *Canada Aircraft* was whether the Article 21.5 Panel's review was limited to issues considered in the original panel and Appellate Body proceedings, and the Appellate Body found that the DSU provides no such limitation". (footnote omitted) (United States appellee's submission, para. 11) With respect to this case, the United States notes: "[t]he Panel's report makes no limitations on its consideration of Malaysia's arguments". (United States appellee's submission, para.13) On this, we agree with the United States. The Panel in this case examined all of Malaysia's arguments, and did not decline to consider an argument on its merits on the ground that such argument had not been raised before the original panel or the Appellate Body.

[47]Panel Report, para. 5.9.

103. Furthermore, in its analysis, the Panel examined Malaysia's claim that the new measure taken by the United States continued to violate Article XI:1 of the GATT 1994, and stated as follows:

> The Panel notes that the elements of the original measure found to be incompatible with Article XI:1 in the Original Panel Report are still part of the implementing measure, i.e. Section 609 as currently applied by the United States. In particular, the United States continues to apply an import prohibition on shrimp and shrimp products harvested in a manner determined to be harmful to sea turtles. We note that the United States does not contest the fact that it applies such a prohibition of import. We consider that the prohibition at issue falls within the "prohibitions or restrictions, other than duties, taxes or other charges" maintained by a Member on the importation of a product from another Member, in contravention of Article XI:1.
>
> The Panel therefore concludes that the measure taken by the United States to comply with the recommendations and rulings of the DSB in this case *violates Article XI:1 of the GATT 1994*.[48] (emphasis added)

104. The Panel then examined the provisional justification under Article XX(g) of the GATT 1994 of Section 609, which it had correctly found to be unchanged, in the following terms:

> As a result, when considering the arguments of the United States, we shall first determine the consistency of the implementing measure under paragraph (g) of Article XX. If we find the implementing measure to be "provisionally justified" under paragraph (g), we shall proceed to determine whether it is applied in *conformity with the chapeau of Article XX*.[49] (emphasis added)
>
> …
>
> We therefore conclude that the implementing measure is provisionally justified *under paragraph (g) of Article XX*. We proceed with the second tier of the method applied by the Appellate Body in this case, i.e. the "further appraisal of the *same measure* under the introductory clause of Article XX."[50] (emphasis added, footnote omitted)

105. This analysis shows clearly that the Panel properly understood the scope of its mandate. Furthermore, the Panel's examination of whether the measure applied by the United States constitutes a "disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994 demonstrates that the Panel understood very well the scope of its mandate. The Panel stated:

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[48]Panel Report, paras. 5.22-5.23.

[49]*Ibid*., para. 5.28.

[50]*Ibid*., para. 5.42.

> The Panel notes that it is instructed by Article 21.5 of the DSU to review "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The fact that the Appellate Body did not have to make a finding that the original measure was a disguised restriction on trade does not mean that the measure adopted to implement the DSB recommendations and rulings is not a disguised restriction on trade. The Panel also recalls that, as the party invoking Article XX, the United States bears the burden of proving that its implementing measure meets *all* the relevant requirements of the chapeau. This implies that the United States make a *prima facie* case that the implementing measure is not a disguised restriction on trade.[51]

106. Thus, the Panel examined the measure in the light of the relevant provisions of the GATT 1994, and, in doing so, made numerous references both to whether a violation of the GATT 1994 had occurred and to whether such a violation was nonetheless justified under Article XX. Accordingly, in reading the Panel Report as a whole, we find no support for Malaysia's argument that the Panel examined the new measure applied by the United States *only* in the light of the recommendations and rulings of the DSb3139 5nht of the relevant proviinh139 Twevant pros tha6 in re 11.25 Tf 0 T

relevant to the Panel's disposition of the issues before it — the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning. Further, we see no indication that, in doing so, the Panel limited itself merely to examining the new measure from the perspective of the recommendations and rulings of the DSB.

110. We find, therefore, that the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of the United States measure taken to comply with the recommendations and rulings of the DSB in *United States – Shrimp*.

VI. The Chapeau of Article XX of the GATT 1994

111. The second issue raised in this appeal is whether the Panel erred in finding that the new measure at issue is applied in a manner that no longer constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is, therefore, within the scope of measures permitted under Article XX of the GATT 1994.[53]

112. In its Notice of Appeal, Malaysia appeals the finding of the Panel that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied."[54] In its appellant's submission, Malaysia has put forward six points of disagreement with respect to the reasoning and findings of the Panel that lead Malaysia to conclude that, despite the changes made by the United States to the original measure, elements of "arbitrary or unjustifiable discrimination" still remain in the manner in which the new measure is applied by the United States.

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[52]Appellate Body Report, ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 108.

[53]Panel Report, para. 5.137.

[54]*Ibid*., para. 6.1.

113. Malaysia argues that:

— the Panel erred in interpreting our previous ruling in

114. Malaysia's first three arguments relate to the nature and extent of the duty of the United States to pursue international cooperation in protecting and conserving endangered sea turtles. Malaysia's last three arguments relate to the flexibility of the Revised Guidelines. Our analysis will address each of these arguments made by Malaysia.

A. *The Nature and the Extent of the Duty of the United States to Pursue International Cooperation in the Protection and Conservation of Sea Turtles*

115. Before the Panel, Malaysia asserted that the United States should have negotiated and *concluded* an international agreement on the protection and conservation of sea turtles before imposing an import prohibition. Malaysia argued that "by continuing to apply a unilateral measure after the end of the reasonable period of time pending the conclusion of an international agreement, the United States failed to comply with its obligations under the GATT 1994".[61] The United States replied that it had in fact made serious, good faith efforts to negotiate and *conclude* a multilateral sea turtle conservation agreement that would include both Malaysia and the United States, and that these efforts, as detailed and documented before the Panel, should, in view of our previous ruling, be seen as sufficient to meet the requirements of the chapeau of Article XX. The Panel found as follows:

> … The Panel first recalls that the Appellate Body considered "the *failure of the United States to engage the appellees*, as well as other Members exporting shrimp to the United States, in serious across-the-board negotiations *with the objective of concluding bilateral or multilateral agreements* for the protection and conservation of sea turtles, *before* enforcing the import prohibition against the shrimp exports of those other Members" bears heavily in any appraisal of justifiable or unjustifiable discrimination within the meaning of the chapeau of Article XX. From the terms used, it appears to us that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms "with the objective"; it would have simply stated that an agreement had to be concluded.
>
> …

[61]Panel Report, para. 5.1.

> We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a "one-off" exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement. Indeed, we consider the reference of the Appellate Body to a number of international agreements promoting a multilateral solution to the conservation concerns subject to Section 609 to be evidence that a multilateral, ideally non-trade restrictive, solution is generally to be preferred when dealing with those concerns, in particular if it is established that it constitutes "an alternative course of action reasonably open".
>
> …
>
> We understand the Appellate Body findings as meaning that the United States has an obligation to make serious good faith efforts to address the question of the protection and conservation of sea turtles at the international level. We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality.[62] (footnotes omitted)

116. Malaysia appeals these findings of the Panel. According to Malaysia, demonstrating serious, good faith efforts to *negotiate* an international agreement for the protection and conservation of sea turtles is not sufficient to meet the requirements of the chapeau of Article XX.[63] Malaysia maintains that the chapeau requires instead the *conclusion* of such an international agreement. As Malaysia sees it, the "pertinent observations and comments" that we made in *United States – Shrimp* that could be construed to suggest otherwise "constitute dicta" in our previous Report.[64] On this basis, Malaysia argues that the Panel used that Report improperly in attempting to justify its reasoning that serious, good faith efforts alone would be enough to meet the requirements of the chapeau.[65] Further, Malaysia submits that the Panel misread our Report with respect to the Inter-American Convention, and, consequently, did not use that Convention properly in its analysis.[66]

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[62]Panel Report, paras. 5.63, 5.67 and 5.76.

[63]Malaysia's appellant's submission, para. 3.11.

[64]*Ibid.*, paras. 3.10-3.11.

[65]*Ibid*., para. 3.11.

[66]*Ibid*., para. 3.13.

120. Moreover, we observed there that Section 609, which was part of that original measure and remains part of the new measure at issue here, calls upon the United States Secretary of State 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 commercial fishing operations … for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles."[70] We concluded in that appeal that the United States had failed to comply with this statutory requirement in Section 609.

121. As we pointed out there:

> Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles … which concluded in 1996, the record before the Panel does not indicate any serious,

can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.

123. Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

124. As we stated in *United States – Shrimp*, "the protection and conservation of highly migratory species of sea turtles … demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations".[73] Further, 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".[74] For example, Principle 12 of the Rio Declaration on Environment and Development states, in part, that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus".[75] Clearly, and "as far as possible", a multilateral approach is

[73]Appellate Body Report, *supra*, footnote 24, para. 168.

be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation."[83]

130. At no time in *United States – Shrimp* did we refer to the Inter-American Convention as a "benchmark". The Panel might have chosen another and better word — perhaps, as suggested by Malaysia, "example".[84] Yet it seems to us that the Panel did all that it should have done with respect to the Inter-American Convention, and did so consistently with our approach in *United States – Shrimp*. The Panel compared the efforts of the United States to negotiate the Inter-American Convention with one group of exporting WTO Members with the efforts made by the United States to negotiate a similar agreement with another group of exporting WTO Members. The Panel rightly used the Inter-American Convention as a factual reference in this exercise of comparison. It was all the more relevant to do so given that the Inter-American Convention was the only international agreement that the Panel could have used in such a comparison. As we read the Panel Report, it is clear to us that the Panel attached a relative value to the Inter-American Convention in making this comparison, but did not view the Inter-American Convention in any way as an absolute standard. Thus, we disagree with Malaysia's submission that the Panel raised the Inter-American Convention to the rank of a "legal standard". The mere use by the Panel of the Inter-American Convention *as a basis for a comparison* did not transform the Inter-American Convention into a "legal standard". Furthermore, although the Panel could have chosen a more appropriate word than "benchmark" to express its views, Malaysia is mistaken in equating the mere use of the word "benchmark", as it was used by the Panel, with the establishment of a legal standard.

131. The Panel noted that while "factual circumstances may influence the duration of the process or the end result, … any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention."[85] Such a comparison is a central element of the exercise to determine whether there is "unjustifiable discrimination". The Panel then analyzed the negotiation process in the Indian Ocean and South-East Asia region to determine whether the efforts made by the United States in those negotiations were serious, good faith efforts comparable to those made in relation with the Inter-American Convention. In conducting this analysis, the Panel referred to the following elements:

[83]Panel Report, para. 5.71.

[84]Malaysia's appellant's submission, para. 3.13.

[85]Panel Report, para. 5.71.

— A document communicated on 14 October 1998 by the United States Department of State to a number of countries of the Indian Ocean and the South-East Asia region. This document contained possible elements of a regional convention on sea turtles in this region.[86]

— The contribution of the United States to a symposium held in Sabah on 15-17 July 1999. The Sabah Symposium led to the adoption of a Declaration calling for the negotiation and implementation of a regional agreement throughout the Indian Ocean and South-East Asia region.[87]

— The Perth Conference in October 1999, where participating governments, including the United States, committed themselves to developing an international agreement on sea turtles for the Indian Ocean and South-East Asia region.[88]

— The contribution of the United States to the Kuantan round of negotiations, 11-14 July 2000. This first round of negotiations towards the conclusion of a regional agreement resulted in the adoption of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the "South-East Asian MOU"). The Final Act of the Kuantan meeting provided that before the South-East Asian MOU can be finalized, a Conservation and Management Plan must be negotiated and annexed to the South-East Asian MOU.[89] At the time of the Panel proceedings, the Conservation and Management Plan was still being drafted.[90]

132. On this basis and, in particular, on the basis of the "contribution of the United States to the steps that led to the Kuantan meeting and its contribution to the Kuantan meeting itself"[91], the Panel concluded that the United States had made serious, good faith efforts that met the "standard set by the Inter-American Convention."[92] In the view of the Panel, whether or not the South-East Asian MOU is a legally binding document does not affect this comparative assessment because differences in

[86]Panel Report, para. 5.79.

[87]*Ibid*.

[88]*Ibid*.

[89]*Ibid*., para. 5.81.

[90]*Ibid*., para. 5.84.

[91]*Ibid*., para. 5.82.

[92]*Ibid*.

"factual circumstances have to be kept in mind".[93] Furthermore, the Panel did not consider as decisive the fact that the final agreement in the Indian Ocean and South-East Asia region, unlike the Inter-American Convention, had not been concluded at the time of the Panel proceedings. According to the

agreement, "Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination, as identified by the Appellate Body in its Report".[97]

B. The Flexibility of the Revised Guidelines

135.

having regulatory programs "comparable" to that of the United States, and even if the measure is applied in such a manner, it results in "arbitrary or unjustifiable discrimination" because it conditions access to the United States market on compliance with policies and standards "unilaterally" prescribed by the United States. Thus, Malaysia puts considerable emphasis on the "unilateral" nature of the measure, and Malaysia maintains that our previous Report does not support the conclusion of the Panel on this point.[101]

137. We recall that, in *United States – Shrimp*, we stated:

> It appears to us … that *conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX*. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.[102] (emphasis added)

138. In our view, Malaysia overlooks the significance of this statement. Contrary to what Malaysia suggests, this statement is not "*dicta*". As we said before, it appears to us "that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX." This statement expresses a principle that was central to our ruling in *United States – Shrimp*.

139. A separate question arises, however, when examining, under the chapeau of Article XX, a measure that provides for access to the market of one WTO Member for a product of other WTO Members *conditionally*. Both Malaysia and the United States agree that this is a common aspect of the measure at issue in the original proceedings and the new measure at issue in this dispute.

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[101]Malaysia's appellant's submission, paras. 3.17-3.19.

[102]Appellate Body Report, *supra*, footnote 24, para. 121.

140. In

142. The Panel reads our previous Report to state that a major deficiency of the original measure was its lack of flexibility, in both design and application. The Panel sees our previous Report as suggesting that the original measure was applied in a manner which constituted "unjustifiable discrimination" essentially "because the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries."[105] The Panel reasons that a measure that, in its design and application, allows certification of exporting Members having regulatory programmes "comparable in effectiveness" to that of the United States does take into account the specific conditions prevailing in the exporting

145. Malaysia also argues that the measure at issue is not flexible enough to meet the requirement of the chapeau of Article XX relating to "unjustifiable or arbitrary discrimination" because the Revised Guidelines do not provide explicitly for the specific conditions prevailing in Malaysia.

Protection Measures), the "Department of State recognizes that sea turtles require protection throughout their life-cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting."[110] Additionally, Section II.B(c)(iii) states that "[i]n making certification determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programmes to protect nesting beaches and other habitat, prohibitions on the direct take of sea turtles, national enforcement and compliance programmes, and participation in any international agreement for the protection and conservation of sea turtles."[111] With respect to the certification process, the Revised Guidelines specify that a country that does not appear to qualify for certification will receive a notification that "will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification, and invite the government of the harvesting nation to provide … any further information." Moreover, the Department of State commits itself to "actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification."[112]

148. These provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification. As Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation. [113]

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[110]Revised Guidelines, Section II.B(c)(iii); *see*, Panel Report, p. 106.

[111]*Ibid*.

[112]Revised Guidelines, Section II.C, Panel Report, p. 107. *See also*, Revised Guidelines, Section II.D, Panel Report, p. 108.

[113]In this respect, we note that the European Communities stated that:

> … the complaint by Malaysia in this case is somewhat premature. As it appears Malaysia has not yet applied for certification and it is therefore not yet clear how the contested legislation would apply to imports of shrimp and shrimp products from Malaysia.

(European Communities' third participant's submission, para. 27)

the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied".[117]

VII. Findings and Conclusions

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

(a) *finds* that the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of the United States measure taken to comply with the recommendations and rulings of the DSB in *United States - Shrimp*; and

(b) *upholds* the finding of the Panel, in paragraph 6.1 of its Report, that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied".

154. As we have upheld the Panel's finding that the United States measure is now applied in a manner that meets the requirements of Article XX of the GATT 1994, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original at Geneva this 2nd day of October 2001 by:

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James Bacchus
Presiding Member

_____ _____

A.V. Ganesan
Member

Julio Lacarte-Muró
Member