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# TRADE AND DOMESTIC PROTECTION OF ENDANGERED SPECIES: PEACEFUL COEXISTENCE OR CONTINUED CONFLICT? THE SHRIMP-TURTLE DISPUTE AND THE WORLD TRADE ORGANIZATION

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INTRODUCTION

Trade and environmental concerns unfortunately have not found much common ground over the last few years. Some high profile disputes have focused a great deal of attention on the problems encountered by nations, seeking both to liberalize trade and protect the environment.<sup>1</sup> Critics of the multilateral trading system view the World Trade Organization (WTO) as working for goals diametrically opposed to the protection of endangered species and the environment. The two Tuna-Dolphin decisions by dispute settlement panels under the General Agreement on Tariffs and Trade (GATT) 1947 system, and the WTO panel decision in the Reformulated Gasoline dispute, did nothing to change the minds of environmentalists, conservationists, or others opposed to the multilateral efforts to liberalize trade regimes.

This article focuses on the dispute between the United States and India, Pakistan, Malaysia, and Thailand concerning the efforts of the United States to protect endangered sea turtles through a ban on the importation of shrimp from certain nations, harvested in a manner likely to threaten sea turtles.

The central focus of the dispute is the interpretation of Article XX of the General Agreement on Tariffs and Trade (GATT 1994). Article XX provides WTO Members certain exceptions to their obligations under

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<sup>1</sup> See generally United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996) [hereinafter Reformulated Gasoline Panel Report]; United States—Standard for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Reformulated Gasoline Appellate Body Report]; United States—Taxes on Automobiles, DS31/R (Oct. 11, 1994) [hereinafter CAFÉ Panel Report]; United States—Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I Panel Report]; United States—Restrictions on Imports of Tuna, GATT Doc. No. DS20/R (June 1994), reprinted in 33 I.L.M. 842 (1994) [hereinafter Tuna-Dolphin II Panel Report].

other provisions of GATT 1994 and the agreements comprising the WTO Agreement. As would be expected, the parties' interpretations of Article XX vary and are often contradictory, but more surprisingly is the extent to which panels and the Appellate Body come into conflict over the provisions of Article XX. It is increasingly unclear exactly what type of measure will be allowed as an exception to WTO Members' obligations under Article XX. This dispute exemplifies the tension between trade and environmental groups and the societal issues touched upon by the ever increasing pressure to liberalize trade regimes. This dispute also brings into focus the pressure on WTO Members to adhere to their obligations under the WTO Agreement and the domestic pressures to pursue certain environmental objectives.

### I. OVERVIEW OF THE DISPUTE

On October 8, 1996, four Members of the WTO filed a joint complaint against the United States concerning its ban on the importation of shrimp and shrimp products from certain nations.<sup>2</sup> The four nations, India, Malaysia, Pakistan, and Thailand, all exporters of shrimp and shrimp products, objected to the U.S. ban on the grounds that it violated U.S. commitments under the General Agreement on Tariffs and Trade 1994.<sup>3</sup>

Specifically, the complainants argued that the ban on the importation of shrimp and shrimp products from these and other nations found not to be in compliance with section 609 of Public Law 101-162, violated Articles I, XI, and XIII of GATT 1994. In addition, the complaining parties claimed that the U.S. import ban nullified and impaired benefits accruing to these nations.<sup>4</sup> According to Article 3.8 of

<sup>2</sup> See Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act 1990, Pub. L. No. 101-162, 1990 U.S.C.C.A.N. (103 Stat.) 988, 1037.

<sup>3</sup> See General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994), in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, 33 I.L.M. 1143 (1994) [hereinafter GATT].

<sup>4</sup> See GATT, *supra* note 3. Article XXIII, entitled Nullification or Impairment, provides that:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

the Understanding on Rules and Procedures Governing the Settlement of Disputes,<sup>5</sup> once a Member establishes that another Member breached one of the rules or violated its obligations under one of the covered agreements, the action to constitute a *prima facie* case of nullification or impairment is considered.

The primary argument being advanced by the complaining parties was that Article XI of GATT 1994 provided for the general elimination of quantitative restrictions on imports and exports. Because the scope of Article XI is comprehensive, the Article applies to the U.S. embargo because the measure was not in the nature of duties, taxes or other charges.<sup>6</sup>

#### A. *The Endangered Species Act*

In 1973 the United States Congress passed the Endangered Species Act (ESA).<sup>7</sup> In the findings, purposes and policy section of the ESA, Congress sets out the reasons for passage of the Act.

Sec. 2. (a) Findings.—The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

*Id.* art. XXIII.

<sup>5</sup> See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994), in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, 33 I.L.M. 81 (1994) [hereinafter DSU].

<sup>6</sup> See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, para. 3.136 (April 6, 1998) [hereinafter Shrimp-Turtle Panel Report].

<sup>7</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 1973 U.S.C.A.N. (87 Stat.) 884 (1973), as amended.

consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to —

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements;

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

(b) Purposes.—The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy.—It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.<sup>8</sup>

The above language illustrates the desire of Congress to provide a means by which endangered species could be protected and tasks all federal departments and agencies to assist in this effort.

In furtherance of the policy, and under the authority of the ESA, regulations were issued by the Department of Commerce (DOC), National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS) in 1987 requiring the use by shrimp fishermen of turtle excluder devices (TEDs).<sup>9</sup> Prior to the regulations, NMFS began a voluntary TEDs program in 1983. The voluntary program was not successful because a sufficient amount of TEDs were not being used on a regular basis.<sup>10</sup> The 1987 regulations, in contrast, required that all shrimp trawlers use conservation measures, including TEDs and tow time restrictions, when fishing for shrimp in certain waters off the coast of the United States<sup>11</sup>

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<sup>8</sup> *Id.* § 2.

<sup>9</sup> See 52 Fed. Reg. 24244 (1987).

<sup>10</sup> See *id.* at 24245.

<sup>11</sup> See *id.* at 24247.

Under these regulations the use of TEDs or tow time restrictions are required in all waters of the Atlantic between the North Carolina-Virginia border and 23° 40' N and throughout the U.S. Gulf of Mexico. Based on seasonal requirements, Atlantic and Gulf waters are each divided into two areas. These are called the Canaveral, the Atlantic, the Southwest Florida and Gulf Areas. These areas are defined as follows: (a) Canaveral Area – includes all ocean and tidal waters between 28° N and 29° N in the Atlantic Ocean; (b) Atlantic Area – includes all ocean and tidal waters in the Atlantic ocean from the North Carolina-Virginia border to 23° 40' N, except for waters in the Canaveral Area; (c) Southwest Florida Area – includes all ocean and tidal waters within the region bounded by 23° N to 27° N between 81° W and 84° W; and (d) The Gulf Area – includes all ocean and tidal waters of the U.S. Gulf of Mexico except for waters in the Southwest Florida Area – includes all ocean and tidal waters within the region bounded by 23° N to 27° N between 81° W and 84° W; and (d) The Gulf Area – includes all ocean and tidal waters of the U.S. gulf of Mexico except for waters in the Southwest Florida Area.

### B. *Section 609 of Public Law 101-162*

In 1989 Congress passed the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990.<sup>12</sup> Section 609 of this Act provided that the Secretary of State, in consultation with the Secretary of Commerce, should “(1) initiate negotiations as soon as possible for the development of bilateral or multinational agreements with other nations for the protection and conservation of such species of sea turtles.”<sup>13</sup> In addition to the initiation of negotiations, the law requires that the importation of shrimp or shrimp products, which have been harvested in such a manner as to adversely affect species of sea turtles, shall be prohibited no later than May 1, 1991. The ban is not to apply to nations which the President certifies annually.<sup>14</sup>

### C. *The Guidelines*

In 1991, the State Department issued guidelines for determining comparability of foreign programs for the protection of turtles in shrimp

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*Id.* at 24247-48.

<sup>12</sup> Pub. L. No. 101-162, 103 Stat. 988.

<sup>13</sup> *Id.* § 609(a)(1).

<sup>14</sup> *See id.* § 609(b)(2).

Certification Procedure—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to the United States; and

(B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by the United States vessels in the course of such harvesting; or

(C) the particular fishing environment or the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

*Id.*



trawl fishing operations.<sup>15</sup> The State Department determined that the scope of section 609 was limited to the wider Caribbean/western Atlantic region.<sup>16</sup>

In passing section 609, Congress recognized that these conservation measures taken by U.S. shrimp fishermen would be of limited effectiveness unless a similar level of protection is afforded throughout the turtles' migratory range across the Gulf of Mexico, Caribbean, and western central Atlantic (Wider Caribbean Region).

It was determined that nations in the wider Caribbean with commercial shrimp trawl operations, through whose waters these sea turtles migrate, are: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guiana, and Brazil.<sup>17</sup>

The guidelines also set out that the import restrictions did not apply to aquaculture shrimp because harvesting such shrimp does not affect sea turtles.<sup>18</sup>

The guidelines also established that the use of approved TEDs were required "in areas and at times when there is a likelihood of intercepting sea turtles."<sup>19</sup> Smaller vessels, those under 25 feet, could use restricted tow times in lieu of TEDs.<sup>20</sup> The goal of the program, according to the guidelines, was to protect sea turtle populations from further decline by reducing their incidental mortality in shrimp trawl operations.<sup>21</sup>

Under these guidelines there was a three-year phase-in period for foreign nations of a comparable regulatory program.<sup>22</sup> In order to be certified as having a comparable regulatory program, the foreign nation was required to submit documentary evidence of a program including the following elements: (1) No retention of incidentally caught sea turtles; (2) Resuscitation of comatose incidentally caught sea turtles; (3) Reduction of incidental taking satisfied by either (a) a commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times if a vessel is under 25 feet) (to be phased in over a period not more

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<sup>15</sup> See *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines*, 56 Fed. Reg. 1051 (1991) [hereinafter 1991 Guidelines].

<sup>16</sup> See *id.* at 1051.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

than three-years) or (b) a commitment to study the impact of shrimp trawl fishing on sea turtles and develop technologies to reduce incidental mortality of sea turtles to "insignificant levels;"<sup>23</sup> and (4) Credible enforcement efforts which monitor compliance and the imposition of appropriate sanctions.<sup>24</sup>

Programs including the above elements had to be certified, by May 1, annually.<sup>25</sup> The annual certifications would only be granted if a program contained three elements: (1) Achievement of program goals—providing evidence that the goals established in the initial timetables have been reached; (2) Compliance and Enforcement—assessment of compliance with the program and a report on enforcement activities, including measures taken against vessel owners; and (3) Scientific Cooperation—affected nation must accommodate reasonable requests by the United States for scientific data and fisheries data as well as requests

<sup>23</sup> The third element specifically states:

At the time of requesting an initial positive determination, many affected nations may not have data on the incidental taking of sea turtle in their shrimp trawl fishery. The element will therefore be satisfied if there is either:

- (a) A commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times if the vessel is under 25 feet). This requirement may be phased in over a period of not more than three years. The program description should establish a timetable during which TEDs use will be phased in; or
- (b) A commitment to engage in a statistically reliable and verifiable scientific program to determine times and areas of turtle abundance and assess the impact of the shrimp trawl fishery on sea turtles; to develop and assess technologies to reduce the impact of the shrimp trawl fishery on sea turtles; and to require the use of fishing technologies and techniques that will reduce the incidental mortality of sea turtles in the shrimp trawl fishery to insignificant levels. A program will be found comparable if it contains these elements and if the period of assessment and implementation is not more than three years. The program description should establish a timetable by which each phase of the program is to be completed.

*Id.* at 1051-52.

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 1052.

for specific scientific and technological cooperation.<sup>26</sup> The guidelines also provide for ongoing consultations between affected nations and the State Department.<sup>27</sup>

On December 4, 1992, the National Marine Fisheries Service (NMFS) issued new regulations on the U.S. domestic sea turtle conservation program.<sup>28</sup> The revised regulations for the domestic program required shrimp trawlers to comply with turtle conservation measures throughout the year in all areas and eliminated the option of restricted tow times, in lieu of using TEDs, for shrimp trawlers under 25 feet in offshore waters as of January 1, 1993.<sup>29</sup> In addition, shrimp trawlers in inshore waters were required to use TEDs unless they were equipped with a single net with a "headrope length of less than 35 feet and a footrope length of less than 44 feet."<sup>30</sup> If so equipped, the trawlers could still use restricted tow times.<sup>31</sup>

In 1993, the State Department revised the guidelines so that they would be more in line with the U.S. domestic program.<sup>32</sup> The State Department's guidelines eliminated the second option for certification for foreign nations (i.e., use of TEDs not required if it could be determined that the level of the incidental capture in those areas and times did not warrant their use).<sup>33</sup> Under the 1993 Guidelines, certification would depend on the use of TEDs in all areas at all times.<sup>34</sup> Merely requiring the use of TEDs would not ensure certification for affected nations. In order to be certified, the turtle conservation program of each affected nation had to contain enforcement provisions to compel compliance with the TED requirement.<sup>35</sup>

In particular, the 1993 Guidelines set out that each affected nation must require the use of TEDs on a significant number of shrimp trawl

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<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* Restrictions Applicable to Shrimp Trawlers and Other Fisheries, 57 Fed. Reg. 57,348 (1992) to be codified at 50 C.F.R. pts. 217 and 227 [hereinafter 1992 Revised Regulations].

<sup>29</sup> *See id.* at 57,348.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015, 9016 (1993) [hereinafter 1993 Guidelines].

<sup>33</sup> *See id.* at 9016.

<sup>34</sup> *See id.* at 9016-17.

<sup>35</sup> *See id.* at 9017.

vessels by May 1, 1993.<sup>36</sup> As of May 1, 1994, the use of TEDs would be required on all commercial shrimp trawl vessels in the affected nations.<sup>37</sup> In order to be certified in 1994 and the years thereafter, affected nations had to require that all commercial shrimp trawl vessels use TEDs at all times. The exceptions to the use of TEDs allowed under the domestic regulations were also applicable to the foreign vessels.<sup>38</sup>

#### D. *The Court of International Trade*

In June 1994, certain environmental organizations, animal protection organizations, and an association of domestic fishermen<sup>39</sup> brought an action in the United States Court of International Trade<sup>40</sup> against the Secretary of State, Secretary of Treasury, the Secretary of Commerce and certain Assistant Secretaries, to compel greater international enforcement of the Endangered Species Act provisions for the protection of endangered sea turtles.<sup>41</sup>

The plaintiffs claimed that the limitation on the scope of section 609, by the State Department's Guidelines, to the wider Caribbean/western Atlantic region was a violation of the plain language of the statute.<sup>42</sup> The United States argued that section 609(b) was "silent on the geographic

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> The plaintiffs were Earth Island Institute, a California Nonprofit Corporation; Todd Steiner; The American Society for the Prevention of Cruelty to Animals, a New York Nonprofit Corporation; the Humane Society of the United States, a Delaware Nonprofit Corporation; The Sierra Club, a California Nonprofit Corporation; and The Georgia Fisherman's Association, Inc., a Georgia Corporation. *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 559 (Ct. Int'l Trade 1995).

<sup>40</sup> The U.S. Court of International Trade was created by Pub. L. No. 96-417, 1996 U.S.C.C.A.N. (94 Stat.) 1727, (*codified* at 28 U.S.C. § 251 (1994)) (indicating that the Ct. Int'l Trade was the successor to the U.S. Customs Court).

<sup>41</sup> *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995) (holding, *inter alia*, that Endangered Species Act provisions are without geographic boundary and that global enforcement is mandatory despite potential conflicts with GATT). *See also Earth Island Inst. v. Christopher*, 6 F.3d 648, 653-54 (9<sup>th</sup> Cir. 1993) (holding that the statute banning importation of shrimp from countries that did not use TEDs was an "embargo" and that the Ct. Int'l Trade had exclusive jurisdiction over the action); *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1087, 1095 (Ct. Int'l Trade 1995) (holding plaintiffs were entitled to seek judicial review of Department of Commerce certification of foreign turtle protection programs).

<sup>42</sup> *See Earth Island Inst.*, 913 F. Supp. at 562.

scope of its implementation” and the State Department’s “delimitation . . . [was] reasonable.”<sup>43</sup> The Court, however, interpreted the statute differently than the United States:

The starting point in every case involving construction of a statute is the language itself. . . .

Here, the court finds the statute Congress has decided to enact to be clear and unambiguous in regard to its scope. Its language includes “*all* foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which . . . may affect adversely [endangered or threatened] species of sea turtles” and “protection of specific ocean and land *regions* which are of special significance to the health and stability of such species of sea turtles” and “amendment of *any* existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party” and “*each* nation” which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles and which may affect them adversely. No language of section 609 restricts its geographical purview, nor can the court accept the premise that the statute is simply silent on the matter.<sup>44</sup>

Counsel for the United States argued that the legislative history of section 609 supported the government’s reading of the statute. In the court’s view there was “hardly any history” and although the history did tend to focus on the oceanic region chosen by the State Department, “such focus does not mean that either the legislative process itself, or more importantly, the adopted result thereof was or is so restricted.”<sup>45</sup>

Another argument put forward by the United States was that Congress had acquiesced to the State Department’s construction of the statute.<sup>46</sup> In support of this argument the United States pointed out that the State Department’s interpretation that section 609 only applied to the

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<sup>43</sup> *Id.* at 574-575.

<sup>44</sup> *Id.* at 575 (footnotes omitted).

<sup>45</sup> *Id.* at 576.

<sup>46</sup> *See id.* at 577.

“wider Caribbean,” was clearly stated during a 1990 hearing, and that Congress, by not taking any action, acquiesced to this interpretation.<sup>47</sup> The authority cited to support this argument did not convince the Court because the State Department’s approach was not long-standing and Congress had never revisited section 609.<sup>48</sup>

In the absence of any such extended, meaningful interaction between the executive and legislative branches which could support judicial reliance on the appearance of congressional acquiescence, the critical, unrefuted facts on this issue in this case remain plaintiff Steiner’s estimate that 124,000 sea turtles continue to drown annually due to shrimping by countries other than the United States, that Congress (and the President) agreed on enactment of section 609 in an attempt to diminish the carnage, and that the Supreme Court continues to adhere to the view that the plain intent of this kind of legislation is to halt and reverse the trend toward species extinction, whatever the cost, and to give endangered species priority over the primary missions of federal agencies.<sup>49</sup>

The Court concluded that it was its responsibility to determine “what the law is” and in its view the purview of section 609 was clear on its face, and not susceptible to differing interpretations.<sup>50</sup> The State Department’s guidelines regarding foreign comparability with the U.S. domestic program were found not to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2),<sup>51</sup> based on the record developed in the case.<sup>52</sup>

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<sup>47</sup> See *Earth Island Inst.*, 913 F. Supp. at 577 (citing Sea Turtle Conservation and the Shrimp Industry: Hearing on the Effectiveness of Federal Efforts to Protect Endangered Species of Sea Turtles and the Impact of Turtle Excluder Devices (TEDS) on the Shrimp Fishing Industry Before the Subcomm. on Fisheries and Wildlife Conservation and the Env’t of the House of Representatives Comm. on Merchant Marine and Fisheries, 101<sup>st</sup> Cong. 35 (May 1, 1990)).

<sup>48</sup> See *id.* (citing *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974)).

<sup>49</sup> *Id.* at 577-578.

<sup>50</sup> See *id.* at 578.

<sup>51</sup> See Administrative Procedures Act, 5 U.S.C. §§ 551-560 (1994).

<sup>52</sup> See *Earth Island Inst.*, 913 F. Supp. at 579.

However, the CIT concluded that defendants were not properly enforcing section 609 because the mandate had been restricted "to the Gulf of Mexico-Caribbean Sea-western Atlantic Ocean."<sup>53</sup> Hence, the Court instructed the United States to enforce section 609 on a global basis.

Ergo, the defendants are hereby directed to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987, 52 Fed.Reg. [sic] 24,244, except as provided in Pub.L. [sic] No. 101-162 § 609(b)(2), 16 U.S.C. § 1537 note, and to report the results thereof to the court on or before May 31, 1996, at which time entry of final judgment will be taken under advisement.<sup>54</sup>

Interestingly for the purposes of the WTO dispute, the defendant-intervenors, the National Fisheries Institute, Inc., raised the issue of the consistency of section 609 with U.S. obligations under GATT. "Indeed, in two instances GATT dispute panels have found analogous embargo provisions of the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361, et. seq. . . . to be violative of GATT principles. A GATT challenge to operation of [section 609] would likely produce the same conclusions."<sup>55</sup>

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<sup>53</sup> *Id.* at 580.

<sup>54</sup> *Id.* (alterations in original).

<sup>55</sup> *Id.* at 579. The court further quotes the Defendant-Intervenor's Memorandum: Obviously, this Court, in construing [section 609] cannot eliminate all infirmities under GATT. No matter what, as the Federal Defendants concede, [section 609] applies to the wider Caribbean/western Atlantic region, and such application could surely be subject to GATT challenge. Nonetheless, NFI suggests that a corollary of *The Charming Betsy* principle must be that, even if *all* conflict with international obligations cannot be eliminated, still it is appropriate to seek to minimize or reduce conflict to the maximum extent possible. In this case, that means construing [s]ection 609 so that it affects the fewest nations and products possible consistent with its statutory purposes.

*Id.* (citation omitted).

Because of the CIT's decision, the State Department had to revise its guidelines concerning the comparability of foreign programs with the U.S. sea turtle conservation program.

#### E. *The Revised Guidelines Mandated by the CIT Decision*

On April 19, 1996, the State Department issued new guidelines.<sup>56</sup> Under the new guidelines, section 609 would be enforced on a world-wide basis as the CIT had ordered in its opinion issued in 1995. Beginning on May 1, 1996, all shipments of shrimp and products of shrimp into the United States were required to be accompanied by a declaration (DSP-121, revised) attesting that the shrimp accompanying the declaration were harvested in a manner that did not adversely affect sea turtles or in waters subject to the jurisdiction of a nation currently certified pursuant to section 609.<sup>57</sup> The declaration was to be signed by the exporter of the shrimp and a government official also had to sign attesting that the shrimp were harvested under conditions that did not adversely affect sea turtles.<sup>58</sup>

The new guidelines did not change any of the substantive requirements of the previous guidelines, only the area of enforcement.

<sup>56</sup> See Revised Notice Guidelines for Determining Comparability of Foreign Programs for Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (1996).

<sup>57</sup> See *id.* at 17,343. These new guidelines provided:

*Shrimp Harvested in a Manner Not Harmful to Sea Turtles.* The Department of State has determined that import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:

- a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested.
- b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.
- c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs.
- d. Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur.

*Id.*

<sup>58</sup> See *id.* (adding that "[t]he declaration must accompany the shipment through all states of the export process, including in the course of any transshipments and of any transformation of the original product").



These new guidelines were the basis of the complaint filed by India, Pakistan, Malaysia and Thailand with the WTO.

## II. ISSUES BEFORE THE PANEL

### A. *The Complaining Parties*

The complaining parties alleged that the U.S. ban on shrimp and shrimp products imposed by section 609 and the guidelines issued thereunder were inconsistent with the obligations of the United States under GATT 1994,<sup>59</sup> particularly Articles I:1, XI:1, and XIII:1, and that the measure could not be justified by invocation of the exceptions set forth in Article XX.<sup>60</sup> The panel undertook to determine first, if the United States violated Article XI:1 of GATT 1994 and then Articles I:1 and XIII:1. After finding a violation of Article XI:1, the panel determined that it was not necessary to inquire into whether there was also a violation of Articles I and XIII.

#### 1. *Article I:1*

Article I of GATT 1994 embodies the most favored nation principle.<sup>61</sup> This principle, a founding principle of the multilateral trading system, commands that WTO Members accord any advantages, privileges

<sup>59</sup> See GATT, *supra* note 3, arts. I:1, XI:1, XIII:1.

<sup>60</sup> See First Submission of Thailand at 12 (May 20, 1997), Shrimp-Turtle Panel Report, *supra* note 6 [hereinafter First Submission Thailand].

<sup>61</sup> See GATT 1994, *supra* note 3, art. I.

#### *General Most-Favored-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and *with respect to all rules and formalities in connection with importation and exportation*, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*

*Id.* (emphasis added).

or immunities granted to any product to the like products originating in or destined for the territories of other WTO Members.

The arguments presented by the complaining parties under Article I:1 were identical with those presented under Article XIII:1: shrimp harvested with or without TEDs are “like products” (because the method of harvest does not change the physical characteristics of shrimp), “like products” are denied entry based on the lack of certification, “like products” are denied entry even though harvested by use of a TED (because the national harvesting the shrimp comes from a non-certified nation), and a “phase-in” period of three years was provided to certain nations while others were only given four months.<sup>62</sup>

## 2. Article XI:1

The main argument of the complaining parties was that the prohibition on shrimp and shrimp products violated Article XI:1 of GATT 1994.<sup>63</sup> In its first submission to the panel, Thailand cited the provisions of Article XI:1 providing for the general elimination of quantitative restrictions on imports and exports. Thailand argued that, because the comprehensive nature of Article XI:1 required its application to all measures instituted or maintained by a Contracting Party, its provisions therefore prohibited outright quotas and quantitative restrictions made effective through import or export licenses.<sup>64</sup> Thailand maintained that the U.S. embargo constituted a restriction on the importation of shrimp and shrimp products from that country and was plainly not in the nature of

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<sup>62</sup> See First Submission Thailand, *supra* note 60, para. 41.

<sup>63</sup> See GATT, *supra* note 3, art. XI.

### *General Elimination of Quantitative Restrictions*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

*Id.*

<sup>64</sup> See First Submission Thailand, *supra* note 60, para. 30. Section III of Thailand's submission was incorporated by reference into the submissions of India and Pakistan. See Submission of Pakistan (May 20, 1997) para. 5 [hereinafter Pakistan Submission]. See also First Written Submission by India (May 20, 1997) para. 5 [hereinafter India Submission].

"duties, taxes, or other charges" as required by Article XI:1.<sup>65</sup> Although nations could be certified as having a program meeting the requirements of U.S. law, that certification could be revoked at any time.<sup>66</sup>

### 3. *Article XIII:1*

The complaining parties also maintained that the U.S. ban on shrimp and shrimp products from nations not in compliance with section 609 was inconsistent with Article XIII:1, which provides for the non-discriminatory application of any quantitative restrictions.<sup>67</sup> Because the United States permitted certain countries (i.e., certified countries) to import shrimp and shrimp products into the United States, while denying the same privilege to other nations, the complaining countries asserted that the U.S. ban had not been applied in a non-discriminatory manner. As a consequence, the complaining parties argued that "like products" from certified and non-certified countries had been treated differently, resulting in an Article XIII:1 violation.<sup>68</sup>

In addition, the complaining parties argued that the United States permitted or denied entry of shrimp and shrimp products based on the methods employed to harvest the shrimp. According to the complaining parties, shrimp and shrimp products are "like products" despite the fact that one nation was certified while another was not.<sup>69</sup> The parties argued that the method chosen to harvest the shrimp did not change the physical characteristics, end-uses, or tariff classifications, and shrimp from non-

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<sup>65</sup> See First Submission Thailand, *supra* note 60, para. 30.

<sup>66</sup> See *id.* (citing the certifications of Ecuador and Colombia in support of their position).

<sup>67</sup> See *id.* para. 34. GATT 1994, Article XIII:1 requires the non-discriminatory administration of quantitative restrictions.

*Non-Discriminatory Administration of Quantitative Restrictions*

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

GATT, *supra* note 3, art. XIII:1.

<sup>68</sup> See First Submission Thailand, *supra* note 60, paras. 35-36.

<sup>69</sup> See *id.* para. 36.

certified nations are perfectly substitutable for shrimp from certified nations.<sup>70</sup>

Shrimp harvested by a national of a non-certified nation would be denied entry into the United States, even if the shrimp were harvested by using a TED, while shrimp harvested by a national of a certified nation in exactly the same manner would be allowed entry into the United States. The difference in treatment between certified and non-certified nations, according to the complaining parties, violated Article XIII:1.<sup>71</sup>

The complaining parties also argued that the embargo was applied in a manner inconsistent with Article XIII:1 because newly affected nations were given only four months notice, while other nations had been granted a three year phase-in period.<sup>72</sup>

#### 4. Article XX

The complaining parties argued that the U.S. embargo, which allegedly was inconsistent with the obligations of the United States under GATT 1994, was not justifiable under the provisions of Article XX of GATT 1994. Article XX provides that WTO Members may adopt and enforce measures that are *inter alia* necessary to protect human, animal or plant life, health, and conservation of exhaustible natural resources.<sup>73</sup> Any measures adopted by a WTO Member must fall within one of the

<sup>70</sup> See *id.* para. 35.

<sup>71</sup> See First Submission Thailand, *supra* note 60, para. 35.

<sup>72</sup> See *id.*

<sup>73</sup> See GATT, *supra* note 3, art. XX.

##### *General Exceptions*

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

....

(b) necessary to protect human, animal or plant life or health;

....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

*Id.*

exceptions listed in Article XX and must not run afoul of the provisions of the introductory chapter or chapeau of the article.

The chapeau of Article XX sets out that although protection measures may be adopted, those measures are subject to certain conditions: "[s]ubject 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 . . ." If the measures are in line with the requirements of the chapeau, and fit within one of the listed categories, presumably the measure will be found to be consistent with the Members' WTO obligations.

First, the complaining parties argued that the embargo could not be justified under Article XX(b) because the measure applied to animals not within the jurisdiction of the United States.<sup>74</sup> Although the complaining parties conceded that the language of Article XX(b) was ambiguous on whether the animals were to be located within the jurisdiction of the Member enacting the measure, they argued that when interpreted in light of the general rules of international law, it should be presumed that Article XX(b) does not extend to measures taken by one Member that affect the life or health of human, plants and animals in the jurisdiction of another Member, absent specific treaty language to the contrary.<sup>75</sup>

In addition, the preparatory work and drafting history of Article XX(b) were cited as supporting the complaining parties' position that the Article was only intended to protect sanitary laws from a GATT challenge.<sup>76</sup>

The complaining parties also challenged the application of Article XX(b) based on the three prong test certain panels had developed to determine whether a particular measure falls within the scope of measures protected by the Article. The first prong of the test examines whether (1) the policy in respect of the measures, for which the provision was invoked, fell within the range of policies designed to protect human, animal or plant life or health; (2) the inconsistent measure for which the exception was being invoked was *necessary* to protect human, animal or plant life or health; and (3) the measure was applied in conformity with the requirements of the chapeau of Article XX.<sup>77</sup>

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<sup>74</sup> See First Submission Thailand, *supra* note 60, para. 44.

<sup>75</sup> See *id.* para. 46.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* para. 55 (citing Reformulated Gasoline Panel Report, *supra* note 1, at 38).

According to the complaining parties, section 609 did not fall within the range of policies designed to protect sea turtle life or health.<sup>78</sup> Furthermore, section 609 would not protect sea turtle life or health because without a phase-in period, fishermen of newly affected nations with no experience in the use of TEDs would likely be unable to use TEDs effectively in the near term.<sup>79</sup>

The complaining parties also asserted that the underlying purpose of section 609 was to redress the "competitive disadvantage of U.S. shrimp fishermen *vis-à-vis* foreign fishermen."<sup>80</sup> To support this argument the complaining countries cited certain parts of the legislative history of section 609, where two Senators supposedly discussed the measure as protection for U.S. fishermen.<sup>81</sup>

In commenting on the provision, one senator explained the embargo would mean that "... the price of shrimp obviously will go up because the supply will be down, so that Louisiana shrimpers, Texas shrimpers, Florida shrimpers will in effect have some form of compensation in the form of higher prices for their shrimp . . . ." Further, another senator stated that it was "... patently unfair to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything and, yet we will then give them our market." This language, together with the fact that Section 609 did not provide the same phase-in period that U.S. shrimp harvesters had been granted, indicates that the policy pursuant to which the embargo was enacted is protection of the U.S. shrimp industry, not sea turtles.<sup>82</sup>

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<sup>78</sup> See *id.* para. 56.

<sup>79</sup> See *id.* para. 18.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* para. 57 (citing the debates on S. 1160, Amendment to the Foreign Relations Authorization Act, 135 CONG. REC. S8373-76 (1989) and H.R. 2991, 135 CONG. REC. S. 12266 (1989)). H.R. 2991 was part of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations, 1990, Pub. L. No. 101-162, 1990 U.S.C.C.A.N. (103 Stat.) 988, 1037. Thailand noted the first of these, S.1160, did not pass but was later included as section 609 in the appropriations measure.

<sup>82</sup> See First Submission Thailand, *supra* note 60, para. 57.

It is interesting to note that the quote used by Thailand in its brief to the panel does not fully reflect the statement of Senator Johnston. In fairness to the United States and to the Senate, upon reading the entire quote from the September 29, 1989 Congressional Record it is quite clear the stated intent behind the legislation was the protection of sea turtles.

What it will mean in practical terms, we think, if those countries do not take that action the price of shrimp obviously will go up because the supply will be down, so that Louisiana shrimpers, Texas shrimpers, Florida shrimpers will in effect have some form of compensation in the form of higher prices for their shrimp should these countries fail to take that action.

If they take the action and do those things which are necessary to protect the sea turtles, then the purpose will have been well achieved.

Mr. President, Senator Breaux and I have in this amendment I think an effective protection first for sea turtles, and alternatively help for the price of shrimp for our shrimpers in Louisiana.<sup>83</sup>

In addition, the statement of Senator Breaux quoted in the Thailand submission is missing some important language.

The problem is even made worse by the fact that other nations which export their shrimp products into this country have little, if any, concern about the endangered species, the ridley sea turtle.

What our amendment does is require our Department of Commerce and the State Department to survey those countries that have an impact on the ridley sea turtle, and to ascertain whether they in fact are taking measures to protect those endangered species, like our shrimpers are being required to do. If they are not—and I tell you I know for a fact they are not—and that determination is made, we will ban the importation of those products into our country.

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<sup>83</sup> 135 CONG. REC. S12266 (Sept. 29, 1989) (statement of Sen. Johnston).

It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and yet, we will give them our market. That is exactly what is happening . . . . It will require other countries to do exactly what we are being required to do, and if in fact they do not, they will lose the U.S. market. It is absolutely unfair and bad policy to do anything else.

So this amendment, I think, will go a long way to establishing a level playing field, while we work together to try to get new rules and regulations which make sense.<sup>84</sup>

Addressing the second prong of the test, the complaining parties argued that the embargo was not "necessary" to fulfill the policy objective, because the word necessary meant that no alternative existed.<sup>85</sup> Specifically, the complaining parties argued that the United States had not demonstrated that alternative GATT consistent measures were not available to it.<sup>86</sup> In support of their argument, the complaining parties cited language in section 609 which specifically called upon the Secretary of State to initiate bilateral or multilateral negotiations with other nations for the protection of sea turtles. Because the legislation contained this language, it indicated that the embargo was not the only means by which the goal could be accomplished.<sup>87</sup>

In addition, the complaining parties argued that the embargo was not necessary because each of the complaining parties had an adequate program in place for the protection of sea turtles<sup>88</sup> and measures other than the embargo were available to the United States.<sup>89</sup> Because sea turtles occur in waters within the jurisdiction of other nations, the United States could have sought the protection of sea turtles through international agreements, instead of unilateral import restrictions.<sup>90</sup> Such negotiations

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<sup>84</sup> *Id.* (statement of Sen. Breaux).

<sup>85</sup> See First Submission Thailand, *supra* note 60, para. 59 (quoting Tuna-Dolphin I Panel Report, *supra* note 1, para. 5.35).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* para. 60.

<sup>88</sup> See *id.* para. 20; Pakistan Submission, *supra* note 64, para. 16; India Submission, *supra* note 64, para. 18; First Submission of Malaysia, paras. 12-22 (June 2, 1997).

<sup>89</sup> See First Submission Thailand, *supra* note 60, para. 62.

<sup>90</sup> See *id.*



and possible agreements, in the complaining parties' view, would achieve the U.S. policy goal and at the same time be consistent with the GATT.<sup>91</sup>

The next requirement, that the measure be consistent with Article XX, could not be proved by the United States, according to the complaining parties. In particular, the United States had the burden of proving that the embargo was not applied in a manner which resulted in arbitrary and unjustifiable discrimination between WTO Members and was not a disguised restriction on international trade.<sup>92</sup>

The complaining parties' basic argument for the inconsistency of the measure with Article XX was that: (1) the newly affected countries were given substantially less notice than other countries before being forced to comply with the TED requirement; and (2) other nations were given a three-year phase-in period and were allowed to continue exporting shrimp, whereas newly affected countries were given only four months notice before the embargo was put in place.<sup>93</sup>

Because of the different treatment, due to the time-periods provided for compliance with the TED requirement, the embargo was applied in a manner that resulted in arbitrary or unjustifiable discrimination among nations and is a disguised restriction on trade.<sup>94</sup> In addition, the United States took approximately ten years to implement the TED program for its fishermen but required the newly affected nations to implement a program in four months, in the complaining parties' view this fact provided proof that the embargo was arbitrary and unjustifiable.<sup>95</sup>

With respect to Article XX(g), the complaining parties argued that it did not apply to renewable resources. The term "exhaustible" as used in Article XX(g), could only apply to finite resources such as minerals, not to biological or renewable resources.<sup>96</sup> In defense of their argument, the complaining parties took issue with the panel report in the Reformulated Gasoline dispute, where the panel determined that a policy to reduce the depletion of clean air was a "policy to conserve a natural resource within the meaning of Article XX(g)."<sup>97</sup> Despite having two GATT 1947 panel

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<sup>91</sup> See *id.*

<sup>92</sup> See *id.* para. 65.

<sup>93</sup> See *id.* para. 66.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* para. 67.

<sup>96</sup> See *id.* paras. 69-72.

<sup>97</sup> See *id.* (citing Reformulated Gasoline Panel Report, *supra* note 1, at 44).

decisions,<sup>98</sup> the Reformulated Gasoline panel and Appellate Body decisions go against their interpretation, the complaining parties went further, arguing that the drafting history of Article XX(g) focused on “raw materials” and therefore, supported their interpretation.<sup>99</sup>

The location of the natural resource or sea turtles, was also an issue because the complaining parties did not believe that Article XX(g) could be applied to natural resources located beyond the jurisdiction of the party enacting the measure. Again, the complaining parties invoked the drafting history of Article XX(g) and the ITO Charter<sup>100</sup> to provide support for their argument.<sup>101</sup>

Even if Article XX(g) did apply, the complaining parties argued that the United States had not satisfied the requirements of Article XX(g). According to the complaining parties, recent panel decisions (i.e., Reformulated Gasoline and 1994 Tuna Dolphin) suggested a four-prong test to determine whether a party invoking Article XX(g) had met its requirements.

The party invoking the exception must establish that:

(1) the policy underlying the measures for which the provision was invoked fell within the range of policies related to the conservation of exhaustible natural resources;

(2) the measures for which the exception was being invoked were related to the conservation of exhaustible natural resources;

(3) the measures for which the exception was being invoked were made effective in conjunction with restrictions on domestic production or consumption; and

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<sup>98</sup> See *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Nov. 20, 1987, GATT B.I.S.D. (Supp. 35) para. 4.4 (1988). See generally *Tuna-Dolphin I* Panel Report, *supra* note 1.

<sup>99</sup> See First Submission Thailand, *supra* note 60, para. 72.

<sup>100</sup> The charter for the International Trade Organization (ITO Charter) was negotiated as part of the Bretton Woods system to be the international organization responsible for trade relations among the members. The U.S. Congress failed to ratify the ITO charter and the organization never came into being. The General Agreement on Tariffs and Trade (GATT 1947) survived the death of the ITO.

<sup>101</sup> The Complaining Parties argued that the “purpose of Article XX(g) was to allow a Contracting Party to impose limits on the exportation of scarce natural resources located within its jurisdiction.” First Submission Thailand, *supra* note 60, para. 74.

(4) the measures were applied in conformity with the requirements of the introductory clause of Article XX.<sup>102</sup>

The complaining parties submitted that although the general purpose of section 609 may have been to protect sea turtles, the objective of the embargo was not. First, the newly affected nations were only given four months to comply with the TED requirement, and the United States recognized that due to inexperience, foreign fishermen were unlikely to use TEDs effectively.<sup>103</sup> Second, the legislative history of section 609 indicated that the purpose was to restrict imports.<sup>104</sup> Third, section 609 was not specifically made an amendment to the ESA, but rather a note to it, and it could be inferred that from this that the purpose of section 609 was something other than protection of endangered species.<sup>105</sup> Fourth, the embargo itself was not related to the conservation of sea turtles because the embargo would only be effective if it forced other nations to change their policies and practices, (i.e., the embargo could not conserve sea turtles by itself).<sup>106</sup> The complaining parties used the statements of the U.S. government made in the dispute at the CIT to demonstrate that, for newly affected nations, the embargo "would not result in any benefit to sea turtles."<sup>107</sup>

According to the complaining parties, the real motivations behind the embargo, were implementing judicial interpretation of U.S. law, protecting the American shrimp industry, and placating the demands of U.S. environmental interest groups.<sup>108</sup>

Taken together, the foregoing factors clearly indicated, in the view of the complaining parties, that the embargo violated the WTO obligations of the United States under Article XI and XIII of GATT 1994 and were not justified under Article XX.

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<sup>102</sup> See *id.* para. 77 (citing Reformulated Gasoline Panel Report, *supra* note 1, at 43 and Tuna-Dolphin II Panel Report, *supra* note 1, para. 5.32).

<sup>103</sup> See *id.* para. 79.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* para. 83.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

B. *The United States*1. *Article XX(g)*

The United States argued that the embargo on imports of shrimp and shrimp products from countries mandated by section 609 satisfied each element of Article XX(g).<sup>109</sup> According to the United States, the embargo met these elements because: (1) sea turtles are exhaustible natural resources; (2) section 609 as a whole relates to the conservation of sea turtles (i.e. “there is a substantial relationship between the measure and the conservation of an exhaustible natural resource,” and “the measure is not ‘merely incidentally or inadvertently aimed’ at conservation”); and (3) “section 609 is made effective in conjunction with restrictions on domestic production or consumption.”<sup>110</sup> The United States invoked the Appellate Body’s opinion in the Reformulated Gasoline dispute to buttress their position.

The Appellate Body interprets this criterion to mean that the measures concerned impose restrictions not just on the imported product but also with respect to the comparable domestic product. The Appellate Body has also stated that this requirement is one of “even-handedness,” and that there is no textual basis for *identical* treatment of domestic and imported products.<sup>111</sup>

According to the United States, those tests were met. In addition, any nation could obtain certification by simply meeting the criteria laid out for “sea turtle safe” shrimp harvesting.<sup>112</sup>

2. *The Chapeau to Article XX*

Simply meeting the tests set out for Article XX(g) does not end the inquiry even if the United States position is correct. The introductory

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<sup>109</sup> See First Submission of the United States of America, United States—Import Prohibition of Certain Shrimp and Shrimp Products (June 9, 1997) paras. 73-92.

<sup>110</sup> Second Submission of the United States of America, Shrimp-Turtle Panel Report, (July 28, 1997), para. 58 [hereinafter Second Submission U.S.].

<sup>111</sup> *Id.* para. 60 (citing Reformulated Gasoline Appellate Body Report, *supra* note 1, at 19)(footnotes omitted).

<sup>112</sup> See *id.*

paragraph or "chapeau" of Article XX must also be satisfied with respect to the provisions of section 609.<sup>113</sup> The United States claimed that section 609 was 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," because the same conditions did not prevail between the complainants and other nations.<sup>114</sup> The United States argued that the conditions should include those that relate to the particular policy goal of the measure.<sup>115</sup> If this were done, the United States argued, the measure clearly fell within the Article XX exceptions.<sup>116</sup>

In other words, if a measure discriminates among countries based on conditions that are legitimately connected with the policy of an Article XX exception, the measure does not amount to an abuse of the applicable Article XX exceptions. . . . In particular, the United States submits that its restrictions on shrimp importation relate to its goal of conserving endangered species of sea turtles. Thus the relevant "conditions" in this case are those conditions of shrimp harvesting that relate to the conservation of sea turtles.<sup>117</sup>

Because section 609 certified: (1) nations having shrimp fisheries only in cold water, where there is virtually no risk of intercepting sea turtles; (2) nations whose shrimp vessels harvest in a manner highly unlikely to result in high turtle mortality (i.e., with small crews and manually-retrieved nets); and (3) any nation adopting a sea turtle conservation program comparable to the United States, it did not

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<sup>113</sup> See GATT, *supra* note 3, art. XX.

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: . . .

*Id.*

<sup>114</sup> Second Submission U.S., *supra* note 110, para. 63 (quoting Article XX) (emphasis omitted).

<sup>115</sup> See *id.* para. 64.

<sup>116</sup> See *id.*

<sup>117</sup> *Id.* paras. 64-65.

discriminate among nations where the same conditions prevail.<sup>118</sup> Hence, section 609 was justified because it met the criteria for Article XX(g) and satisfied the requirements set forth in the chapeau.<sup>119</sup>

With respect to the complaining parties' argument regarding the timing of the U.S. measures, the United States argued that in reality, this was a benefit not discrimination.<sup>120</sup> Because the measures under section 609 were only applied to a limited geographic area in the first three years of application, the complaining parties were unaffected.<sup>121</sup> The three-year grace period could have only benefited the complaining parties. During this period, TEDs became "extraordinarily effective, easily available, and inexpensive" such that the complaining parties should have adopted their use.<sup>122</sup>

The growing effectiveness of TEDs combined with their relatively low cost and the increased international consensus supporting sea turtle conservation, according to the U.S. argument, belied any claims that the U.S. measure was a disguised restriction on trade.<sup>123</sup> Hence, section 609 withstood any scrutiny under Article XX and clearly fell within the exception provided in Article XX(g).<sup>124</sup>

### 3. *Article XX(b)*

The United States argued that the measure could also be justified under Article XX(b), if the panel should somehow find that Article XX(g) was not applicable.<sup>125</sup> Because Article XX(b) allows for certain measures that are "necessary to protect human, animal or plant life or health,"<sup>126</sup> and section 609 was intended to protect animal life or health (i.e., the protection of sea turtles) the measure fit within the Article XX(b) exception.<sup>127</sup> The next element to be satisfied was that the measure was

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<sup>118</sup> See *id.* para 66.

<sup>119</sup> See *id.* para. 69.

<sup>120</sup> See *id.* para. 67.

<sup>121</sup> See *id.*

<sup>122</sup> *Id.* para. 67.

<sup>123</sup> See *id.* para. 68.

<sup>124</sup> See *id.* para. 69.

<sup>125</sup> See *id.*

<sup>126</sup> GATT, *supra* note 3, art. XX:1(b).

<sup>127</sup> See Second Submission U.S., *supra* note 110, para. 70.

“necessary” to achieve this goal. The United States claimed that it met the “necessary” test in two ways.<sup>128</sup>

First, efforts to reduce sea turtle mortality are “necessary” because, as noted, sea turtles are threatened with extinction. Second, the United States measures under Section 609 relating to the use of TEDs are “necessary” because shrimp trawling without TEDs is the largest source of human-induced sea turtle mortality.<sup>129</sup>

Hence, the United States claimed that the measure was also justified under Article XX(b).

#### 4. *Jurisdictional Limitation to Article XX*

The United States then turned to Thailand’s argument concerning a purported jurisdictional limitation to Article XX.<sup>130</sup> Thailand argued in its first and second submissions to the panel that Article XX(g) did not apply to natural resources located outside the jurisdiction of the Member imposing the measure.<sup>131</sup>

The United States flatly rejected Thailand’s arguments.<sup>132</sup> Thailand argued that the 1994 Tuna Panel Report foreclosed any territorial limitation in Article XX(g), but left open the possibility of a jurisdictional limitation.<sup>133</sup>

The United States disagreed with Thailand’s characterization of the 1994 Tuna panel findings and quoted the panel to make its point.

The Panel noted that two previous panels have considered Article XX(g) to be applicable to policies related to migratory species of fish, and had *made no distinction between fish caught within or outside the*

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<sup>128</sup> See *id.* para. 71.

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* para. 74-77.

<sup>131</sup> See First Submission Thailand, *supra* note 60, paras. 45-53; Second Submission of Thailand, paras. 41-58 (July 28, 1997); Shrimp-Turtle Panel Report, *supra* note 6, [hereinafter Second Submission Thailand]. Thailand first argued the point with respect to Article XX(b). See *id.* paras. 75-79.

<sup>132</sup> See Second Submission U.S., *supra* note 110, paras. 74-77.

<sup>133</sup> See generally Second Submission Thailand, *supra* note 131.

*territorial jurisdiction* of the contracting party that had invoked this provision.

The Panel then observed that measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement *with respect to things located, or actions occurring, outside the territorial jurisdiction* of the party taking the measure. An example was the provision in Article XX(e) relating to the products of prison labor. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions *outside the territorial jurisdiction* of the party taking the measure.<sup>134</sup>

In addition, the United States cited the third-party submission of the European Communities in support of its position.<sup>135</sup> The EC pointed out that “in the Tuna II panel, following extensive argument in the question, the panel concluded that there was no valid reason for supporting the conclusion that either Article XX(b) or (g) apply only to policies respecting things located or actions occurring within the territorial jurisdiction of the party taking the measure.”<sup>136</sup>

### III. THE PANEL REPORT

The panel issued its report to the due parties on April 6, 1998. Although the issues in dispute were very controversial, the underlying concerns were quite straightforward and generally uncomplicated.<sup>137</sup>

Essentially the issue was whether a WTO member could ban importation of certain products in furtherance of its conservation policies without violating its WTO obligations.<sup>138</sup>

The panel addressed each issue raised by the parties, beginning with a procedural or preliminary issue that caused a great deal of controversy.

<sup>134</sup> Second Submission U.S., *supra* note 110, para. 75 (quoting Tuna-Dolphin II Panel Report, *supra* note 1, paras. 5.15-5.16).

<sup>135</sup> *See id.* para. 76.

<sup>136</sup> *Id.* (quoting Third-Party Submission of the European Communities, Shrimp-Turtle Panel Report, *supra* note 6, para. 9).

<sup>137</sup> *See generally* Shrimp-Turtle Panel Report, *supra* note 6.

<sup>138</sup> *See id.*



## A. Preliminary Issues

### 1. *Amicus Curiae* Briefs

One constant complaint, voiced by individuals and groups, about the GATT and now the WTO, is that it operates in a non-transparent manner.<sup>139</sup> Panel and Appellate Body proceedings are closed to the public, no transcripts of these proceedings are made available, and the public must wait, sometimes for extensive periods, to have access to documents and decisions. The Shrimp-Turtle panel report did little to change these negative perceptions.

Two non-governmental organizations attempted to provide the panel with amicus curia briefs.<sup>140</sup> The panel rejected these amicus briefs because, in the words of the panel, "[a]ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied."<sup>141</sup>

Although the DSU provides panels the authority to seek information and technical advice from any appropriate source,<sup>142</sup> the panel interpreted this as not permitting information to reach the panel that the panel did not seek.<sup>143</sup> Therefore, in the panel's opinion, "the initiative to

<sup>139</sup> See *World Trade Organization: United States-Standards for Reformulated and Conventional Gasoline: Report of the Appellate Body*, Doc. I-B-77, May 20, 1996, at 25.

<sup>140</sup> See Shrimp-Turtle Panel Report, *supra* note 6, paras. 7.7-7.8.

<sup>141</sup> *Id.* para. 7.8.

<sup>142</sup> See General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1994) [hereinafter DSU].

Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

*Id.*

<sup>143</sup> See Shrimp-Turtle Panel Report, *supra* note 6, para. 7.8.

seek information and to select the source of information rests with the Panel.”<sup>144</sup> Consequently, the panel refused to consider the amicus briefs.<sup>145</sup>

The panel did point out that nothing prevented the parties from incorporating such briefs into their submissions to the panel.<sup>146</sup>

We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.<sup>147</sup>

The panel’s interpretation of Article 13 of the DSU did not find support among NGOs nor certain parties and third-parties. The ruling on amicus briefs did not end the controversy over participation by NGOs in WTO dispute proceedings. If anything, the controversy over the actions of the Shrimp-Turtle panel has brought the issue increased exposure. So much exposure that President Clinton addressed the issue in his remarks at the 50<sup>th</sup> Anniversary of the Multilateral Trading System, WTO Ministerial Meeting in Geneva on May 18, 1998.<sup>148</sup>

Fourth, we must modernize the WTO by opening its doors to the scrutiny and participation of the public.

The WTO should take every feasible step to bring openness and accountability to its operations.” . . .

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<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See* President’s Remarks at the World Trade Organization in Geneva, Switzerland, 34 WEEKLY COMP. PRES. DOC. 926 (May 18, 1998).

Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file 'amicus briefs', to help inform the panels in their deliberations.<sup>149</sup>

## 2. *Use of Experts*

With respect to certain scientific and technical questions, the panel decided to consult experts under the provisions of Article 13(1) and 13(2), first sentence, rather than resort to an expert review group.<sup>150</sup> Consistent with other WTO panels that have encountered the same situation, the panel declined to opt for a formal expert review group advisory report.

### B. *Article XI:1 of GATT 1994*

Article XI:1 of GATT 1994 provides for the general elimination of quantitative restrictions.<sup>151</sup> Prohibitions or restrictions other than duties, taxes or other charges are not allowed under the provisions of Article XI. The panel did not need to go into a lengthy inquiry over the purported violation Article XI:1 because the United States did not dispute that "with respect to countries not certified under section 609, section 609 amounts to a restriction on the importation of shrimp within the meaning of Article

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<sup>149</sup> *Id.* at 929.

<sup>150</sup> See DSU, *supra* note 142, arts. 13.1, 13.2. The second sentence of Article 13.2 provides:

With respect to a factual issue concerning scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for establishment of such a group and its procedures are set forth in Appendix 4.

*Id.* art. 13.2.

<sup>151</sup> See GATT, *supra* note 3, art. XI:1.

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory or any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

*Id.*

XI:1 of GATT 1994.”<sup>152</sup> The panel concluded with respect to this issue that even if the U.S. statement was not an admission of an Article XI:1 violation, the evidence available to the panel was sufficient for it to conclude that the import ban on shrimp from non-certified countries violated Article XI:1.<sup>153</sup>

### C. Articles XIII:1 and I:1

As addressed earlier,<sup>154</sup> the complaining parties claimed that the ban on imported shrimp from non-certified nations violated Articles XIII:1 and I:1 of GATT 1994, because of the time-periods for phase-in and because identical products from different member nations were being treated differently.

The panel concluded because it had already determined that the import ban constituted a violation of Article XI:1, there was no need to reach a decision on Articles I:1 and XIII:1.<sup>155</sup>

### D. Article XX

The United States argued that the import ban adopted pursuant to section 609 was justified under the provisions of Article XX(b) and (g).<sup>156</sup> The dispute in essence, came down to how Article XX is to be interpreted, and the breadth of its provisions. The complaining parties disagreed with the United States, claiming that: (1) Article XX(b) and (g) could not be invoked to justify a measure which applies to animals not within the jurisdiction of the Member enacting the measure; and (2) since section 609 allowed the United States to take actions unilaterally to conserve a shared

<sup>152</sup> Shrimp-Turtle Panel Report, *supra* note 6, para.7.15.

<sup>153</sup> *See id.* para. 7.16.

<sup>154</sup> *See supra* notes 56-101 and accompanying text.

<sup>155</sup> *See* Shrimp-Turtle Panel Report, *supra* note 6, para. 7.22.

This is consistent with GATT and WTO panel practice and has been confirmed by the Appellate Body in the *Wool Shirts* case, where the Appellate Body mentioned that "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."

*Id.*

<sup>156</sup> *See* Second Submission U.S., *supra* note 110, at 32.

natural resource, it therefore violated the sovereignty principle under international law.<sup>157</sup>

In response to the arguments of the complaining parties, the United States argued that: (1) Article XX (b) and (g) contain no jurisdictional limitation, nor limitations on the location of the animals or natural resources to be protected and conserved; and (2) under principles of international law relating to sovereignty, States have the right to regulate imports within their jurisdiction.<sup>158</sup>

From the above arguments the panel framed the issue as, "whether Article XX(b) and (g) apply at all when a Member has taken a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s)."<sup>159</sup> The framing of the issue in this manner did not bode well for the United States. The panel did, however, go on to state that Article XX can be interpreted broadly.<sup>160</sup>

We note that Article XX can accommodate a broad range of measures aiming at the conservation and preservation of the environment. At the same time, by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures whereby a Member conditions access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s).<sup>161</sup>

The tension as expressed by the panel in the quote above between the Members WTO obligations on the one hand, and Members efforts to protect the environment and endangered species on the other, provides the most contentious issue in this dispute.

The panel determined that, in order to interpret whether a measure was justified under Article XX, it had to first determine the scope of Article XX by considering its terms in their ordinary meaning and in their

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<sup>157</sup> See Shrimp-Turtle Panel Report, *supra* note 6, para. 7.24.

<sup>158</sup> See *id.*

<sup>159</sup> *Id.* para. 7.26.

<sup>160</sup> See *id.*

<sup>161</sup> *Id.*

context taking into account the object and purpose of GATT 1994 and the WTO Agreement.<sup>162</sup>

In order to interpret whether a particular measure is justified under a provision or the provisions of Article XX, the measure must fit within the scope of the provision invoked and must also be consistent with the introductory paragraph or chapeau of Article XX.<sup>163</sup>

#### Article XX

##### *General exceptions*

Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . .<sup>164</sup>

Rather than analyze the measures under the specific provisions of Article XX and then determine if those measures were consistent with the chapeau, the panel first examined the measures in light of the chapeau.<sup>165</sup> In the opinion of the panel, the chapeau by its terms, "addresses, not so much the questioned measure or its specific contents, but rather the manner in which that measure is applied."<sup>166</sup> Because the United States was claiming an exception under Article XX, and because Article XX is considered an affirmative defense, the panel determined that the burden was on the United States to prove that the measure was justified under the provisions of Article XX.<sup>167</sup>

The panel laid out the manner in which it would interpret Article XX.<sup>168</sup>

In order to apply Article XX in this case, we must, as mentioned in paragraph 7.27 above, interpret it in line with Article 31(1) of the Vienna Convention. More particularly, the chapeau of Article XX must be interpreted

<sup>162</sup> See *id.* para. 7.27.

<sup>163</sup> See GATT, *supra* note 3, art. XX.

<sup>164</sup> *Id.*

<sup>165</sup> See Shrimp-Turtle Panel Report, *supra* note 6, para. 7.28.

<sup>166</sup> See *id.* para. 7.29.

<sup>167</sup> See *id.* para. 7.30.

<sup>168</sup> See *id.* para. 7.33.

on the basis of the ordinary meaning of its terms, in their context and in the light of the object and purpose of GATT 1994 and the WTO Agreement. We consider first if the terms of the chapeau of Article XX explicitly address the issue of whether Article XX contains any limitation on a Member's use of measures conditioning market access to the adoption of certain conservation policies by the exporting Member. In this connection, we note that the chapeau prohibits such application of the measure as would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail.<sup>169</sup>

The panel first determined that shrimp from certified nations and shrimp from non-certified nations were treated differently (i.e., shrimp from non-certified nations were discriminated against by virtue of the provisions of section 609). Although Article XX allows for discriminatory treatment under certain conditions, the manner of the discrimination must not be arbitrary or unjustifiable. The panel proceeded to determine whether the U.S. measure was unjustifiable:<sup>170</sup>

As was recalled by the Appellate Body in the *Gasoline* case, "the text of the chapeau of Article XX is not without ambiguity." The word "unjustifiable" has never actually been subject to any precise interpretation. The ordinary meaning of this term is susceptible to both narrow and broad interpretations. While the ordinary meaning of "unjustifiable" confirms that Article XX is to be applied within certain boundaries, it does not explicitly address the issue of whether Article XX should be interpreted to contain any limitation on a Member's use of measures conditioning market access on the adoption of certain conservation policies by the exporting Member. For that reason, it is essential that we interpret the term "unjustifiable" within its context and in the light of the object and purpose of the agreement to which it belongs.<sup>171</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *See id.* para. 7.34.

<sup>171</sup> *Id.*

The panel considered that the context and the object and purpose of the WTO Agreement were “intimately linked.”<sup>172</sup> For this reason, the panel determined that the chapeau to Article XX could not be distinguished from Article XX as a whole, and that because the WTO Agreement is an integrated system, it must consider not only the relevant provisions of GATT 1994, but of the WTO Agreement as a whole.<sup>173</sup>

In reviewing past GATT 1947 panel decisions<sup>174</sup> and a WTO Appellate Body decision, the panel determined that the provisions of Article XX are to be interpreted narrowly.<sup>175</sup> The panel looked to the Appellate Body decision in the Reformulated Gasoline dispute, where the Appellate Body concluded that there were certain limits and conditions on the provisions of Article XX.<sup>176</sup>

[W]hile the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions [contained in Article XX] are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.<sup>177</sup>

Based on its reading of the above-quoted language and its interpretation of Article XX, the panel concluded that when Members invoke the right to derogate from certain of their obligations under the WTO Agreement by virtue of Article XX, they must not do so in a manner that frustrates or defeats the “purposes and objects of the General Agreement and the WTO Agreement. . . .”<sup>178</sup> In addition, the panel

<sup>172</sup> See *id.* para. 7.35.

<sup>173</sup> See *id.*

<sup>174</sup> See Tuna-Dolphin I Panel Report, *supra* note 1; United States Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36<sup>th</sup> Supp.) at 345 (1989); United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R (Jan. 6, 1997).

<sup>175</sup> See Shrimp-Turtle Panel Report, *supra* note 6, paras. 7.36-7.38.

<sup>176</sup> See *id.* paras. 7.34-7.39.

<sup>177</sup> *Id.* (quoting the Reformulated Gasoline Appellate Body Report, *supra* note 1, at 22).

<sup>178</sup> *Id.* para. 7.40 (footnote omitted).



recalled the international law principle of *pacta sunt servanda* (i.e., that treaties are to be performed in good faith) and the explanation of this principle contained in Article 26 of the Vienna Convention, as further support for its conclusion.<sup>179</sup>

The next task for the panel was to determine the object and purpose of the WTO Agreement. Although the preamble of the WTO Agreement contains language which discusses the "optimal" use of the world's resources, the panel concluded that the central focus of the WTO Agreement was the promotion of economic development through trade.<sup>180</sup>

While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.<sup>181</sup>

The WTO Agreement, in the panel's view, favors a multilateral approach to trade issues. Therefore, WTO Members are only allowed to derogate from the provisions of GATT so long as they do not undermine the multilateral trading system.<sup>182</sup>

We are of the view that a type of measure adopted by a Member which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only

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<sup>179</sup> Article 26 of the Vienna Convention on the Law of Treaties states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>180</sup> See Shrimp-Turtle Panel Report, *supra* note 6, para. 7.42.

<sup>181</sup> *Id.*

<sup>182</sup> See *id.* para. 7.44.

whether the measure *on its own* undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.<sup>183</sup>

The “threat to the multilateral trading system” standard is a new one for Article XX. The panel concluded that allowing a broad interpretation of the chapeau to Article XX would permit a Member to condition access to its markets upon the adoption by other “[m]embers of certain policies, including conservation policies.”<sup>184</sup> The ultimate danger in the opinion of the panel was that Members would adopt differing standards for products such that “[m]arket access for goods could become subject to an increasing number of conflicting policy requirements . . . [and this would result in] the end of the WTO multilateral trading system.”<sup>185</sup>

This approach to interpreting Article XX (i.e., first interpreting the measure in light of the chapeau) is quite different from the approach taken by other GATT 1947 panels and the Appellate Body in the Reformulated Gasoline dispute.<sup>186</sup> Past panels first attempted to determine if the measure fit within one of the exceptions and then determined if the measure was applied in a non-discriminatory manner as required by the chapeau to Article XX.<sup>187</sup>

Based on its finding that the U.S. measures conditioned access to the U.S. market on whether other WTO Members adopted certain conservation policies, the panel concluded that the U.S. measures under section 609 “constitut[ed] unjustifiable discrimination between countries where the same conditions prevail [and were therefore] not within the scope of measures [covered by] Article XX.”<sup>188</sup> In addition, the panel concluded that although WTO Members are free to have environmental and endangered species protection policies, such policies must not endanger the multilateral trading system.<sup>189</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* para. 7.45.

<sup>185</sup> *Id.*

<sup>186</sup> See Reformulated Gasoline Panel Report, *supra* note 1.

<sup>187</sup> See *id.*

<sup>188</sup> *Id.* para. 7.49.

<sup>189</sup> See *id.* para. 9.1.

"Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose."<sup>190</sup>

Based on the panel's analysis of Article XX, it is difficult to fathom what type of measure would not be a "threat to the multilateral trading system." It would seem that any time a Member restricts access to its market, even if the measure employed fits within the type of measures listed in Article XX, that this action would threaten the multilateral trading system. As stated in the report, the panel feared that a particular measure, even though it may not affect a significant amount of trade, could be a threat to the multilateral system if other Members were free to adopt policies similarly restricting access to their markets.<sup>191</sup>

*E. The Differing Interpretations of Article XX: Are There Any Environmental Exceptions That Do Not "Threaten the Multilateral Trading System?"*

As stated earlier, the panel report seems to set a new and higher standard for imposition of measures pursuant to Article XX exceptions. The interpretation that the chapeau to Article XX contains a "threat to the multilateral trading system" standard is hard to reconcile with the language of Article XX.

After the Appellate Body issued its report in the Reformulated Gasoline dispute, the issue of Article XX exceptions and the analysis to be employed when dealing with such exceptions was thought to be somewhat resolved.<sup>192</sup> The Appellate Body, in Reformulated Gasoline, rejected the

<sup>190</sup> Shrimp-Turtle Panel Report, *supra* note 6, para. 9.1.

<sup>191</sup> See Shrimp-Turtle Panel Report, *supra* note 6, para. 112. The panel states:  
[B]y allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that . . . we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure*, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.

*Id.* (emphasis in original).

<sup>192</sup> See *id.*

[I]f an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access

panel's legal conclusion that the baseline establishment rules did not fall within the terms of Article XX(g) because "the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs."<sup>193</sup>

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized. . . . The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III, and XI; conversely the context of Articles I and III and XI includes Article XX. Accordingly, the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.<sup>194</sup>

This interpretation of Article XX is in stark contrast to the panel's interpretation of Article XX in the Shrimp-Turtle report. Not only did the

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*to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.*

*Id.* para 7.45 (emphasis in original).

<sup>193</sup> *Id.* para. 6.40.

<sup>194</sup> *Id.* paras. 6.25-6.28.

panel seem to ignore the words actually used, it added a new requirement that does not appear in the text at all.<sup>195</sup>

The Appellate Body, in the Reformulated Gasoline Report, determined that the interests embodied in Article XX had to be balanced with the obligations contained in other articles.<sup>196</sup> The Shrimp-Turtle panel, however, ignores the type of balancing test the Appellate Body suggested in Reformulated Gasoline Report and instead shifts the balance in favor of trade over the environment or endangered species.

Under the Shrimp-Turtle panel's application of the "threat to the multilateral trading system standard," the trading system would be threatened anytime a WTO Member blocked or put any type of conditions on access to its market. Hence, the exceptions contained in Article XX would be rendered useless, despite the fact that the Members agreed on their inclusion in the General Agreement and on the language used. It would be difficult to imagine an instance where a measure that fell within an Article XX exception would not cause a threat to the multilateral trading system, under the standard employed by the Shrimp-Turtle panel. The panel's interpretation of the chapeau to Article XX in the Shrimp-Turtle report does not seem compatible with the language in Article XX and the purpose of the WTO Agreement.

The panel's legal findings and conclusions in the Shrimp-Turtle report are hard to reconcile with the actions of WTO Members at the end of the Uruguay Round. There are several multilateral environmental agreements and agreements to protect endangered species. In each case, the signatories have undertaken obligations to protect and preserve the environment, endangered species, or in some cases, both.<sup>197</sup>

## F. Conclusion

The tension between efforts to strengthen the multilateral trading system through continued liberalization and the efforts to protect the environment and endangered species is made more intense by the panel ruling in the Shrimp-Turtle dispute.

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<sup>195</sup> See *supra* notes 182-185 and accompanying text.

<sup>196</sup> See Reformulated Gasoline Appellate Body Report, *supra* note 6, at 14.

<sup>197</sup> See, e.g., Convention on Wetlands of International Importance Especially as Waterfowl Habitat, concluded at Ramsar, Iran, on Feb. 2, 1971; Convention on the Conservation of European Wildlife and Natural Habitats (with appendices), concluded at Bern on Sept. 19, 1979; Convention on International Trade in Endangered Species of Wild Fauna and Flora (with appendices and Final Act of Mar. 2, 1973).

The panel's admonition to the United States that it should embark on multilateral negotiations to address issues like the preservation of sea turtles rather than taking unilateral action seems to set a new and higher standard for measures intended to protect the environment. If WTO Members have to embark on multilateral negotiations as a prerequisite for employing measures that are clearly anticipated in Article XX, then the likelihood of any measure being found to be consistent with the provisions of Article XX decreases dramatically.

#### IV. REACTION TO THE PANEL REPORT

As was expected, the reaction to the panel report was not positive. On the day the report was released environmental and conservationist groups held a press conference to blast the report and the WTO.<sup>198</sup>

The Office of the U.S. Trade Representative (USTR) released a statement that it was disappointed with the ruling.<sup>199</sup> There was an unexpectedly muted reaction by Members of Congress. Although obviously disappointed by the ruling, the type of outrage expressed by the environmentalists was not echoed by the Executive Branch or Members of Congress, evidenced by a lack of response in the press.

#### V. THE APPEAL BY THE UNITED STATES

On July 13, 1998 the United States communicated its notice of appeal to the WTO Dispute Settlement Body (DSB).<sup>200</sup> The United States asked the Appellate Body to review the panel's finding that the measure at issue was not within the scope of measures permitted under the chapeau of Article XX.<sup>201</sup> In addition, the United States appealed the panel's rejection of information from non-governmental organizations (NGOs).<sup>202</sup>

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<sup>198</sup> See, e.g., *Press Conference of National Wildlife Federation, Center for Marine Conservation, World Wildlife Fund, Defenders of Wildlife, and Center for International Environmental Law* (CSPAN television broadcast, Apr. 6, 1998).

<sup>199</sup> See *USTR Barshefsky Responds to WTO Shrimp-Turtle Report*, USTR Press Release, 98-40 (Apr. 6, 1998).

<sup>200</sup> United States, *Import Prohibition of Certain Shrimp and Shrimp Products, Notification of an Appeal by the United States under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), WT/DS58/11 (July 13, 1998).

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

The United States submitted its brief to the Appellate Body on July 23, 1998.<sup>203</sup> The United States took issue not only with the panel's finding that the provisions of section 609 were outside the scope of Article XX, but also with its interpretation of the object and purpose of the WTO Agreement and the adoption of the "threat to the multilateral trading system" analysis.<sup>204</sup> The final point addressed in the U.S. submission was the panel's rejection of the briefs from non-governmental organizations.<sup>205</sup>

In its appellate submission, the United States argued that the panel's finding that the measure at issue was outside the scope of Article XX was based upon its failure to apply the ordinary meaning of the phrase "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."<sup>206</sup> The United States further argued that the panel interpreted this phrase as "requiring panels to determine whether [such] a measure constitutes a threat to the multilateral trading system" and that "[t]his interpretation...ha[d] no basis in the text of the GATT [and]... [ha[d]] never been adopted by any prior panel or Appellate Body. . . ."<sup>207</sup> In addition, the United States argued that such an interpretation "would impermissibly diminish the rights that WTO Members reserved under Article XX."<sup>208</sup>

The United States argued that with respect to the panel's interpretation of Article XX, it incorrectly applied the object and purpose of the WTO Agreement.<sup>209</sup>

The Panel's description of the GATT's overall object and purpose is both vastly oversimplified, and *not* helpful in interpreting Article XX, which explicitly *allows* for measures that result in discriminatory market access. Like the panel in [Reformulated Gasoline Report], the panel here has "ignore[d] the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests—including the protection of

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<sup>203</sup> See Submission of the United States (Appellant), *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 (July 23, 1998) [hereinafter U.S. Appellate Submission].

<sup>204</sup> See *id.* para. 49.

<sup>205</sup> See *id.* para. 28.

<sup>206</sup> *Id.* para. 21.

<sup>207</sup> *Id.* para. 22.

<sup>208</sup> *Id.* para. 22.

<sup>209</sup> See *id.* para. 32.

human health, as well as the conservation of exhaustible natural resources—to find expression.”<sup>210</sup>

The United States argued that the panel erred when it determined that because the GATT is a trade agreement, it would necessarily follow that trade concerns must prevail over all other concerns in all situations where the measures affected obligations under GATT.<sup>211</sup> In the view of the United States, the WTO Agreement is a far-reaching agreement, one that has more than a single object and purpose.<sup>212</sup> In fact, the preamble to the WTO Agreement contains explicit language that addresses environmental concerns within the context of trade.<sup>213</sup>

Further, the United States rejected the panel’s “threat to the multilateral trading system”<sup>214</sup> analysis because, among other reasons, this analysis: (1) “assumes that the complaining parties had an expectation that the General Exceptions in Article XX would never be invoked by another WTO Member”;<sup>215</sup> (2) “the Appellate Body explicitly disapproved of panels using ‘expectations’ as a basis for interpreting the WTO Agreement;”<sup>216</sup> (3) [t]he expectations of the [p]arties are reflected in the

<sup>210</sup> *Id.* (alteration in original) (quoting Reformulated Gasoline Appellate Body Report, *supra* note 1, para. 32).

<sup>211</sup> *See id.* para. 33.

<sup>212</sup> *See id.* para. 34.

<sup>213</sup> *See id.* The first clause of the Preamble to the WTO Agreement states:

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. . . .

Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, 33 I.L.M. 1144 (1994) (emphasis in original).

<sup>214</sup> U.S. Appellate Submission, *supra* note 203, para. 45.

<sup>215</sup> *Id.* para. 37.

<sup>216</sup> *Id.* (citing India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, para. 7.18 (Sept. 5, 1997)).



language of Article XX itself";<sup>217</sup> and (4) "the [p]anel made no findings that the U.S. measure amounted to any sort of disguised restriction."<sup>218</sup>

Although it disagreed with the panel's analysis and stated that the "threat to the multilateral trading system" analysis should be disregarded, the United States claimed that even under that analysis, the measure did not threaten the multilateral trading system.<sup>219</sup> The Appellate Body agreed, finding that the U.S. measure was not an actual threat to the multilateral trading system.<sup>220</sup>

The threat to the multilateral trading system analysis, according to the U.S. argument, is not found in the text of the WTO Agreement and thus adds a new obligation to Article XX.<sup>221</sup> The addition of this new obligation runs counter to the explicit provisions of Article 3.2 of the DSU which provides, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>222</sup> In adopting the threat to the multilateral trading system analysis, the panel exceeded the authority provided to it under the DSU. In addition, the United States argued that the measure reasonably differentiates between countries based on the risk posed to endangered sea turtles by countries' shrimp trawling industries, and the measure did not amount to unjustifiable discrimination.<sup>223</sup>

The last issue addressed by the United States was the panel's decision not to consider the submissions from non-governmental organizations.<sup>224</sup> Contrary to the findings of the panel, the United States argued that nothing in the DSU prohibited a panel from considering unsolicited information.<sup>225</sup> According to the United States, Article 13 of the DSU provides the panel with broad authority and allows it "discretion in choosing its sources of information."<sup>226</sup>

Ultimately, the United States asked the Appellate Body to reverse the findings of the panel because if the findings were upheld, they would

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<sup>217</sup> *Id.* para. 39.

<sup>218</sup> *Id.* para. 40.

<sup>219</sup> *See id.* para. 42.

<sup>220</sup> *See id.* para. 47.

<sup>221</sup> *See id.* para. 48.

<sup>222</sup> *Id.* para. 50 (quoting DSU, *supra* note 142, art. 3.2).

<sup>223</sup> *See id.* para. 61.

<sup>224</sup> *See* U.S. Appellate Submission, *supra* note 203, para. 66.

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* para. 67.

“impermissibly change the basic terms of the bargain agreed to by WTO Members in agreeing to the GATT 1994.”<sup>227</sup>

## VI. THE APPELLATE BODY REPORT

On October 12, 1998, the Appellate Body issued its report in the Shrimp-Turtle dispute.<sup>228</sup> The United States appealed two issues, the rejection by the panel of non-requested submissions by non-governmental organizations and the panel’s interpretation of Article XX of GATT 1994.<sup>229</sup>

The first issue the Appellate Body addressed was the finding by the panel that acceptance of “non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied.”<sup>230</sup> Although the Appellate Body agreed with the panel that WTO dispute settlement is limited to Members of the WTO, and only those Members who are parties to the dispute or are third-parties have a legal right to submit information, the Appellate Body disagreed with the panel’s interpretation of the provisions of Article 13.2 of the DSU.

Article 13 of the DSU provides panels the authority to seek information:

1. Each panel shall have the right to seek information and technical advice from any individual or body that it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the

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<sup>227</sup> *Id.* para. 73.

<sup>228</sup> See United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp-Turtle Appellate Body Report].

<sup>229</sup> See United States, *Import Prohibition of Certain Shrimp and Shrimp Products, Notification of an Appeal by the United States under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), WT/DS58/11 (July 13, 1998).

<sup>230</sup> See *id.* para. 98.

individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.<sup>231</sup>

Based on the Appellate Body's interpretation of Article 13, panels are provided comprehensive authority to seek information and technical advice.<sup>232</sup> This authority, in the view of the Appellate Body, "is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel."<sup>233</sup>

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.<sup>234</sup>

Hence, according to the Appellate Body, the panel's legal interpretation that accepting non-requested information would be incompatible with the provisions of the DSU was in error.

The next issue addressed by the Appellate Body was the panel's interpretation of Article XX and the finding that section 609 was not within the scope of Article XX's exceptions.

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<sup>231</sup> DSU, *supra* note 6, art. 13.

<sup>232</sup> See Shrimp-Turtle Appellate Body Report, *supra* note 228, para. 107.

<sup>233</sup> *Id.* para. 108.

<sup>234</sup> See *id.* (emphasis in original).

The Appellate Body reviewed the panel's Article XX analysis and found that it did not follow "all of the steps of applying the 'customary rules of interpretation of public international law' as required by Article 3.2 of the DSU."<sup>235</sup> First, the Appellate Body found that the panel did not "expressly examine the ordinary meaning of the words of Article XX."<sup>236</sup>

The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied." In *United States—Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied." The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself*.

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The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau. The Panel failed to scrutinize the *immediate* context of the chapeau: i.e., paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner.<sup>237</sup>

The Appellate Body disagreed with the sequence of the Panel's analysis under Article XX. The Appellate Body argued that the structure

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<sup>235</sup> *Id.* para. 114.

<sup>236</sup> *Id.* para. 115.

<sup>237</sup> *Id.* paras. 115-16 (emphasis in original).

and the logic of Article XX dictates that a measure is to be first analyzed under the paragraphs of Article XX and then under the provisions of the chapeau.<sup>238</sup>

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the application of a measure "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." When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination," for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.<sup>239</sup>

The Appellate Body concluded that the panel's interpretative analysis, embodied in its findings, constituted legal error and thus reversed those findings.<sup>240</sup> The Appellate Body then had to complete the legal analysis left unfinished by the panel to determine if the U.S. measure was within the scope of measures encompassed by Article XX.<sup>241</sup> In at least two other disputes the Appellate Body had to undertake to complete a legal analysis left incomplete due to errors by the panels.<sup>242</sup>

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<sup>238</sup> See *id.* paras. 118-19.

<sup>239</sup> *Id.* para. 120 (emphasis added).

<sup>240</sup> See *id.* para. 122.

<sup>241</sup> See *id.* para. 123.

<sup>242</sup> See *id.* para. 124 (citing *European Communities-Measures Affecting the Importation*

The Appellate Body had to determine two things: first, whether under its Article XX analysis, the U.S. measure fit under Article XX(g); and second, whether section 609 was a measure relating to the conservation of exhaustible natural resources within the meaning of Article XX(g).<sup>243</sup>

The panel, because it began with the chapeau rather than the specific provision of Article XX, did not complete the analysis to determine if section 609 fit within the scope of measures covered by Article XX(g).

The Appellate Body, upon review of the arguments made by the parties,<sup>244</sup> determined that Article XX(g) was not limited to the conservation of mineral or non-living resources:

The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable," are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources

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of Certain Poultry Products, WT/DS48/R/CAN (Aug. 18, 1997) para. 5, and Canada-Certain Measures Concerning Periodicals, WT/DS31/AB/R (July 30, 1997) at 23-24).

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

*Id.*

<sup>243</sup> *Id.* Article XX(g) provides, in part "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT 1994, *supra* note 3, art. XX(g).

<sup>244</sup> See *supra* notes 59-105 and accompanying text.

are just as "finite" as petroleum, iron ore and other non-living resources.<sup>245</sup>

The next issue the Appellate Body reviewed was whether section 609 was a measure related to the conservation of an exhaustible natural resource.<sup>246</sup> First, the Appellate Body noted that the policy of protecting and conserving endangered sea turtles was one that was shared by all participants to the dispute and thus constituted a legitimate conservation policy.<sup>247</sup> Second, the Appellate Body inquired into the relationship between the general structure and design of section 609 and the policy goal of preserving sea turtles:<sup>248</sup>

In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States-Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.<sup>249</sup>

Based on the foregoing, the Appellate Body concluded that section 609 was a measure "relating to" the conservation of an exhaustible natural

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<sup>245</sup> Shrimp-Turtle Appellate Body Report, *supra* note 228, para. 128.

<sup>246</sup> *See id.* para. 135.

<sup>247</sup> *See id.*

<sup>248</sup> *See id.* para. 137.

<sup>249</sup> *Id.* para. 141 (footnote omitted).

resource within the meaning of Article XX(g) of GATT 1994.”<sup>250</sup>

The next issue for the Appellate Body was whether section 609 was made effective in conjunction with restrictions on domestic production or consumption.<sup>251</sup> In essence, in order to satisfy the provisions of Article XX(g), the restrictions imposed on imports of foreign shrimp (i.e., that it be caught in a sea-turtle safe manner) also must be imposed on domestically caught shrimp.<sup>252</sup> Upon review of section 609 and the accompanying regulations, the Appellate Body concluded the provisions of section 609 were “even-handed” in nature and were made effective in conjunction with restrictions on domestic harvesting of shrimp.<sup>253</sup>

After the Appellate Body determined that the provisions of section 609 satisfied the requirements of Article XX(g), it then turned to the question of whether the measure complied with the provisions of the chapeau of Article XX.<sup>254</sup> In particular, the Appellate Body had the “task of appraising Section 609, and specifically the manner in which it is applied under the chapeau of Article XX; that is, the second part of the two-tier analysis required under Article XX.”<sup>255</sup>

According to the Appellate Body’s interpretation of the chapeau, the exceptions contained in the paragraphs following the chapeau, are limited and conditional with respect to the substantive obligations found in the other sections of GATT 1994.<sup>256</sup> This interpretation was bolstered by

<sup>250</sup> *Id.*

<sup>251</sup> *See id.* para. 54.

<sup>252</sup> Paragraph (g) of Article XX covers measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” GATT 1994, *supra* note 3, art. XX(g). *See id.* para. 126.

<sup>253</sup> *See* Shrimp-Turtle Appellate Body Report, *supra* note 228, paras. 144-45. The Appellate Body noted the penalties imposed on domestic shrimp operations for failure to comply with the provisions of section 609 and the regulations. *See id.*

<sup>254</sup> *See id.* para. 147. The chapeau of Article XX of GATT 1994 puts certain requirements on measures imposed under other provisions of the article:

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

GATT 1994, *supra* note 3, art. XX.

<sup>255</sup> Shrimp-Turtle Appellate Body Report, *supra* note 228, para. 147.

<sup>256</sup> *See id.* para. 157.



the negotiating history of that provision.<sup>257</sup> In addition, the interpretation and application of the chapeau, in the opinion of the Appellate Body requires a delicate balancing act.<sup>258</sup>

The Appellate Body looked to the language of the chapeau of Article XX and analyzed section 609 to determine whether the measure ran afoul of its requirements. In order to comply with the chapeau, section 609 must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or be "a disguised restriction on international trade."<sup>259</sup>

#### A. *Unjustifiable Discrimination*

The first step in the Appellate Body's analysis was to determine if section 609 constituted a means of unjustifiable discrimination.<sup>260</sup> The Appellate Body focused on the application of section 609, consistent with its understanding of the correct way to analyze a measure under the chapeau.

Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as

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<sup>257</sup> See *id.*

<sup>258</sup> See *id.* para. 159.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.

*Id.*

<sup>259</sup> See *id.* para. 160.

<sup>260</sup> See *id.* para. 161.

that applied to, and enforced on, United States domestic shrimp trawlers.<sup>261</sup>

The Appellate Body found that this fact combined with the inflexible nature of the 1996 Guidelines essentially created the situation in which foreign nations were forced to adopt a regulatory program identical to the one adopted by the United States.<sup>262</sup> Although the Appellate Body recognized that it was entirely appropriate for the United States to apply a uniform standard throughout its territory, this was not acceptable procedure in international trade relations.<sup>263</sup> The flaw in the application of the measure was the failure of the United States to “tak[e] into consideration different conditions which may occur in the territories of those other Members.”<sup>264</sup>

This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.<sup>265</sup>

Another factor, decidedly not in favor of the United States was its failure to engage in negotiations with the objective of concluding bilateral or multilateral agreements, prior to enactment of section 609. To make matters worse, the Appellate Body noted that Congress in passing section 609 gave explicit instructions to the Secretary of State to initiate negotiations for the development of bilateral or multilateral agreements.<sup>266</sup>

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<sup>261</sup> *Id.* para. 161 (emphasis in original).

<sup>262</sup> *See id.* para. 163.

<sup>263</sup> *See id.* para. 164.

<sup>264</sup> *Id.* para. 165.

<sup>265</sup> *Id.*

<sup>266</sup> *See id.* para. 167.

Despite the clear language of Congress only one multilateral agreement for the protection of sea turtles was concluded.<sup>267</sup>

In addition, the Appellate Body pointed out that the protection of sea turtles, a highly migratory species, "demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations."<sup>268</sup>

The Inter-American Convention, in the Appellate Body's opinion, demonstrated "the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles."<sup>269</sup>

Based on the foregoing facts and conclusions, and on the length of the phase-in periods, the Appellate Body determined that section 609 constituted unjustifiable discrimination within the meaning of the chapeau to Article XX.<sup>270</sup>

### B. *Arbitrary Discrimination*

The next issue for the Appellate Body was whether section 609 was applied in a manner that constituted arbitrary discrimination.<sup>271</sup> The Appellate Body found that the certification requirements and procedures did, in fact, constitute arbitrary discrimination.<sup>272</sup> First, the Appellate Body noted that section 609 "imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States' program . . . ."<sup>273</sup> In addition, the lack of flexibility in determining whether to certify nations troubled the Appellate Body.<sup>274</sup> The certification determinations, in the Appellate Body's opinion, were not made in a transparent or predictable manner.<sup>275</sup>

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<sup>267</sup> See *id.* See also Inter-American Convention for the Protection and Conservation of Sea Turtles, First Written Submission of the United States to the Panel, Exhibit AA of Appellate Body Report, *supra* note 221.

<sup>268</sup> Shrimp-Turtle Appellate Body Report, *supra* note 228, para. 168.

<sup>269</sup> *Id.* para. 170.

<sup>270</sup> See *id.* para. 176.

<sup>271</sup> See *id.* para. 177.

<sup>272</sup> See *id.* para. 184.

<sup>273</sup> *Id.* para. 177.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* para. 180.

The fact that no formal written decision was provided to the applicant countries troubled the Appellate Body.<sup>276</sup>

The Appellate Body determined that the provisions of Article X:3 of GATT 1994<sup>277</sup> had to be taken into account.<sup>278</sup>

Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here.<sup>279</sup>

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The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or deny certification is made.

*Id.* (footnote omitted).

<sup>276</sup> *See id.*

<sup>277</sup> *See id.* para. 182. Article X:3 states in part:

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

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

GATT 1994, *supra* note 3, art. X:3.

<sup>278</sup> *See Shrimp-Turtle Appellate Body Report, supra* note 228, para. 182.

<sup>279</sup> *Id.* paras. 182-83.

The Appellate Body concluded that the measure, section 609, amounted to unjustifiable and arbitrary discrimination between countries where the same conditions prevail and, hence, was contrary to the provisions of the chapeau.<sup>280</sup> The measure, therefore, could not be justified under the provisions of Article XX of GATT 1994. Due to this finding the Appellate Body determined that a finding on the issue of whether the measure was a "disguised restriction on international trade" was not necessary.<sup>281</sup>

The Appellate Body took great care to point out that the protection of the environment was of significance to Members of the WTO.<sup>282</sup> The Appellate Body stated that it simply had found the U.S. measure to be applied in a manner that constituted unjustifiable and arbitrary discrimination which was not protected under Article XX of GATT 1994.<sup>283</sup>

### CONCLUSION

Balancing the obligations undertaken by WTO Members to liberalize their trade regimes and the efforts to protect the environment and endangered species will never be a simple endeavor. The interpretation of Article XX perhaps will become more uniform after the Appellate Body decision in the Shrimp-Turtle dispute. To date, however, the tension between those who strive to protect the environment and those who strive to liberalize trade regimes continues.

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<sup>280</sup> *See id.* para. 184.

<sup>281</sup> *See id.*

<sup>282</sup> *See id.* para. 185.

<sup>283</sup> *See id.* para. 186.