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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

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Import Prohibition of Certain Shrimp and Shrimp Products
Recourse to Article 21.5 of the DSU by Malaysia

Malaysia, *Appellant*
United States, *Appellee*

Australia, *Third Participant*
European Communities, *Third Participant*
Hong Kong, China, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
Thailand, *Third Participant*

AB-2001-4

Present:

Bacchus, Presiding Member
Ganesan, Member
Lacarte-Muró, Member

I. Introduction

1. Malaysia appeals from certain issues of law and legal interpretations in 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").[1] In accordance with Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Malaysia requested that the Dispute Settlement Body (the "DSB") refer to a panel its complaint with respect to whether the United States had complied with the recommendations and rulings of the DSB in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*").

2. The background to this dispute is set out in detail in the Panel Report.[2] On 6 November 1998, the DSB adopted the reports of the original panel and the Appellate Body in *United States – Shrimp*.[3] The DSB recommended that the United States bring its import prohibition into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). On 6 December 1999, the period of time for implementation established by

[1] WT/DS58/RW, 15 June 2001.

[2] Panel Report, paras. 1.1-1.5 and 2.12-2.21.

[3] Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998; original panel report, WT/DS58/R and Corr.1, as modified by the Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998.

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 result that the import prohibition is still in effect. However, the United States Department of State issued 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").[7] These Revised Guidelines replace the guidelines issued in April 1996 that were part of the original measure. This dispute between Malaysia and the United States arises in relation to the import prohibition of shrimp and shrimp products provided for by Section 609, and its application by the United States.

4. Section 609, the Revised Guidelines, and their application, are described in the Panel Report.[8] In the following paragraphs, we set out those aspects of the Revised Guidelines that are pertinent to the consideration of the issues raised in this appeal.

5. Section 609(b)(2) provides that the import prohibition on shrimp does not apply to harvesting nations that are "certified" according to criteria set by the United States. The Revised Guidelines set forth the criteria for certification. The stated goal of the programme set out in the Revised Guidelines is the same as that set out in the programme of the original guidelines, namely, to protect endangered sea turtle populations from further decline by reducing their incidental mortality in commercial

[4]WT/DS58/15, 15 July 1999.

[5]Malaysia's recourse to a panel was also in accordance with a bilateral agreement it had concluded with the United States in respect of the procedures to be followed under Articles 21.5 and 22 of the DSU. *See*, WT/DS58/16, 12 January 2000.

[6]*Supra,* footnote 3, paras. 3-6.

[7]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.

[8]Panel Report, paras. 2.5 – 2.11 and 2.22 – 2.32.

shrimp trawling. A central element of the United States programme is that commercial shrimp trawlers are required to use Turtle Excluder Devices ("TEDs") approved in accordance with standards established by the United States National Marine Fisheries Service. Where the government of a harvesting country seeks certification on the basis of having adopted a programme that is based on TEDs, certification will be granted if this government's programme includes a requirement that commercial shrimp trawlers use TEDs that are "*comparable in effectiveness*" to those used in the United States, and a credible enforcement effort that includes monitoring for compliance.[9]

6. Under the original guidelines, the practice of the Department of State was to certify countries *only after* they had shown that they required the use of TEDs. Under the Revised Guidelines, countries may apply for certification even if they do not require the use of TEDs. In such cases, a harvesting country has to demonstrate that it has implemented, and is enforcing, a "*comparably effective*" regulatory programme to protect sea turtles without the use of TEDs. The Department of State is required "to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources."[10]

7. An exporting country may also be certified if its shrimp fishing environment does not pose a threat of incidental capture of sea turtles. The Revised Guidelines provide that the Department of State shall certify a harvesting country pursuant to Section 609 if it meets any of the following criteria: the relevant species of sea turtles do not occur in waters subject to that country's jurisdiction; in that country's waters, shrimp is harvested exclusively by means that do not pose a threat to sea turtles, for example, any country that harvests shrimp exclusively by artisanal means; or, commercial shrimp trawling operations take place exclusively in waters in which sea turtles do not occur.[11]

8. Before the Panel, Malaysia argued that the United States had failed to comply with the recommendations and rulings of the DSB, and that, consequently, the United States continued to violate its obligations under the GATT 1994. In its Report circulated on 15 June 2001, the Panel found as follows:

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[9]Panel Report, para. 2.25.

[10]*Ibid*., para. 2.28.

[11]*Ibid*., para. 2.29.

> (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 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 2 August 2001, Malaysia filed its appellant's submission. [14] On 17 August 2001, the United States filed an appellee's submission. [15] On the same day, Australia, the European Communities, Hong Kong, China, India, Japan, Mexico and Thailand each filed a third participant's submission. [16]

11. On 13 August 2001, the United States requested that the Division hearing this appeal change the date of the oral hearing set out in the working schedule for this appeal. After inviting the participants to make their views known with respect to this request, the Division ruled that it would not change the date of the oral hearing. Accordingly, the oral hearing in the appeal was held on 4 September 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division.

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[12]Panel Report, para. 6.1.

[13]*Ibid*., para. 7.2.

[14]Pursuant to Rule 21 of the *Working Procedures*.

[15]Pursuant to Rule 22 of the *Working Procedures*.

[16]Pursuant to Rule 24 of the *Working Procedures*. Ecuador, a third party in the proceedings before the Panel, did not file a third participant's submission, but requested permission to attend the oral hearing as a "passive observer". After consulting the participants and third participants, the Division hearing this appeal granted Ecuador permission to attend the oral hearing in this capacity.

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* ("*Canada – Aircraft (21.5)*")[17], where the Appellate Body held that the scope of Article 21.5 dispute settlement proceedings is not limited to the issue of whether or not a WTO Member has implemented the recommendations and rulings of the DSB. The Appellate Body ruled that the task of the panel was to determine whether the new measure is consistent with the disputed provisions of the *WTO Agreement*.

14. Malaysia submits that, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measure taken to comply" only from the perspective of the claims, arguments and factual circumstances that relate to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Malaysia submits that Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure that was not before the original panel. In Malaysia's view, 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.

15. Malaysia argues that the Panel erred in its treatment of the Appellate Body Report in *United States – Shrimp*. First, Malaysia asserts that in relying solely on the reasoning of the Appellate Body, the Panel has in fact relied on the claims and arguments brought by the parties that related to the original measure. Second, Malaysia argues that the Panel erred in treating the Appellate Body Report in *United States – Shrimp* as having proposed alternative courses of conduct or alternative measures as *conditions* which, if fulfilled, would necessarily render the implementing measure

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

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 sense was that convention considered as a "legal standard" by the Appellate Body. Moreover, the Appellate Body stated that one of the obligations which the United States had to fulfill in order to avoid "unjustifiable discrimination" was to engage in serious efforts to negotiate in good faith *before* the enforcement of a "unilateral" import prohibition.

21. Malaysia submits that the Panel's legal interpretation is erroneous because the United States had not proven that the unilateral and non-consensual procedures of the import prohibition had been eliminated. On the contrary, the ongoing negotiations on the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region (the "South-East Asian MOU") demonstrated that an alternative and less trade restrictive course of action for securing the legitimate goals of the United States measure, was available. The logical consequence of the above argument is that the negotiations are underway, and, therefore, the import prohibition should be lifted.

22. Malaysia also appeals the Panel's conclusions under the heading "[m]easures comparable in effectiveness to the United States measure". Malaysia submits that the Appellate Body spoke of measures comparable in effectiveness to the United States measures in the context of illustrating the difference between the design and the application of the original measure.[19] The Appellate Body noted that while the design of the measure permitted certification of countries with measures comparable in effectiveness to United States measures, this was not the way in which the measure was applied in fact. The Panel misread this observation of the Appellate Body to mean that a measure requiring that exporting countries adopt regulatory programmes that are comparable in effectiveness to that of an importing country could not constitute "unjustifiable discrimination".

23. Malaysia contends that the Appellate Body did not accept the legitimacy of "comparable measures" – either implicitly or otherwise. Rather, it was merely describing the intended operation of

[19]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 3, para. 163.

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 *flexibility*, as they take account of situations where sea turtles are not endangered by shrimp trawling. Malaysia submits that the Revised Guidelines address only the incidental capture of sea turtles in the course of shrimp trawl harvesting. Close scrutiny of the Revised Guidelines discloses that they do not address the fact that the same conditions do not prevail in Malaysia. Malaysia does not practise shrimp trawling and the incidental capture of sea turtles in Malaysian waters is due to fish trawling and not shrimp trawling. Thus the Revised Guidelines fail to take into account the specific conditions prevailing in Malaysia and they, therefore, violate the chapeau of Article XX of the GATT 1994.

25. Malaysia appeals the Panel's treatment of the decision of the United States Court of International Trade (the "CIT") in *Turtle Island Restoration Network, et al. v. Robert L. Mallett, et al.*[20] (the "*Turtle Island* case"). Malaysia is of the view that, in declining to consider this decision, the Panel erred in taking the view that municipal law is insulated from scrutiny by panels. Malaysia submits that had the Panel scrutinized the decision in the *Turtle Island* case, and assessed the likelihood and consequences of the Revised Guidelines being modified in the future, it would have found that the "unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 has not been eliminated.

26. Finally, Malaysia requests that the Appellate Body recommend that the import prohibition be lifted so as to give effect to the recommendations and rulings of the DSB as per the Appellate Body Report.

[20] 110 Fed. Supp. 2d 1005 (CIT, 2000).

B. *Arguments of the United States – Appellee*

1. Terms of Reference

27. The United States submits that Malaysia's argument that the Panel failed to apply the correct scope of review in accordance with Article 21.5 of the DSU is without merit. Malaysia's reliance in this regard on the Appellate Body Report in *Canada – Aircraft (21.5)* is misplaced. The issue in that appeal was whether the Panel's review was limited to issues considered in the original panel and Appellate Body proceedings. The Appellate Body found that the DSU imposed no such limitation. In the present case, however, the Panel's scope of review was fully consistent with the Appellate Body findings in *Canada – Aircraft (21.5).*

28. The United States observes that the Panel in this case quoted at length from the Appellate Body Report in *Canada – Aircraft (21.5)*. The Panel then concluded that it was 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 the Appellate Body proceedings.

29. The United States argues that Malaysia's argument is based solely on the Panel's use of the phrase "recommendations and rulings of the DSB". In the view of the United States, the Panel's use of the phrase "complied with the recommendations and rulings of the DSB", is entirely appropriate, and indicates no limitation in its scope of review. In the context of this case, the recommendations and rulings of the DSB are that the United States "bring its measure … into conformity with the obligations of the United States under [the GATT 1994]". The GATT 1994 is the only covered agreement at issue in the dispute.

2. The Chapeau of Article XX of the GATT 1994

30. The United States submits that the Panel correctly found that the United States has remedied the aspect of discrimination relating to differences in efforts to negotiate a bilateral or multilateral agreement. In its previous ruling in *United States - Shrimp*, the Appellate Body found that certain aspects of the application of Section 609, in their "cumulative effect", amounted to unjustifiable discrimination between countries where the same conditions prevail. One of those aspects related to efforts to negotiate. The Appellate Body then cited, and relied upon, the factual findings of the original panel concerning the absence of serious efforts of the United States to negotiate a conservation agreement with the complaining WTO Members.

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 States measure does not result in unjustifiable discrimination between countries where the same conditions prevail. In particular, in the original panel and Appellate Body proceedings, the United States showed the absence of any "unjustifiable discrimination between countries where the same conditions prevail" by demonstrating

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

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 concluding that the United States would be entitled to maintain the implementing measure if it were demonstrated that it was making serious, good faith efforts to conclude an international agreement on the protection and conservation of sea turtles. This interpretation would seriously impair the delicate balance of rights and obligations embodied in Article XX and open the door for WTO Members to justify unilaterally-imposed trade restrictions simply on the basis of simultaneous entry into international negotiations. Article XX does not proscribe unilateral trade restrictions, but a reasonable degree of limitation must be imposed on their use – in line with the wording of the chapeau – if the balance of rights and obligations is to be preserved.

49. Australia submits that it is for the United States to demonstrate what serious, good faith efforts it had undertaken to obviate or eliminate the unjustifiably discriminatory nature of the ban –

including in the design, extent and implementation of the measure. The progress of the Indian Ocean initiative has demonstrated the existence of a viable, non-discriminatory alternative to the unilateral import restriction. Given this progress, the United States has not established why its unilateral import restriction is no longer a form of unjustifiable discrimination.

50. Australia argues that the Panel did not ensure that the United States effectively met its burden of proof in seeking to justify its measure pursuant to Article XX. In particular, the United States did not prove that its measure was consistent with the requirements of the chapeau of Article XX. The fact that the United States did not present sufficient evidence to demonstrate that the measure was not a means of unjustifiable discrimination meant that the Panel could not have found that the United States measure met the requirements of the chapeau.

2. European Communities

(a) Terms of Reference

51. The European Communities submits that, given that measures taken to comply with the recommendations and rulings of the DSB are, by definition, new and different measures that may be inconsistent with provisions of the *WTO Agreement* that were not examined by the original panel, it is correct that a panel acting pursuant to Article 21.5 of the DSU will, as a consequence, have to address a new and different factual and legal situation.

52. However, the European Communities submits that all panels are bound by their terms of reference that are determined, pursuant to Article 7.1 of the DSU, by the "request for the establishment of a panel". The European Communities observes that, in its "request for the establishment of a panel", Malaysia referred only to the GATT 1994, and to the recommendations and rulings of the DSB. On the basis of Malaysia's "request for the establishment of a panel", and on its subsequent submissions, the Panel found that the claims of Malaysia are exclusively based on the findings of the Appellate Body and on non-compliance with them. Malaysia does not make any new claim under Article XX.

53. Given that the terms of reference of a panel "established" pursuant to Article 21.5 of the DSU are based on the same claims and legal bases as the terms of reference of the original panel, the Panel's treatment of Malaysia's complaint pursuant to Article 21.5 of the DSU does not appear to be in error. The Panel was not at liberty to examine other issues.

(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. Its interpretation that Section 609 did not permit the import of TED-caught shrimp from non-certified countries should be treated as an authoritative interpretation of United States law. In the light of the Appellate Body's finding in *United States – Shrimp*, the Panel should have concluded that Section 609 was inconsistent with the chapeau of Article XX of the GATT 1994.

5. Japan

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

65. Japan is of the view that as the provisions in Article XX of the GATT 1994 are "exceptions" to the basic principles of the GATT 1994, they should be applied in a strict manner. This applies especially when a unilateral measure is claimed to be justified under this Article.

66. Although Japan agrees with most of the conclusions reached by the Panel, it is Japan's view that the Panel Report does not describe in detail the reasoning or process by which the Panel reached those conclusions. Considering the importance attached to the requirements of the chapeau of Article XX as a tool for prevention of abuse, the chapeau of Article XX must be applied in a manner that fully accounts for the strict standard required of the "General Exceptions" under Article XX.

67. Malaysia's argument that negotiations are not alternative actions for the United States to rectify and address the problem of "arbitrary and unjustifiable discrimination" is based on an incorrect reading of the original Appellate Body Report. As the lack of serious good faith negotiation was one of the reasons for the Appellate Body finding of "arbitrary or unjustifiable discrimination", it seems logical to assume that by engaging in sufficiently "serious good faith" negotiations and meeting other requirements, the United States has addressed the "arbitrary or unjustifiable discrimination". Thus, Japan agrees with the Panel's finding that the United States was not under the obligation to conclude an agreement for the protection and conservation of sea turtles before taking the measure.

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*"), attaching a brief or other material to the submission of either an appellant or an appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission.[24] In that Report, we stated further that it is for a participant in an appeal to determine for itself what to include in its submission.[25]

[24] Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 89.

[25] *Ibid.*

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 rulings of the DSB in *United States – Shrimp*; and

(b) whether the Panel erred in finding that the measure at issue is now 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.[29]

81. With respect to the measure at issue in this dispute, the United States has not appealed the conclusion of the Panel that the measure violates Article XI:1 of the GATT 1994.[30] Thus, we do not address that issue in this appeal.

82. Malaysia has not appealed the conclusion of the Panel that Section 609 is provisionally justified under subparagraph (g) of Article XX of the GATT 1994.[31] Also, Malaysia confirmed at the oral hearing in this appeal that it has also not appealed the conclusion of the Panel that the measure at issue is not applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994.[32] Thus, we do not address those issues in this appeal.

V. Terms of Reference

83. The first issue raised by Malaysia in this appeal is whether the Panel properly examined the United States measure taken to comply with the recommendations and rulings of the DSB in *United States – Shrimp*. Malaysia argues that the Panel improperly limited its analysis to the recommendations and rulings of the DSB, and thus failed to fulfill its mandate under Article 21.5 of the DSU because it did not examine the consistency of the United States implementing measure with

[29] Panel Report, para. 5.137.

[30] *Ibid.*, para. 5.23.

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

[32] The Panel's findings on this issue are set out in paragraph 5.144 of the Panel Report. At the oral hearing, we noted that Malaysia had made no reference in its appellant's submission to the findings of the Panel with respect to whether the United States measure was applied in a manner that constitutes "a disguised restriction on international trade". We asked Malaysia to confirm that it was not appealing those findings. Malaysia did so.

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* ("*Canada – Aircraft (21.5)*"), we discussed one aspect of a panel's task under Article 21.5 of the DSU. In that case, the Panel declined to examine an argument by Brazil on the ground that the argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada had implemented the DSB recommendation".[33] We disagreed with that ruling, and stated there that:

> It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement.*
>
> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. . . .[34]

[33] Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 39.

[34] *Ibid*., paras. 40-41.

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.

88. Malaysia relies in this appeal on our ruling in *Canada – Aircraft (21.5)*. We understand Malaysia to argue, based in part on our ruling in *Canada – Aircraft (21.5),* that the Panel in this case had a duty to review the *totality* of the United States measure, and to assess it for its consistency with the relevant provisions of the GATT 1994. That is indeed a panel's task under Article 21.5 of the DSU. Yet, as we have said, it is not part of a panel's task to go beyond the particular claims that have been made with respect to the consistency of a new measure with a covered agreement when a matter is referred to it by the DSB for an Article 21.5 proceeding. Thus, it would not have been appropriate in this case for the Panel to address a claim that was *not* made by Malaysia when requesting that this matter be referred by the DSB for an Article 21.5 proceeding.

89. With respect to a claim that *has* been made when a matter is referred by the DSB for an Article 21.5 proceeding, Malaysia seems to suggest as well that a panel must re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO – consistent* in that dispute, and that remain unchanged as part of the new measure.

90. In considering this argument, we examine what the Panel did in this case in fulfilling its task under the DSU. As we have said, the Panel was required to review the new measure in its totality and in its application when examining the matter referred by the DSB for the Article 21.5 proceeding. In this case, the question whether it did or did not fulfil this requirement arises from the treatment by the Panel of a particular part of the new measure that was also part of the original measure in the original proceedings — Section 609.

91. Section 609 — a United States statute enacted by the United States Congress — is a common aspect of both the original measure at issue in the previous case and appeal, and the new measure at issue in this case and appeal. As Section 609 is part of the new measure, it is not immune from scrutiny under Article 21.5. However, it will be recalled that, in the previous case, we found that Section 609 was entitled to "provisional justification" under subparagraph (g) of Article XX of the GATT 1994. It will be recalled as well that, in the previous case, the deficiencies we found in the *application* of the original measure by the United States that denied that original measure the benefit of the exception provided by Article XX of the GATT 1994 were unrelated to Section 609 itself. Those deficiencies related to the original guidelines that were promulgated by the United States Department of State for the purpose of implementing Section 609, and to the practice of the United States in applying those original guidelines to WTO Members.

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 requirements of paragraph (g) of Article XX. First, the Panel notes that the Appellate Body found that Section 609 was "provisionally justified" under Article XX(g). We understand this to mean that, in the process of determining whether Section 609 was justified under Article XX, the Appellate Body concluded that Section 609 satisfied the first tier of the analysis defined in its report on *United States – Gasoline*, i.e. the *characterization* of the measure under Article XX(g). This implies that, as long as the implementing measure before us is identical to the measure examined by the Appellate Body in relation to paragraph (g), we should not reach a different conclusion from the Appellate Body.[38] (footnote omitted)

The Panel went on to conclude that:

> … the United States did not amend Section 609, whereas it has issued revised implementing guidelines. We therefore conclude that since Section 609 as such has not been modified, the findings of the Appellate Body regarding paragraph (g) remain valid and the consistency of Section 609 as such with the requirements of paragraph (g) also remains valid, to the extent that the Revised Guidelines do not modify the *interpretation* to be given to Section 609 in that respect. We have no evidence that the Revised Guidelines have modified in any way the meaning of Section 609 *vis-à-vis* the requirements of paragraph (g), as interpreted by the Appellate Body.[39]

93. We agree. It is not disputed that the wording of Section 609 has not been changed since the first case. The Congress of the United States has not amended the statute. In addition, the meaning of Section 609 has not been changed by the decision of the United States Court of International Trade (the "CIT") in *Turtle Island Restoration Network, et al. v. Robert L. Mallett, et al.* (the "*Turtle Island* case").[40]

94. The CIT ruling in the *Turtle Island* case addressed the Revised Guidelines: that ruling made no change to the interpretation of Section 609. Moreover, as stated by the Panel, the ruling in the *Turtle Island* case is declaratory: the CIT has not ordered the United States Department of State to modify either the content or the interpretation of the Revised Guidelines; in the legal interpretation of the United States authorities entrusted with enforcing them, the Revised Guidelines remain the

[38]Panel Report, para. 5.39.

[39]Panel Report., para. 5.41.

[40]110 Fed. Supp. 2d 1005 (CIT, 2000). *See*, Panel Report, para. 5.109.

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 to the consistency of Section 609, therefore, still stands.

97. We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body

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[41]Panel Report, para. 5.109.

[42]The United States submitted that:

> We do not believe that the court decision in the litigation changes the measure. The measure is the statute and the guidelines. There is litigation and controversy in the United States about what those guidelines might look like. However, for today and the foreseeable future, the guidelines stand. They are what governs. That is what happens at the ports.

(United States response to questioning at the oral hearing)

[43]Panel Report, para. 5.109.

"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 DSB.

107. Malaysia also objects to the frequent references made by the Panel to our reasoning in our Report in *United States – Shrimp*. The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in *United States – Shrimp*. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case.

108. In this respect, we note that in our Report in *Japan – Taxes on Alcoholic Beverages*, we stated that:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[52]

109. This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report — a Report, moreover, that was directly

[51] Panel Report, para. 5.138.

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 *United States – Shrimp* as imposing upon the United States an obligation to *negotiate* rather than an obligation to *conclude* an international agreement[55];

— the Panel's finding results in "the absurd situation where any WTO Member would be able to offer to negotiate in good faith on an agreement incorporating its unilaterally defined standards before claiming that its measure is justified under Article XX of the GATT 1994 and in the event of failure to conclude an agreement, claim that the measure applying the unilateral standards could not constitute unjustifiable discrimination"[56];

— the Panel erred in concluding that the Inter-American Convention can reasonably be regarded as a "benchmark" of what can be achieved through multilateral negotiations in the field of protection and conservation[57];

— the Panel misconstrued the usage of the term "measures comparable in effectiveness to United States measures" by the Appellate Body to mean that the Appellate Body accepted the legitimacy of such "comparable measures"[58];

— the Panel erred in concluding that the Revised Guidelines are sufficiently flexible, even though the Revised Guidelines do not provide explicitly for the particular conditions prevailing in Malaysia [59]; and

— the Panel erred in its treatment of the CIT ruling in the *Turtle Island* case and, thus, in its conclusion about the legal validity of those portions of the Revised Guidelines that permit the importation of TED-caught shrimp from non-certified harvesting countries.[60]

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[55]Malaysia's appellant's submission, para 3.10(b)(i).

[56]Executive summary of Malaysia's appellant's submission, para. 2(b)(ii).

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

[58]*Ibid*., paras. 3.17-3.18. *See also*, Executive summary of Malaysia's appellant's submission, para. 2(iv);

[59]Malaysia's appellant's submission, paras. 3.20-3.21.

[60]*Ibid*., paras. 3.22-3.25.

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.
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> …

[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".
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> …
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> 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.

117. The chapeau of Article XX states:

> 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 contracting party of measures: …

118. The chapeau of Article XX establishes three standards regarding the *application* of measures for which justification under Article XX may be sought: first, there must be no "arbitrary" discrimination between countries where the same conditions prevail; second, there must be no "unjustifiable" discrimination between countries where the same conditions prevail; and, third, there must be no "disguised restriction on international trade".[67] The Panel's findings appealed by Malaysia concern the first and second of these three standards.[68]

119. It is clear from the language of the chapeau that these two standards operate to prevent a Member from applying a measure provisionally justified under a sub-paragraph of Article XX in a manner that would result in "arbitrary or unjustifiable discrimination".[69] In *United States – Shrimp*, we stated that the measure at issue there resulted in "unjustifiable discrimination", in part because, as applied, the United States treated WTO Members differently. The United States had adopted a cooperative approach with WTO Members from the Caribbean/Western Atlantic region, with whom it had concluded a multilateral agreement on the protection and conservation of sea turtles, namely the Inter-American Convention. Yet the United States had not, we found, pursued the negotiation of such a multilateral agreement with other exporting Members, including Malaysia and the other complaining WTO Members in that case.

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[67]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 150; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21-22.

[68]The Panel also made findings regarding disguised restriction on trade but these are not appealed. Panel Report, paras. 5.138-5.144.

[69]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, paras. 156 and 160; Appellate Body Report, *United States – Gasoline*, *supra*, footnote 67 at 21-22.

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, substantial efforts to carry out these express directions of Congress.[71] (footnotes omitted)

We also stated:

> Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable.[72]

122. We concluded in *United States – Shrimp* that, to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries "similar opportunities to negotiate" an international agreement. Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. The negotiations need not be identical. Indeed, no two negotiations

[70]Section 609(a). *See also*, Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 167.

[71]Appellate Body Report, *supra*, footnote 24, para. 167.

[72]*Ibid*., para. 172.

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.

[74] *Ibid*.

[75] *Ibid*.

strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.

125. Malaysia also disagrees with certain statements made by the Panel with respect to the Inter-American Convention. The Panel found that:

> With respect to the absence of or insufficient negotiation with some Members compared with others, the reference of the Appellate Body to the Inter-American Convention is evidence that the efforts made by the United States to negotiate with the complainants before imposing the original measure were largely insufficient. The Inter-American Convention was negotiated as a binding agreement and has entered into force on 2 May 2001. We conclude that the Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. While we agree that factual circumstances may influence the duration of the process or the end result, we consider that any effort alleged to be a "serious good faith effort" must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention.[76]

126. Malaysia maintains that the word "benchmark", as used by the Panel, has the connotation of a "legal standard", and asserts that nothing in the Appellate Body Report in *United States – Shrimp* suggests that the Inter-American Convention has the status of a legal standard.[77] Malaysia sees a distinction between a "benchmark", which would have the value of a "legal standard", and an "example", which would not have such a value.[78]

127. It should be recalled how we viewed the Inter-American Convention in *United States – Shrimp*. We stated there:

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[76]Panel Report, para. 5.71.

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

[78]*Ibid*.

> The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.[79]

128. Thus, in the previous case, in examining the original measure, we relied on the Inter-American Convention in two ways. First, we used the Inter-American Convention to show that "consensual and multilateral procedures are available and feasible for the establishment of programmes for the conservation of sea turtles."[80] In other words, we saw the Inter-American Convention as evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States. Second, we used the Inter-American Convention to show the existence of "unjustifiable discrimination". The Inter-American Convention was the result of serious, good faith efforts to negotiate a regional agreement on the protection and conservation of turtles, including efforts made by the United States. In the original proceedings, we saw a clear contrast between the efforts made by the United States to conclude the Inter-American Convention and the absence of serious efforts on the part of the United States to negotiate other similar agreements with other WTO Members. We concluded there that such a disparity in efforts to negotiate an international agreement amounted to "unjustifiable discrimination".[81]

129. With this in mind, we examine what the Panel did here. In its analysis of the Inter-American Convention in the context of Malaysia's argument on "unjustifiable discrimination", the Panel relied on our original Report to state that "the Inter-American Convention is evidence that the efforts made by the United States to negotiate with the complainants before imposing the original measure were largely insufficient".[82] The Panel went on to say that "the Inter-American Convention can reasonably

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[79]Appellate Body Report, *supra*, footnote 24, para. 171.

[80]*Ibid*., para. 170.

[81]*Ibid*., para. 172.

[82]Panel Report, para. 5.71.

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 Panel, "at least until the Conservation and Management Plan to be attached to the MOU is completed, the United States efforts should be judged on the basis of its active participation and its financial support to the negotiations, as well as on the basis of its previous efforts since 1998, having regard to the likelihood of a conclusion of the negotiations in the course of 2001."[94]

133. We note that the Panel stated that "any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention."[95] In our view, in assessing the serious, good faith efforts made by the United States, the Panel did not err in using the Inter-American Convention as an *example*. In our view, also, the Panel was correct in proceeding then to an analysis broadly in line with this principle and, ultimately, was correct as well in concluding that the efforts made by the United States in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those that led to the conclusion of the Inter-American Convention. We find no fault with this analysis.[96]

134. In sum, Malaysia is incorrect in its contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX requires the *conclusion* of an international agreement on the protection and conservation of sea turtles. Therefore, we uphold the Panel's finding that, in view of the serious, good faith efforts made by the United States to negotiate an international

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[93]Panel Report. It appears that the United States was in favour of a legally binding agreement for the Indian Ocean and South-East Asia region, but a number of other parties were not, and the latter view prevailed. *See,* Panel Report, para. 5.83.

[94]Panel Report, para. 5.84.

[95]*Ibid*., para. 5.71.

[96] We note that a multilateral conference on sea turtles was held in Manila and resulted in the adoption of the Conservation and Management Plan to be annexed to the South-East Asian MOU. We also note that the South-East Asian MOU came into effect on 1 September 2001. To our mind, these events only reinforce the finding of the Panel that the efforts made by the United States to negotiate an international agreement in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those made in relation to the Inter-American Convention. The Inter-American Convention, in Article IV.2(h), provides for the use of TEDs to reduce the incidental capture and mortality of sea turtles in the course of fishing activities. Objective 1.4 of the Conservation and Management Plan attached to the South-East Asian MOU requires signatory states to "[r]educe to the greatest extent practicable the incidental capture and mortality of marine turtles in the course of fishing activities". In this respect, signatory states are directed to "[d]evelop and use gear, devices and techniques to minimise incidental capture of marine turtles in fisheries, such as devices that effectively allow the escape of marine turtles, and spatial and seasonal closures".

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. We now turn to Malaysia's arguments relating to the flexibility of the Revised Guidelines. Malaysia argued before the Panel that the measure at issue results in "arbitrary or unjustifiable discrimination" because it conditions the importation of shrimp into the United States on compliance by the exporting Members with policies and standards "unilaterally" prescribed by the United States.[98] Malaysia asserted that the United States "unilaterally" imposed its domestic standards on exporters.[99] With respect to this argument, the Panel found:

> It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.[100] (footnote omitted)

136. Malaysia disagrees with the Panel that a measure can meet the requirements of the chapeau of Article XX if it is flexible enough, both in design and application, to permit certification of an exporting country with a sea turtle protection and conservation programme "comparable" to that of the United States. According to Malaysia, even if the measure at issue allows certification of countries

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[97]Panel Report, para. 5.137. We do wish to note, though, that there is one observation by the Panel with which we do not agree. In assessing the good faith efforts made by the United States, the Panel stated that:

> The United States is a *demandeur* in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts. Indeed, the capacity of persuasion of the United States is illustrated by the successful negotiation of the Inter-American Convention.

(Panel Report, para. 5.76)

We are not persuaded by this line of reasoning. As we stated in our previous Report, the chapeau of Article XX is "but one expression of the principle of good faith". (Appellate Body Report, *United States – Shrimp, supra*, footnote 24, para. 158) This good faith notion applies to all WTO Members equally.

[98]Panel Report, para. 3.131.

[99]*Ibid*., paras. 3.125 and 3.127.

[100]*Ibid*., para. 5.93.

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 *United States - Shrimp*, we concluded that the measure at issue there did not meet the requirements of the chapeau of Article XX relating to "arbitrary or unjustifiable discrimination" because, through the application of the measure, the exporting members were faced with "a single, rigid and unbending requirement"[103] to adopt *essentially the same* policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the United States. In contrast, in this dispute, the Panel found that this new measure is more flexible than the original measure and has been applied more flexibly than was the original measure. In the light of the evidence brought by the United States, the Panel satisfied itself that this new measure, in design and application, does *not* condition access to the United States market on the adoption by an exporting Member of a regulatory programme aimed at the protection and the conservation of sea turtles that is *essentially the same* as that of the United States.

141. As the Panel's analysis suggests, an approach based on whether a measure requires "essentially the same" regulatory programme of an exporting Member as that adopted by the importing Member applying the measure is a useful tool in identifying measures that result in "arbitrary or unjustifiable discrimination" and, thus, do *not* meet the requirements of the chapeau of Article XX. However, this approach is not sufficient for purposes of judging whether a measure *does* meet the requirements of the chapeau of Article XX. Therefore, in construing our previous Report, the Panel inferred from our reasoning there that a measure requiring United States and foreign regulatory programmes to be "comparable in effectiveness", as opposed to being "essentially the same", would, absent some other shortcoming, comply with the chapeau of Article XX. On this, the Panel stated:

> It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.[104] (footnote omitted)

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[103] Appellate Body Report, *supra*, footnote 24, para. 177.

[104] Panel Report, para. 5.93.

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 WTO Members and is, therefore, flexible enough to meet the requirements of the chapeau of Article XX.

143. Given that the original measure in that dispute required "essentially the same" practices and procedures as those required in the United States, we found it necessary in that appeal to rule only that Article XX did not allow such inflexibility. Given the Panel's findings with respect to the flexibility of the new measure in this dispute, we find it necessary in this appeal to add to what we ruled in our original Report. The question raised by Malaysia in this appeal is whether the Panel erred in inferring from our previous Report, and thereby finding, that the chapeau of Article XX permits a measure which requires only "comparable effectiveness".

144. In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination". We, therefore, agree with the conclusion of the Panel on "comparable effectiveness".

[105]Panel Report, para. 5.92.

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.[106]

146. We note that the Revised Guidelines contain provisions that permit the United States authorities to take into account the specific conditions of Malaysian shrimp production, and of the Malaysian sea turtle conservation programme, should Malaysia decide to apply for certification. The Revised Guidelines explicitly state that "[if] the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification."[107] Likewise, the Revised Guidelines provide that the "Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations as well as information available from other sources." [108]

147. Further, the Revised Guidelines provide that the import prohibitions that can be imposed under Section 609 do not apply to shrimp or products of shrimp "harvested in any other manner or under any other circumstances that the Department of State may determine, following consultations with the [United States National Marine Fisheries Services], does not pose a threat of the incidental taking of sea turtles."[109] Under Section II.B(c)(iii) of the Revised Guidelines (*Additional Sea Turtle*

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[106]According to Malaysia, the specificity of its case rests on the fact that shrimp trawling is not practised in Malaysia; shrimp is a by-catch from fish trawling and therefore, the incidental catch of sea turtles is due to fish trawling, not shrimp trawling. *See*, Malaysia's appellant's submission, para. 3.21 and Panel Report, para. 3.128. In addition, Malaysia stated:

> Malaysia is a nesting ground but it is not known to be a feeding ground for sea turtles and the nesting season in Malaysia does not overlap with the shrimp season. The Loggerheads and the Kemps released rarely nested on Malaysian beaches and did not occur in Malaysian waters respectively and the high mortality of sea turtles that is reported in the shrimp trawls in the United States relate to both these sea turtles. The Green Turtle, the Hawksbill, Leatherback and Olive Ridley are the major sea turtle species in Malaysia. Green turtles were resident in sea grass beds which were found in shallow coastal waters, whilst the Hawksbills were found in coral reef. Trawling was prohibited in these areas. During the nesting season, the Green turtles remain close to the shore in areas where trawling was also prohibited. During long distance migrations between feeding and nesting grounds, turtles were actively swimming close to the surface of the water which made them more vulnerable to drift nets and long lines rather than trawl nets. In Malaysia, trawling targeted fish for the most part of the year and thus the incidental capture of sea turtles was due to fish trawls and not shrimp trawls.

(Malaysia's response to questioning at the oral hearing)

[107]Revised Guidelines, Section II.B; *see*, Panel Report, p. 105.

[108]*Ibid*.

[109]Revised Guidelines, Section I.B; *see*, Panel Report, p. 103.

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)

149. We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member, including, of course, Malaysia.[114] Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* Member.

150. We are, therefore, not persuaded by Malaysia's argument that the measure at issue is not flexible enough because the Revised Guidelines do not explicitly address the specific conditions prevailing in Malaysia.

151. Malaysia argues, finally, that the Panel should have scrutinized the decision of the CIT in the *Turtle Island* case and assessed, in the light of that decision, the likelihood and consequences of the Revised Guidelines being modified in the future. According to Malaysia, the Panel should have come to the conclusion that the Revised Guidelines are not flexible enough because the CIT ruled that the part of the Revised Guidelines allowing TED-caught shrimp from non-certified harvesting countries to be imported into the United States is contrary to Section 609.[115] As we have already ruled[116], we are of the view that, when examining the United States measures, the Panel took into account the status of municipal law at the time, and reached the correct conclusion. The CIT decision in the *Turtle Island* case has not modified the legal effect or the application of the Revised Guidelines; hence, we are not persuaded by this argument of Malaysia.

152. For all these reasons, we uphold the finding of the Panel, in paragraph 6.1 of the Panel 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

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[114]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 164.

[115]Malaysia's appellant's submission, para. 3.25.

[116]*See*, *supra*, para. 95.

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.

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[117]Panel Report, para. 6.1. The Panel stated that its findings of justification stand, "*as long as*" certain conditions it set out in its Report, in particular, the good faith efforts to reach a multilateral agreement, continue to be met. In this respect, we note that the United States negotiated and concluded a Memorandum of Understanding with certain countries in the Indian Ocean and South-East Asia region, the South-East Asian MOU. *See*, *supra,* footnote 96. This agreement took effect on 1 September 2001, almost two and a half months after the circulation of the Panel Report. The participants have not disputed the existence of this agreement. There was some dispute at the oral hearing as to the legally binding nature of this agreement. Basic Principle 4 of that agreement states:

> This Memorandum of Understanding, including the Conservation and Management Plan, may be amended by consensus of the signatory States. When appropriate, the signatory States will consider amending this Memorandum of Understanding to make it legally binding.

At the oral hearing, the United States stated that "[The South-East Asian MOU] is considered a political undertaking that does not have binding consequences under international law". Malaysia stated that "The [South-East Asian] MOU … would have the status of a treaty under the Vienna Convention of the law of treaties, because "treaty" has been defined as an international agreement that is concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation." We need not judge this issue, and we do not. Even so, we note that, whether legally binding or not, the Memorandum of Understanding reinforces the Panel's finding that the United States had indeed made serious good faith efforts to negotiate a multilateral agreement.

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

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James Bacchus
Presiding Member

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A.V. Ganesan
Member

Julio Lacarte-Muró
Member