

Free Trade and Sea Turtles: The International and Domestic Implications of the *Shrimp-Turtles* Case

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I. INTRODUCTION

On October 12, 1998 the Appellate Body of the World Trade Organization (WTO) released its decision in the closely-watched case of United States—Import Prohibition of Certain Shrimp and Shrimp Products (*Shrimp-Turtles* case). The case is significant for both its international and domestic implications. On the international level, the case is significant because the WTO Appellate Body made two important rulings. First, it recognized that a WTO member could impose its domestic environmental regulations on another member so long as certain safeguards are met. Second, it recognized the right of panels to accept information from nongovernmental organizations (NGOs).

At the domestic level, the *Shrimp-Turtles* case demonstrates the increasing conflict between the three branches of government in enacting and enforcing environmental measures. This conflict is evident in the underlying US litigation in *Earth Island Institute v. Christopher*¹ that ultimately led to the WTO challenge. This case also demonstrates how domestic environmental groups can play a significant role in global environmental policy by challenging the government's lack of enforcement in US courts, such as the Court of International Trade (CIT).

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1. *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085 (Ct. Int'l Trade 1995).

To obtain a full understanding of the implications of the *Shrimp-Turtles* case, it is helpful to know its long and somewhat tortured background. Part II outlines the nature of sea turtles and the magnitude of the threat to them, including a discussion of the US legislation (referred to as Section 609) that was enacted to protect the sea turtles from extinction.

Part III discusses the litigation brought to the Court of International Trade, *Earth Island Institute v. Christopher (Earth Island)*. The rulings in this case directly impact whether or not the United States can comply with the WTO's decision.

Part IV discusses the WTO's Panel Report, including the arguments raised by the parties regarding conservation efforts, the use of turtle excluder devices (TEDs) and the transfer of TED technology, international environmental agreements, the scope and purpose of Section 609, and communications received from NGOs and the Panel's legal findings.

Part V addresses the report of the WTO's Appellate Body, including the parties' arguments regarding submissions from NGOs; whether Section 609 is within the scope of Article XX of the GATT; whether Section 609 satisfied the chapeau of Article XX of the GATT; and the findings of the Appellate Body.

Finally, Part VI addresses the international and domestic implications the *Shrimp-Turtles* case will have on future environmental-trade disputes. These include the right of a member country to impose environmental regulations on other members, the difficulties the United States will have in complying with the WTO decision, and the rights of NGOs in future WTO cases.

II. BACKGROUND AND PROTECTION OF SEA TURTLES

There is no doubt that the universal recognition of the threat to sea turtles played a significant role in the way the *Earth Island* and *Shrimp-Turtles* cases were decided. An understanding of the nature of sea turtles and the magnitude of the threat to them is therefore important to understanding why Section 609 was challenged in both the CIT and WTO.

A. *The Plight of the Sea Turtle*

Because sea turtles are natural wonders, environmentalists can easily create a compelling campaign to save the sea turtle. Sea turtles

can live up to eighty years, with the largest species weighing as much as 1400 pounds.² More amazing is that sea turtles swim vast distances during their life spans, with females returning to the beach of their birth to nest.³

Seven species of sea turtle are currently recognized: (1) green turtle, (2) loggerhead, (3) flatback, (4) hawksbill, (5) leatherback, (6) olive ridley, and (7) Kemp's ridley.⁴ Sea turtles spend their lives at sea where they migrate between their foraging and nesting grounds.⁵ Adult females come ashore to lay clutches of about 100 eggs in nests they dig on the beach. After about fifty to sixty days of incubation, the hatchlings dig their way out of the nest and head for the sea.⁶ Very few hatchlings survive to the age of reproduction, which is ten to fifty years, depending on the species.⁷

Research has shown that sea turtles have been adversely affected by human activity. Sea turtles have suffered direct exploitation by being harvested for their meat, shells, and eggs. They have been indirectly exploited by incidental captures in fisheries, through destruction of their habitats, and from pollution of the oceans.⁸ Scientists believe, however, that "the inadvertent capture of turtles in shrimp trawls is a major factor in the mortality and decimation of [sea turtles] and significantly hinders recovery of their population."⁹ Regrettably, close to 125,000 turtles die every year as "they are hauled in (and drowned) as unwanted bycatch for target catch such as shrimp and tuna."¹⁰ Since very few hatchling turtles survive until the age of reproduction, the drowning of juvenile and adult sea turtles quickly depletes sea turtle populations.¹¹

2. See Julie Kosterlitz, *Shell Game*, NAT'L J., Sept. 12, 1998, available in 1998 WL 2089568.

3. See *id.*

4. See *Report of the Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, May 15, 1998, 37 I.L.M. 832 [hereinafter *Panel Report*].

5. See *id.* para. 2.2.

6. See *id.*

7. See *id.*

8. See *id.* para. 2.3.

9. *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1088 (Ct. Int'l Trade 1995). See also *Panel Report*, *supra* note 4, para. 2.1 ("Research programmes in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States led to the conclusion that incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles.").

10. Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57, 59 (1996-97). See also *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1354 (Fed. Cir. 1998) ("One of the major causes of death for adult sea turtles is drowning in shrimp trawlers' nets.").

11. See Traci Watson, *World Trade Body Vetoes Turtle-Protection Law*, USA

Sadly, there are at least four species currently facing extinction: the loggerhead, the green leatherback, the hawksbill, and the Kemp's ridley.¹² With fewer than 1500 nesting turtles remaining in the wild, the Kemp's ridley turtle is the most threatened.¹³

In response to the threat that shrimp trawlers pose to the sea turtles, TEDs were developed. A TED is a "grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net."¹⁴ The use of TEDs can "reduce sea turtle mortality from shrimp fishing operations by ninety-seven percent."¹⁵ TEDs are particularly important since other measures to protect sea turtles, including the protection of nesting beaches and bans on the harvest of sea turtles eggs, are ineffective in increasing the survival rate of juvenile and adult sea turtles.¹⁶ As explained by the United States before the WTO panel:

Increasing the numbers of large juvenile and adult sea turtles was necessary because they were responsible for the greatest contribution to the growth of sea turtle populations—the reproductive value of a large juvenile or adult sea turtle was 584 times that of a hatchling sea turtle. Of the measures available to protect sea turtles, only the required use of TEDs effectively protected large juvenile and adult sea turtles, and was, therefore, of exponentially greater value to sea turtle populations overall. Even if the other measures could achieve a 100 per cent survival rate for baby sea turtles in their first year, scientific models showed that they were unlikely to have a significant effect on sea turtle populations due to the extremely high mortality of sea turtles before they reached breeding age; scientists currently estimated that it took between 1000 and 10,000 eggs to produce a single adult female.¹⁷

B. US Endangered Species Act and Related Legislation

In the late 1980s and early 1990s, science and government apparently agreed that "the [sea] turtles which have navigated the Earth's oceans for millions of years [would] not survive modern human

TODAY, Apr. 7, 1998, at 3A.

12. See Kibel, *supra* note 10, at 60.

13. See *id.*

14. Panel Report, *supra* note 4, para. 2.5.

15. Kibel, *supra* note 10, at 61.

16. See Panel Report, *supra* note 4, para. 3.19.

17. *Id.* (citations omitted).

habits (and appetites) without the intervention of law.”¹⁸ In 1987, under the authority of the Endangered Species Act,¹⁹ the Department of Commerce promulgated regulations requiring US shrimp trawlers to use TEDs.²⁰ Five species of sea turtle were identified living in the areas concerned and thus fell under the regulations: (1) loggerhead, (2) Kemp’s ridley, (3) green, (4) leatherback, and (5) hawksbill.²¹

1. Section 609

In 1989, Congress took the TED regulations one step further by enacting Section 609 of Public Law 101–162.²² The purpose of Section 609 was to encourage foreign countries to upgrade their sea turtle protection programs.²³ Section 609 sets forth two basic requirements. First, Section 609(a) requires the US Secretary of State to initiate negotiations with foreign countries to develop treaties to protect sea turtles and to report to Congress about such negotiations.²⁴ In addition, Section 609(b) places limitations on the importation of shrimp from nations that have not taken adequate measures to protect sea turtles.²⁵

2. 1991 Guidelines

In 1991, the United States issued guidelines (1991 Guidelines) for assessing the compatibility of foreign regulatory programs with the US program.²⁶ Under the 1991 Guidelines, a foreign nation’s program had to include, *inter alia*, a commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times for vessels under twenty-five feet) or, alternatively, a commitment to engage in a statistically reliable and verifiable scientific program to reduce the mortality of sea turtles caused by shrimp fishing.²⁷

18. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 561 (Ct. Int’l Trade 1995).

19. 16 U.S.C. § 1533(d) (1994).

20. *See* Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987).

21. *See id.*

22. Pub. L. No. 101-162, Title VI 609, 103 Stat. 988, 1037–38 (1989) (codified at 16 U.S.C. § 1537).

23. *See* Kibel, *supra* note 10, at 62.

24. *See* Appendix A *infra*.

25. *See* Appendix A *infra*.

26. *See State Department Guidelines Implement Sea Turtle Decision*, 17 Int’l Trade Rep. (BNA) 687 (Apr. 24, 1996) Although Section 609 was enacted in 1989, Congress postponed formal implementation of Section 609’s certification program until May 1, 1991.

27. *See* 56 Fed. Reg. 1051 (Jan. 10, 1991). *See also* Kibel, *supra* note 10, at 62

Concerned that the application of Section 609 to all nations might adversely affect trade, the State Department directed its efforts toward those nations that operate in the wider Caribbean/western Atlantic region, since this area hosts most of the US shrimping industry.²⁸ In construing Section 609 in this manner, the State Department applied the sea turtle protection measure only to fifteen²⁹ of the more than eighty-five countries that export shrimp to the United States.³⁰ Of the top seven shrimp exporters to the United States, only Mexico fell within the State Department's application of Section 609.³¹

3. 1993 Guidelines

The United States issued revised guidelines in 1993 (1993 Guidelines) that stated that to receive certification, affected nations (as determined in the 1991 Guidelines) had to commit to requiring TEDs on all commercial shrimp trawl vessels by May 1, 1994, and demonstrate the use of TEDs on a significant number of shrimp trawl vessels by May 1, 1993.³² To receive certification in 1994 and subsequent years, affected nations were required to use TEDs on all their shrimp trawl vessels, subject to a limited number of exemptions. These were essentially limited to the use of nets that were retrieved by manual rather than mechanical means, and the use of certain specified trawls.³³ Significantly, the 1993 Guidelines eliminated the second option for certification contained in the 1991 Guidelines, i.e., the commitment to

n.34. The 1991 Guidelines also specified that they did not apply to aquaculture shrimp since such harvesting does not adversely affect sea turtles. There is currently a debate, however, as to whether aquaculture shrimp should be recognized as a valid practice under Section 609. Although aquaculture shrimp do not pose a direct threat to sea turtles, they are damaging from an environmental standpoint because the creation of such ponds have often come at the expense of the destruction of natural mangrove forests, adversely affecting both wildlife and fish habitats. Thus, environmentalists contend that recognizing aquaculture shrimp as "turtle-safe" under Section 609 would encourage the spread of environmentally destructive aquaculture activities.

28. See 56 Fed. Reg. 1051 (Jan. 10, 1991). See also Kathleen D. Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live with*, 21 N.C. CENT. L.J. 256, 293-94 (1995).

29. See 56 Fed. Reg. at 1051 (These nations include: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad, Tobago, Guyana, Suriname, French Guyana, and Brazil.).

30. See 56 Fed. Reg. at 1051. See also Yaninek, *supra* note 28, at 283.

31. See 56 Fed. Reg. at 1051. See also Yaninek, *supra* note 28, at 294.

32. See 58 Fed. Reg. 9017 (Feb. 18, 1993).

33. See *id.*

engage in a scientific program to reduce the mortality of sea turtles in shrimp trawling.³⁴

III. EARTH ISLAND INSTITUTE V. CHRISTOPHER AND THE 1996 GUIDELINES

Not surprisingly, advocates for the protection of endangered sea turtles were concerned that since sea turtles migrate great distances and cross many national boundaries, Section 609's limited application to the wider Caribbean/western Atlantic Region would fail to protect many turtles.³⁵ Although open to debate, it appears that

the real impetus behind the State Department's limiting [application of Section 609 to only the wider Caribbean/western Atlantic region] had little to do with US coastal waters or the migratory patterns of turtles. It had to do with the Bush and Clinton Administrations' interest in avoiding a high-profile international trade dispute. Such a dispute could potentially undermine the United States' credibility as a free trade advocate, and therefore undermine adoption and implementation of GATT and NAFTA.³⁶

In 1992, a coalition of environmental groups led by the Earth Island Institute³⁷ brought suit in the United States District Court for the

34. See *id.* at 9016–17. The justification for the requirement of 100% TED use can be found in the following passage:

Protective measures for sea turtles should be implemented throughout the year in all . . . areas of the Caribbean and western Atlantic. The Department will continue to follow and review the results of research efforts and, if it is demonstrated conclusively that there are times and areas where sea turtles are not present, will consider modifying the certification requirements for that particular area. . . . *However, no such areas or times can be delineated at the present time and in the absence of any such data, 100 percent TEDs use is the standard by which the Department will determine comparability of foreign programs with the US program.* *Id.* (emphasis added).

35. See *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1354 (Fed. Cir. 1998).

36. Kibel, *supra* note 10, at 64. See also *Judge Says Law to Save Turtles Prevents Most Imports of Shrimp*, N.Y. Times, Jan. 8, 1996, at A9. "The issue arose during the Bush Administration when the State Department complained that enforcing the sea turtle law would hurt countries that exported up to \$3 billion worth of shrimp to the United States." *Id.* See also Stephen J. Orava, *Court Decision on Shrimping Undermines U.S. Trade Policy*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, May 24, 1996, available in LEXIS Legnew Library, WLF File.

37. "Earth Island Institute is a nonprofit corporation devoted to the conservation of the world's marine and terrestrial ecosystems. It established a Sea Turtle Restoration Project in 1989, in order to protect endangered species of sea turtles." Earth Island Inst.

Northern District of California.³⁸ The plaintiffs alleged that the defendants did not initiate treaty negotiations with foreign governments as required under Section 609(a) and failed to properly certify that foreign nations had the regulatory programs required under Section 609(b).³⁹ Plaintiffs further alleged that defendants failed to ban the importation of shrimp from nations whose fishing practices harmed sea turtles as also required under Section 609(b).⁴⁰

The district court ruled that it could not adjudicate the Section 609(a) claims because it lacked subject matter jurisdiction since the claim raised a political question.⁴¹ The district court also ruled that it did not have jurisdiction over the Section 609(b) claims because those claims involved "embargoes" or "quantitative restrictions" on the importation of products into the United States and that such claims fell within the exclusive jurisdiction of the CIT under 28 U.S.C. § 1581(i)(3).⁴² The Ninth Circuit affirmed the district court's dismissal and Earth Island subsequently brought suit in the CIT.⁴³

A. The CIT's Rulings

In the CIT, plaintiffs abandoned their claims that the defendants had not initiated treaty negotiations as required under Section 609(a) and instead focused on their claims that defendants had incorrectly applied Section 609(b).⁴⁴ Plaintiffs' primary claim was that the Departments of State and Commerce had improperly limited application of Section 609

v. Christopher, 6 F.3d 648, 650 (9th Cir. 1993).

38. Earth Island Institute v. Baker, No. C 92-0832 JPV, 1992 WL 565222 (N.D. Cal. 1992) *appeal filed*, Earth Island Inst. v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995). Secretary of State Warren Christopher was later replaced as a Defendant by former Secretary James A. Baker III. Plaintiffs were Earth Island Institute; Todd Steiner, the director of Earth Island Institute; The American Society for the Prevention of Cruelty to Animals; The Humane Society of the United States; The Sierra Club; and, The Georgia Fishermen's Association, Inc. Defendants were Warren Christopher, Secretary of State; Robert E. Rubin, Secretary of Treasury; Elinor G. Constable, Assistant Secretary of State for the Bureau of Oceans; Ronald Brown, Secretary of Commerce; and Rolland. A. Schmitten, Assistant Administrator for Fisheries, National Marine Fisheries Service. The National Fisheries Institute was the Intervenor-Defendant.

39. See Earth Island Inst. v. Christopher, 6 F.3d 648, 650 (9th Cir. 1993).

40. See *id.*

41. See *id.*

42. *Id.* See also Appendix B *infra* (reprint of § 1581(i)).

43. See 6 F.3d at 648, 650.

44. See Earth Island Inst. v. Christopher, 890 F. Supp. 1085, 1088 (Ct. Int'l Trade 1995) (citing Plaintiffs' Memorandum in Opposition to Defendants' Partial Motion to Dismiss, at 7 n.7).

to the wider Caribbean/western Atlantic region and that Section 609 applied globally to all nations engaged in shrimp fishing that adversely affected sea turtles.⁴⁵ The plaintiffs argued that the State Department's limiting interpretation rendered Section 609 "inoperative and meaningless."⁴⁶

In response, the government argued that since Section 609(b) is silent regarding the geographic scope of implementation, they had reasonably limited its scope to the wider Caribbean/western Atlantic region since this area hosts most of the US shrimping industry.⁴⁷ Alternatively, they contended that even if Section 609 had originally been enacted to cover all sea turtle-shrimping operations, Congress had acquiesced to the Department of State's interpretation of the statute by remaining silent regarding its application.⁴⁸

The CIT began its analysis by noting that "[t]he starting point in every case involving construction of a statute is the language itself . . . [and that if] the statute is silent or ambiguous with respect to the specific issue, the question of the court is whether the agency's answer is based on a permissible construction of the statute."⁴⁹ Although the defendants argued that they had interpreted Section 609 in a permissible manner,⁵⁰ the CIT disagreed, pointing out that the statute was neither ambiguous nor silent on the matter since 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."⁵¹

45. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 562 (Ct. Int'l Trade 1995).

46. *Id.* at 578 (quoting Plaintiffs' Reply and Opposition Memorandum, at 21).

47. See *id.* at 576-77. Although beyond the scope of this paper, defendants also argued that under *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), plaintiffs lacked standing to bring the suit for lack of a legally sufficient interest in ensuring that Section 609 was implemented globally. *Id.* at 564-66. The CIT found that Earth Island had demonstrated its members' long-standing interest in sea turtle conservation, that the government's failure to implement Section 609 presented an immediate and imminent danger to this interest, and that the relief sought (global enforcement of Section 609) would provide effective redress to the identified harm. See *id.* at 566-73. The court therefore held that the plaintiffs had standing to challenge the government's actions. See *id.*

48. See *id.* at 577.

49. 913 F. Supp. at 575, quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

50. See *id.* at 576-77.

51. *Id.* at 575.

The CIT also rejected the defendants' argument that Congress had effectively acquiesced to the limited geographic scope interpretation.⁵² The CIT noted that judicial determination of congressional acquiescence is limited to cases in which there has been "extended, meaningful interaction between the executive and legislative branches" and where Congress has revisited the statute and left the practice untouched.⁵³ Here, defendants' interpretation had existed only for a short period of time and Congress had not revisited Section 609 or even been asked to do so by the executive branch since its enactment.⁵⁴

After rejecting the government defendants' arguments, the CIT next addressed the ancillary argument raised by the intervenor-defendant, National Fisheries Institute:

There are very serious questions relating to the consistency of [Section 609] with US GATT obligations. 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.⁵⁵

In recognizing that the United States was likely to lose a GATT challenge to Section 609, the intervenor-defendant contended that under the *Charming Betsy* principle,⁵⁶ the CIT should seek to minimize or reduce international conflict to the maximum extent possible and therefore should construe Section 609 narrowly so that it affects the "fewest nations and products possible."⁵⁷

Although the CIT agreed in principle, it noted that "the record of enforcement of Section 609 to date does not reveal troubling tensions with the foreign sovereigns already deemed covered, including those not certified positively and thus subject to embargoes."⁵⁸ Thus, "the CIT seemed to suggest that 609's alleged conflict with GATT was too speculative to warrant limiting the application of the shrimp certification program."⁵⁹

52. See *id.* at 577.

53. *Id.*

54. See *id.*

55. *Id.* at 579.

56. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804).

57. 913 F. Supp. at 579 (quoting Memorandum of Defendant-Intervenor, at 45).

58. *Id.*

59. *Kibel*, *supra* note 10, at 78.

The court therefore held that defendants were “not properly enforcing [Section 609(b)] by restricting its mandate to the Gulf of Mexico—Caribbean Sea—western Atlantic Ocean” and ordered defendants 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 turtle [falling under Section 609] and to report the results thereof to the court on or before May 31, 1996.”⁶⁰

B. The 1996 Guidelines

In response to the CIT’s rulings, in February 1996 the State Department issued a preliminary list of over fifty nations and territories that could be subject to a shrimp embargo.⁶¹ As international tensions mounted, the federal defendants in the CIT case sought leave from the court for a one-year extension of time to enforce the sea turtle protection provision of the Endangered Species Act, claiming that widespread embargoes would cause “substantial harm” and that the “failure to postpone the deadline would cause serious and long-lasting harm to overall US foreign policy interests.”⁶²

Although the CIT honored the request to hold an expeditious hearing on the matter, it ultimately denied the government’s motion.⁶³ In a scathing opinion, the CIT criticized the government’s failure to support their allegations of the harm that would result if the deadline were not postponed. The CIT found that the government’s inability or refusal to “answer rudimentary questions seemingly relevant” such as the government’s refusal to name even one country that would be harmed by the deadline.⁶⁴

The CIT also found unsupported and disingenuous the argument that the “newly affected” countries needed more time to comply.⁶⁵ For example, the CIT noted that in June 1991, the State Department had sent a cable to its embassies in various countries, including Thailand and

60. 913 F. Supp. at 579–80.

61. *See State Department Identifies Nations Potentially Subject to Shrimp Embargo*, 13 Int’l Trade Rep. (BNA) 340 (Feb. 28, 1996). *See also* Appendix C *infra* (lists identified countries).

62. *Earth Island Inst. v. Christopher*, 922 F. Supp. 616, 618 (Ct. Int’l Trade 1996) (The substantial harm alleged was the impairment of the ability to protect the sea turtles and the disruption of international trade in shrimp).

63. *See id.* at 627.

64. *Id.* at 619.

65. *See id.* at 623–24.

Malaysia, asking them to approach their respective governments about establishing a TED program.⁶⁶ In the CIT's view, nations had been on notice of Section 609 long enough so that "the presumed anticipation of Congress [had] been realized, and any additional extension of time for all countries . . . would be more than anomalous."⁶⁷ Thus, it was time for the "concerned governments of the world, including that of the United States . . . [to protect the] more than 124,000 sea turtles [that] drown annually due to shrimping."⁶⁸ Significantly, the CIT noted that "any modification of the deadline established in [Section 609] must be made in Congress and not in court."⁶⁹

By denying the defendants' motion requesting a one-year extension, the CIT's May 1, 1996 deadline remained firm, and in April 1996, the State Department published revised guidelines (1996 Guidelines) for determining if a foreign nation has a "comparable" regulatory program for protecting sea turtles.⁷⁰

The 1996 Guidelines extended Section 609 to shrimp harvested in all foreign nations and essentially provided that as of May 1, 1996, all shipments of shrimp and shrimp products into the United States were to be accompanied either by a declaration (Shrimp Exporter's Declaration Form) attesting that the shrimp or shrimp product in question was harvested in a country with regulations comparable to those adopted by the United States, or a declaration signed by both the exporter and an official of the harvesting nation's government asserting that the particular shipment of shrimp had been harvested in a manner that did not adversely affect sea turtles.⁷¹

On June 21, 1996, Earth Island filed a motion to enforce the court's judgment, alleging that the 1996 Guidelines did not comply with the statute and the CIT's December 29, 1995 Order.⁷² In October 1996, the CIT found that the 1996 Guidelines were contrary to Section 609 since they allowed imports of shrimp from noncertified countries if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles.⁷³ Accordingly, the CIT held that the

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Revised Notice of Guidelines for Determining Comparability of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (1996).

71. *See id.* at 17,343.

72. *See Earth Island Inst. v. Albright*, 147 F.3d 1352, 1355 (9th Cir. 1998).

73. *See Earth Island Inst. v. Christopher*, 942 F. Supp. 597, 604-05 (Ct. Int'l Trade 1996).

embargo enacted by Section 609(b) could not be enforced in a manner that allowed entry in the United States of shrimp or shrimp products harvested by citizens or vessels of nation "which had not been certified in accordance with [Section] 609(b)(2)."⁷⁴

IV. WTO PANEL DECISION

Predictably, the "troubling tensions" that were not evident to the CIT in the *Earth Island* case became increasingly evident as the United States struggled to apply Section 609. These tensions came to a head when, in a letter dated October 6, 1996, India, Malaysia, Pakistan and Thailand (the Complainants), acting jointly, requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) regarding the import ban imposed on the respective countries pursuant to Section 609 and the revised 1996 Guidelines.⁷⁵ Though consultations were held on November 19, 1996, they were unsuccessful.⁷⁶

Each Complainant subsequently requested the Dispute Settlement Body (DSB) to establish a panel to examine their complaint regarding the US prohibition under Section 609.⁷⁷ On April 10, 1997, the DSB established a consolidated panel to hear the dispute.⁷⁸

Before discussing the Panel Report, it should be noted that the Panel's decision was neither brief nor arrived at lightly. In approximately 370 pages⁷⁹ of closely printed text, footnotes, appendices and annexes, the Panel explored the global conversation on sea turtles, including the use of TEDs and the scope and purpose of Section 609. The panel decision also recited in excruciating detail the parties' legal arguments as well as arguments raised by eleven other WTO members.⁸⁰ The Panel also addressed the submission of *amicus curiae* briefs

74. *Id.* This ruling was later reversed by the Ninth Circuit on technical grounds in *Earth Island v. Albright*, 147 F.3d 1352 (9th Cir. 1998).

75. *See Panel Report, supra* note 4, para. 1.1.

76. *See id.*

77. *See id.*

78. *See id.* paras. 1.2, 1.3.

79. As printed from Westlaw document 1998 WL 256632.

80. The following WTO members presented arguments generally challenging US import restrictions: Australia, Ecuador, El Salvador, European Union Community, Guatemala, Hong Kong, Japan, Nigeria, Philippines, Singapore, and Venezuela. The arguments of these countries have been omitted.

submitted by several nongovernmental organizations and summarized, in further detail, a two-day "consultation" by the panel with technical experts requested by and chosen by the panel.⁸¹

A. Conservation and Management of Sea Turtles

After reviewing basic facts about sea turtles and the history and purpose of Section 609, the Panel turned its attention to each party's arguments regarding the conservation efforts undertaken to protect sea turtles. These arguments are important since they shed some light on why there was so much resistance to using TEDs, which are a seemingly easy and inexpensive solution to the problem.

1. Arguments Raised by the Parties Regarding Conservation Efforts

The Complainants each claimed to have a well-established history of protecting sea turtles. India pointed out that it had enacted various laws to protect sea turtles and had implemented projects and studies for the conservation and preservation of sea turtles. These projects included a hatchery for sea turtles as well as training programs to discuss the fabrication and use of TEDs.⁸²

Malaysia maintained that it had a comprehensive legal framework for the conservation and protection of sea turtles that dated as far back as 1932 and that various programs were in place with conservation organizations that included protecting turtle eggs through incubation programs, protecting beach hatcheries, banning the commercial harvest and sale of turtle eggs, and establishing turtle sanctuaries.⁸³ Malaysia also noted that it had won the 1997 J. Paul Getty Wildlife Conservation Award for having released more than 4 million turtle hatchlings into the wild over the last 15 years.⁸⁴

Pakistan and Thailand also claimed that they had various conservation programs that included the collection and incubation of

81. *Panel Report, supra* note 4, para. 5.1 (Although none of the parties had requested the Panel to consult experts, the Panel noted that since numerous studies and scientific documents had been presented, the Panel, acting on its own initiative, decided to seek scientific and technical advice pursuant to Article 13 of the DSU. The Panel focused its questions on sea turtle conservation in light of local conditions and habitat and migratory patterns of sea turtles.).

82. *See id.* paras. 3.4, 3.5.

83. *See id.* paras. 3.8, 3.9.

84. *See id.* para. 3.9.

eggs and restoration programs designed to cultivate and release baby sea turtles.⁸⁵ India, Pakistan, and Thailand maintained that since their cultures embraced a traditional belief that it was sinful to kill sea turtles, fisherman were particularly careful not to catch turtles in their nets.⁸⁶

Although the Complainants shared the US concern over the plight of the sea turtle, they did not accept the US assertion that the use of TEDs was the only way to prevent the extinction of sea turtles. They considered the application of Section 609 to be an unacceptable interference with their sovereign right to formulate their own environmental and conservation policies.⁸⁷

In response to the Complainants' arguments, the United States maintained that since the

incidental mortality of sea turtles in shrimp trawl nets constituted the largest cause of human-induced sea turtle mortality, any effective program to allow the recovery of [the endangered sea turtles] had to include the required use of TEDs by shrimp trawl vessels that operated in areas and in times where there was a likelihood of intercepting sea turtles.⁸⁸

Although the United States noted that the "measures adopted by the Complainants to protect sea turtles were laudable, . . . they had not prevented drastic declines in sea turtle populations in the waters of these countries."⁸⁹ The United States explained that TEDs were the only effective way to protect sea turtles since "other measures to protect sea turtles, including the protection of nesting beaches, bans on the harvest of sea turtle eggs, and 'head-starting'⁹⁰ baby sea turtles had proven ineffective in increasing the number of large juvenile and adult sea turtles."⁹¹ Increasing the number of juvenile and adult sea turtles was critical in light of the high reproductive value of older sea turtles.⁹²

Supporting this assertion, the United States argued that scientists recognized the limitations of measures such as nest protection and head-starting that only protected sea turtle eggs and hatchlings. Indeed, a recent study commissioned by Thailand's Office of Natural Resource

85. *See id.* paras. 3.11, 3.14.

86. *See id.* paras. 3.4, 3.11, 3.14.

87. *See id.* paras. 3.6, 3.10, 3.12, 3.16.

88. *Id.* para. 3.19.

89. *Id.* para. 3.20.

90. *Id.* at n.29. "'Headstarting' is a technique where sea turtle eggs are taken from the wild and incubated. The hatchlings are raised in captivity, usually for approximately one year, then released into the wild." *Id.*

91. *Id.* para. 3.20.

92. *See id.* para. 3.19.

Conservation noted the "generally accepted scientific opinion that head-starting is not a valid conservation method (at the very least, its value has yet to be demonstrated)."⁹³ The IUCN (World Conservation Union) also found that the "conservation of eggs and hatchlings, without concurrent conservation of the older life stages, may be of limited value."⁹⁴

The Panel suggested that one reason why the Complainants had maintained measures protecting eggs and hatchlings was that they appeared, on first blush, to produce impressive results. Between 1961 and 1986, Malaysia's hatchery program had incubated about 33,000 eggs that produced about 16,000 hatchlings. Although this number seems impressive, if "estimates are correct that 1000 to 10,000 eggs are needed to produce a single adult female, then the hatchery programme would only have produced about 3 to 34 new adult females each year."⁹⁵ The Panel further noted that "considering that 33,000 eggs represents fewer than 2 per cent of the eggs laid annually in the late 1950s, perhaps we should not be too surprised to note a population decline of more than 98 per cent."⁹⁶

Noting the inherent flaws of sea turtle conservation programs that rely solely on measures to protect eggs and hatchlings, the United States contended that the measures taken by the Complainants would "be negated and wasted if young turtles are released into waters where trawlers operate without TEDs. In such waters, many [sea turtles] will be captured and drowned each year and few will survive the two decades or more they will require to mature and produce."⁹⁷

2. Use of TEDs and Transfer of TED Technology

In the US view, the use of a TED "was a simple, cheap and highly effective solution to the problem of sea turtle mortality in shrimp trawl nets."⁹⁸ A completely installed TED ranged in price from US\$300–400, and if installed by the fisherman, cost about US\$75–100.⁹⁹ Significantly, "[p]roperly installed TEDs approached 97 per cent efficiency in allowing sea turtles to escape from shrimp trawl nets, while limited

93. *Id.* para. 3.21.

94. *Id.*

95. *Id.* para. 3.22.

96. *Id.*

97. *Id.* para. 3.23 (quoting Statement of Deborah Crouse, Ph.D., July 23, 1997, paras. 6–8 (document submitted by the United States to the Panel)).

98. *Id.* para. 3.78.

99. *See id.* para. 3.78.

shrimp loss rates to 1–3 per cent.”¹⁰⁰ And the United States noted that none of the Complainants had questioned the effectiveness of TEDs.¹⁰¹

India and Pakistan disagreed that TEDs were inexpensive, noting that costs had to be considered in context. Since the average annual income of fishermen in India is only US\$300, and in Pakistan only US\$60–700, TEDs in these countries were cost-prohibitive.¹⁰²

India was also concerned that other fish caught in nets during trawling, in particular large fish sought for commercial purposes by Indian fishermen could escape through the grid of a TED, resulting in an increase in catch loss, and corresponding increase in costs for Indian fishermen.¹⁰³

Malaysia disagreed with the US contention that the drowning of sea turtles in shrimp trawls could be virtually eliminated through the use of TEDs. Malaysia also pointed to some practical difficulties of using TEDs, including the problem of enforcement, since local fishermen contended that they rarely caught sea turtles during shrimp harvesting.¹⁰⁴

Although Thailand accepted the position that the cost of a single TED was relatively modest, it claimed that the “consequential costs of TEDs use in Thailand had been enormous, principally in lost shrimp catch, estimated at 30–40 per cent.”¹⁰⁵

In terms of the transfer of TED technology, “[t]he United States considered that one reason why TED use had become so widespread was that the United States Government had undertaken extraordinary effort to transfer TEDs technology to governments and industries in other countries, particularly in developing countries.”¹⁰⁶ The Complainants, however, maintained that the United States had made little, if any, effort to transfer TED technology to them prior to the introduction of the import restriction.¹⁰⁷ The United States responded that it “remained ready and willing to provide technical assistance to make TED technology available to any nation that requested it.”¹⁰⁸

100. *Id.* para. 3.80.

101. *See id.* para. 3.87.

102. *See id.* para. 3.81.

103. *See id.* para. 3.82.

104. *See id.* para. 3.84.

105. *Id.* para. 3.86.

106. *Id.* para. 3.107.

107. *See id.* paras. 3.108–3.111.

108. *Id.* para. 3.112.

3. *International Environmental Agreements and the Use of TEDs*

The United States maintained that the use of TEDs had become a recognized multilateral environmental standard and that as parties to the Convention on International Trade in Endangered Species (CITES), the Complainants were obligated under international law to conserve sea turtles by using TEDs.¹⁰⁹ The United States also asserted that the 1982 United Nations Convention on the Law of the Sea required states "to ensure through proper conservation and management measures, that the maintenance of living resources was not endangered by over-exploitation."¹¹⁰

Additionally, the United States pointed out that in 1993 it "had joined with Mexico in leading negotiations toward a new multilateral agreement for the Western Hemisphere devoted specifically to protecting sea turtles from extinction."¹¹¹ This effort led to the adoption in 1996 of the Inter-American Convention for the Protection and Conservation of Sea Turtles (the Inter-American Convention).¹¹² The Inter-American Convention required parties to take a variety of measures to protect and conserve sea turtles and their habitats and provided that "[e]ach Party shall require shrimp trawl vessels subject to its jurisdiction that operate within the Convention Area to use recommended TEDs that are properly installed and functional."¹¹³

The United States contended that following the conclusion of the negotiations on the Inter-American Convention in the latter part of 1996, it had proposed to the governments of certain Asian nations—including India, Malaysia, Pakistan and Thailand—the negotiation of a similar protocol or other international agreement for sea turtle protection that would apply to the Asian region.¹¹⁴ The governments of India, Malaysia, Pakistan and Thailand declined to enter into multilateral negotiations.¹¹⁵

109. *See id.* paras. 3.94, 3.95.

110. *Id.* 3.95.

111. *Id.* para. 3.96.

112. *See id.*

113. *Id.* para. 3.96, *quoting* Inter-American Convention, annex III, para. 4.

114. *See id.* para. 3.97. Even absent a multilateral agreement in the Asian region, the required use of TEDs had indeed become the multilateral environmental standard as evidenced by the fact that the following nations required TEDs: Belize, Brazil, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, the People's Republic of China, *Thailand*, Trinidad, Tobago, and Venezuela. Other nations in Asia and Africa had informed the United States of their intention or desire to establish TED programs. *See id.* (emphasis added). Interestingly, the United States certified Thailand on November 8, 1996. However, since Thailand's future ability to export shrimp to the United States was conditioned upon maintaining its certification status, Thailand elected to proceed with its

The Complainants responded that if the use of TEDs had become a multilateral environmental standard, it was only because of coercion applied through the trade measures at issue in the case.¹¹⁶ Moreover, the international conventions cited by the United States were indicative of the consensus that conservation issues relating to shared resources should be resolved through international cooperation, not unilateral action.¹¹⁷ The Complainants further maintained that because the measures adopted by the United States were not authorized by CITES, there was no international consensus on their necessity or desirability.¹¹⁸ Thus, "if the United States believed that other nations needed to take specific actions to protect sea turtles within their jurisdiction or on the high seas, the answer was to seek amendment to CITES or to negotiate other consensual international agreements to address the problem."¹¹⁹

The Complainants further maintained that the United States had not made any effort to negotiate an agreement with them on the protection of sea turtles.¹²⁰ India claimed that the United States had not initiated any negotiations prior to the embargo.¹²¹ Subsequent to the consultations held in the WTO in November 1996, the United States made a proposal to India to enter into a regional agreement on the lines of the Inter-American Convention.¹²² However, this proposal was conditioned upon India's abandoning the WTO proceedings, which it was not willing to do since it had been subject to trade restrictions that it felt were inconsistent with GATT and CITES.¹²³

Thailand also asserted that the US offer to enter into multilateral negotiations for the protection of sea turtles had taken place only *after* the embargo had been put in place and after the first round of WTO negotiations.¹²⁴ A copy of the Inter-American Convention had been submitted to Thai officials as a proposed model for the negotiations.¹²⁵ In January 1997, the Thai Department of Fisheries responded with a series of questions about the model agreement that the United States

claim before the WTO. Thailand's Submission to the Panel, para. 16, *available in* 1997 WL 304829, *5.

115. *See Panel Report, supra* note 4, para. 3.97.

116. *See id.* note 4, paras. 3.98–3.101.

117. *See id.* paras. 3.98, 3.100, 3.101.

118. *See id.*

119. *Id.* paras. 3.98, 3.100, 3.101.

120. *See id.* para. 3.98.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.* para. 3.105.

125. *See id.*

never answered.¹²⁶ It thus appeared that the United States had not seriously offered to negotiate.¹²⁷

Malaysia also declared that "no sincere or serious effort had been made by the United States in establishing a[n] arrangement similar to the Inter-American Convention with certain Asian countries."¹²⁸ The import prohibition on Malaysia had been imposed on May 1, 1996. In December 1996, two months after the WTO consultations, the United States informally gave Malaysia a copy of the Inter-American Convention.¹²⁹ Before that, "there had been no approach or indication, whether on an official or unofficial basis, that the United States intended to negotiate or discuss any arrangement."¹³⁰ Malaysia also pointed out that the United States had not exhausted the bilateral and multilateral channels expressly set forth in Section 609.¹³¹ Pakistan also maintained that the United States had not made any efforts to initiate negotiations.¹³²

4. Scope and Purpose of Section 609

The Complainants stated that pursuant to Section 609, nations had been forced either to quickly adopt TED requirements or lose the right to trade with the United States.¹³³ They further claimed that although the stated objective of Section 609 was to protect and conserve sea turtles, Section 609, as applied, did not accomplish this goal.¹³⁴ To support their claim, they cited a memorandum filed by the United States during the course of the CIT litigation:

Even assuming the willingness of affected nations to comply with Section 609, a May 1, 1996, compliance date will achieve no conservation benefit. Significant training and practice in the construction, installation and maintenance of TEDs are required before TEDs can be effective in protecting sea turtles . . . it is unlikely that shrimp fishermen will be able to use TEDs effectively in the short term to protect sea turtles.¹³⁵

126. *See id.*

127. *See id.*

128. *Id.* para. 3.99.

129. *See id.*

130. *Id.*

131. *See id.*

132. *See id.* para. 3.100.

133. *See id.* para. 3.113.

134. *See id.*

135. *Id.* para. 3.113 (quoting Memorandum in Support of Defendants' Motion for Modification of December 29, 1995 Order, at 11-12). *See Earth Island Institute v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995).

India, Pakistan and Thailand also argued that the case was not designed to prevent imports of “turtle-unsafe” shrimp into the United States.¹³⁶ Under Section 609, shrimp caught in trawl nets equipped with TEDs could not be imported into the United States unless the exporting country was certified.¹³⁷ To be certified,

a country had to show that all shrimp, whether consumed domestically, exported to the United States, or exported to other Members, was harvested using TEDs. Thus, the purpose of the shrimp embargo was not simply to prevent importation into the United States of shrimp caught with technologies that might or might not pose a threat to sea turtles, it was to dictate the environmental policy that was to be followed by other Members with respect to all shrimp caught within their jurisdiction if they wished to export any shrimp to the United States.¹³⁸

The United States denied that it had claimed that the applicability of Section 609 to all nations would not promote sea turtle conservation.¹³⁹ Rather, the United States maintained that it had sought delay of the CIT’s May 1, 1996 deadline since it was felt that newly affected countries would be unlikely to adopt comprehensive TED programs by this time.¹⁴⁰ The United States noted that the CIT had denied its request.¹⁴¹

B. Legal Arguments and Findings

The legal arguments and findings at the Panel level concerned whether the Panel could receive *amicus* briefs from NGOs, whether the United States had violated Article XI:1 of GATT 1994, and whether the United States had violated Article XX of GATT 1994.

1. Communications Received from NGOs

During the course of the proceedings, the Panel received two *amicus* briefs from NGOs. The NGOs also sent copies of the documents directly to the parties to the dispute.¹⁴² The Complainants requested that

136. *Panel Report*, *supra* note 4, para. 3.114.

137. *See id.*

138. *Id.*

139. *See id.* para. 3.115.

140. *See id.*

141. *See id.*

142. *See id.* para. 3.129.

the Panel not consider the NGO briefs.¹⁴³ The United States contended that the Panel could seek information from any relevant source under Article 13 of the DSU¹⁴⁴ and urged the Panel to consider the two *amicus* briefs.¹⁴⁵

The Panel began by noting that it had not requested the information from the NGOs and that under Article 13 of the DSU, the initiative to seek information rested with the Panel.¹⁴⁶ Since only parties and third parties are allowed to submit information directly to the Panel, it found that "accepting nonrequested information from nongovernmental sources would be . . . incompatible with the provision of the DSU as currently applied."¹⁴⁷ The Panel therefore informed the parties that it would not consider the information submitted by the NGOs.¹⁴⁸ The Panel noted, however, that the parties were free to put forward the NGO briefs as part of their own submission.¹⁴⁹

2. Article XI:1 of GATT 1994

All four Complainants alleged a violation of Article XI:1 of GATT 1994, which provides in part that:

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.¹⁵⁰

Although the United States argued that since the measures at issue were permitted under Article XX it need not address Article XI,¹⁵¹ it 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 XI:1 of GATT 1994."¹⁵² The Panel thus had no difficulty in finding that Section 609 violated Article XI:1 of GATT 1994.¹⁵³

143. *See id.*

144. Article 13 of the DSU is reprinted *infra* in Appendix D.

145. *See Panel Report, supra* note 4, para. 3.129.

146. *See id.* para. 7.8.

147. *Id.*

148. *See id.*

149. *See id.*

150. *Id.* paras. 7.8, 7.16 (quoting Article XI:1 of GATT 1994.).

151. *See id.* para. 7.13.

152. *Id.* para. 7.15.

153. *See id.* para. 7.17. The Complainants also alleged that the import prohibition

3. Article XX of GATT 1994

The main argument made by the United States was that even if Section 609 was inconsistent with Article XI:1 of GATT 1994, it was justified under Article XX(b) and (g) of GATT 1994, which permits measures necessary to protect human, animal, plant life or health, or that relate to the conservation of exhaustible natural resources.¹⁵⁴ The Complainants argued that Article XX(b) and (g) could not be invoked to justify a measure that applied to animals not within the jurisdiction of the member enacting the measure.¹⁵⁵

Since the Panel found that the introductory provisions, or “chapeau,” of Article XX determined to a large extent the context of the specific exception contained in Article XX, the Panel deemed it necessary to first determine whether the measure at issue satisfied the chapeau of Article XX.¹⁵⁶

In following the Panel’s “chapeau down” analysis, the Complainants first argued that the US embargo was implemented in an arbitrary and discriminatory manner in that newly affected countries, such as those of the Complainants, had been given substantially less notice than other countries before being forced to comply with TED requirements.¹⁵⁷ The Complainants also argued that before the United States required TED applications from them, it should have demonstrated that the same conditions did not prevail between them and the countries without TED requirements.¹⁵⁸ The Complainants further contended that the legislative history of Section 609 supported the conclusion that the embargo was in fact a disguised restriction on international trade.¹⁵⁹

on shrimp from noncertified countries was inconsistent with the most-favored-nation (MFN) principle embodied in Article I:1 of GATT 1994 because physically identical shrimp from noncertified members were treated differently from shrimp from certified members. *See id.* para. 7.18. The Complainants further alleged that the embargo as applied violated both Articles I:1 and XIII:1 because initially affected countries were given a phase-in period of three years, whereas newly affected countries were given a very short period of time. *See id.* para. 7.19. The Panel found that in light of its conclusion that Section 609 violated Article XI:1, it was not necessary to address Articles I:1 and XIII:1. The Panel thus moved on to address Article XX. *See id.* para. 7.22.

154. *See id.* para. 7.24. Article XX is reprinted *infra* in Appendix E.

155. *See id.* para. 7.24.

156. *Id.* paras. 7.28, 7.29.

157. *See id.* para. 7.31.

158. *See id.*

159. *See id.*

The United States maintained that the measures were carefully and justifiably tied to the particular conditions of each country and that each country was treated equally, without discrimination.¹⁶⁰ The United States further argued that "the strong and growing international consensus regarding sea turtle conservation and the mandatory use of TEDs belies any claim [that] the US measures are some sort of disguised restriction on trade."¹⁶¹ Finally, the United States contended that the application of Section 609 to the wider Caribbean/western Atlantic area had not led to a decrease in the quantities imported nor to an increase in prices.¹⁶²

The Panel first addressed whether Article XX contained any limitation on a member's use of measures conditioning market access to the adoption of certain conservation policies.¹⁶³ In this connection, the Panel noted that the chapeau prohibits the application of the measure if it would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail.¹⁶⁴ Turning to the issue of whether the measure was unjustifiable discrimination, the Panel first noted that this term had never been subject to any precise interpretation.¹⁶⁵ The Panel deemed it essential to "interpret the term 'unjustifiable' within its context and in light of the object and purpose of the agreement to which it belongs."¹⁶⁶ The Panel first stated that "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 discriminatory basis."¹⁶⁷ For this reason, the Panel noted that under the chapeau of Article XX, a member can derogate from GATT provisions only if it does not undermine the WTO multilateral trading system.¹⁶⁸

In analyzing the measure at issue, the Panel noted that as a result of various rulings of the CIT, the United States had to apply the import ban on TED-caught shrimp if the country concerned had not been certified.¹⁶⁹ The Panel further noted that certification was only granted if a comprehensive TED program was in place or if the shrimp trawling operations took place exclusively in waters in which sea turtles did not

160. *See id.* para. 7.32.

161. *Id.* para. 7.32.

162. *See id.*

163. *See id.* para. 7.33.

164. *Id.*

165. *See id.* para. 7.34.

166. *Id.*

167. *Id.* para. 7.42.

168. *See id.* para. 7.44.

169. *Id.* para. 7.49.

occur.¹⁷⁰ As a result, “Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own.”¹⁷¹

The Panel went on to find that “[i]n light of the context of the term ‘unjustifiable’ and the object and purpose of the WTO Agreement, the US measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.”¹⁷²

The Panel also noted that environmental protection through international agreement—as opposed to unilateral measures—was the long-recognized course of action for environmental protection.¹⁷³ The United States pointed out that “nothing in Article XX requires a Member to seek negotiation of an international agreement instead of, or before adopting unilateral measures.”¹⁷⁴ The Panel rejected this argument noting that since the nature of the measures at issue concerned principles found in several international environmental agreements,¹⁷⁵ it was implied “that a country seeking to promote environmental concerns of such a nature should engage into international negotiations.”¹⁷⁶ The Panel also noted that Section 609 itself contained provisions requiring the United States to initiate negotiations and that despite Section 609’s mandate, there was no evidence that the United States actually undertook negotiations prior to the May 1, 1996 import ban ordered by the CIT.¹⁷⁷

The Panel also considered whether any international obligations existed under CITES with respect to the protection of sea turtles.¹⁷⁸ Although there was no dispute that the sea turtles were endangered and needed protection, the Panel noted that CITES pertained to trade in endangered species and that the subject of the US import prohibition (shrimp) was not the endangered species whose protection was

170. *See id.* para. 7.48.

171. *Id.*

172. *Id.* para. 7.49.

173. *See id.* para. 7.50.

174. *Id.* para. 7.54.

175. *See id.* para. 7.55.

176. *Id.*

177. *See id.* para. 7.56.

178. *See id.* para. 7.58.

sought.¹⁷⁹ Accordingly, CITES did not impose on its members specific methods of conservation such as TEDs.¹⁸⁰

The Panel concluded that the import ban as applied by the United States pursuant to Section 609 was inconsistent with Article XI:1 of GATT 1994 and could not be justified under Article XX of GATT 1994.¹⁸¹ The Panel thus recommended that the Dispute Settlement Body request that the United States bring the measure into conformity with its obligations under the WTO Agreement.¹⁸²

V. WTO APPELLATE DECISION

The Panel Decision was considered a "powerful reminder how intertwined trade and environmental policies have become" and caused many to question whether the WTO, with its "free trade" mission, was the proper forum for resolving environmental trade conflicts.¹⁸³ Indeed, environmental groups¹⁸⁴ as well as politicians urged President Clinton to "vigorously appeal the WTO decision," increase efforts to negotiate international agreements to protect sea turtles, and address the environmental deficiencies of the WTO.¹⁸⁵

179. *See id.*

180. *See id.*

181. In light of its finding that the United States measure at issue was not within the scope of the measures permitted under the chapeau of Article XX, the Panel did not find it necessary to address Article XX(b) or (g). *See id.* para. 7.63. The Complainants also argued that since the measure at issue clearly violated Articles I, XI and XIII of GATT 1994, there was a *prima facie* nullification or impairment of benefits accruing to Complainants within the meaning of Article XXIII of GATT. *See id.* para. 7.64. The Panel agreed, noting that the United States had not succeeded in rebutting the presumption. *See id.* para. 7.64.

182. *See id.* para. 8.2.

183. Kathryn S. Fuller, *Balancing Trade and Sea Turtles*, INT'L HERALD TRIB., May 16, 1998. *See also* Elizabeth Olson, *Target Practice in Geneva on the Global Trade Body*, N.Y. TIMES, May 16, 1998, at D1.

184. A coalition of environmental groups "representing millions of concerned citizens in the United States and throughout the world" sent a letter to President Clinton urging him to take action in response to the Panel's decision. This letter can be found on the Sierra Club's website at <<http://www.sierraclub.org/trade/turtles.htm>>.

185. Beth Baker, *Washington Watch: World Trade Organization Decisions Put Environmental Policies at Risk*, 48 BIOSCIENCE 512 (July 1998). "Rep. Elizabeth Furse, a liberal Democrat from Oregon, recently asked her colleagues to sign a letter to President Clinton urging him to vigorously appeal the WTO shrimp decision, to redouble efforts to negotiate international agreements to protect sea turtles, and to address the 'environmental deficiencies' of the WTO. And a bipartisan group of six Senators . . . sent the President a letter expressing their concern about the WTO decision-making process,

On July 13, 1998, the United States notified the WTO of its decision to appeal certain issues of law in the Panel Report and certain legal interpretations developed by the Panel.¹⁸⁶ The United States raised two claims of error: (1) that the Panel erred in finding that it could not accept nonrequested submissions from NGOs; and (2) that the Panel erred in finding that Section 609 was outside the scope of Article XX.¹⁸⁷

A. Acceptance of Nonrequested Submissions from NGOs

The Appellate Body began its analysis with a discussion of whether the Panel had erred in finding that it could not accept nonrequested submissions from NGOs.

*1. Arguments of the Parties*¹⁸⁸

The United States claimed that the Panel erred in finding that it could not accept nonrequested submissions from NGOs since there is nothing in the DSU that prohibits panels from considering unsolicited information.¹⁸⁹ In support, the United States pointed out that the language of Article 13.2 of the DSU is broadly drafted to provide a panel with discretion in choosing its sources of information and that when a NGO makes a submission to the panel, Article 13.2 of the DSU authorizes the panel to “seek” such information.¹⁹⁰ To find otherwise would unnecessarily limit the Panel’s discretion in choosing sources of information to consider.¹⁹¹

India, Malaysia, Pakistan, and Thailand (Joint Appellees) contended that the Panel’s ruling rejecting the NGO information was correct and should be upheld.¹⁹² According to the Joint Appellees, Article 13 of the DSU gives the panel discretion to determine the

which is shrouded in secrecy.” *Id.*

186. See Report of the Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, at para. 8, *available in* 1998 WL 72013 [hereinafter Appellate Report].

187. See *id.* paras. 9, 10.

188. The arguments of the third party participants (Australia, Ecuador, European Communities, Hong Kong, China and Nigeria) have been omitted.

189. See Appellate Report, *supra* note 186, para. 9. Article 13 of the DSU is reprinted *infra* in Appendix D.

190. See *id.*

191. See *id.*

192. See *id.* para. 29.

information it needs to resolve a dispute but does not oblige the panel to consider unsolicited information.¹⁹³

2. Findings of the Appellate Body

The Appellate Body began its analysis by noting that the Panel did two things.¹⁹⁴ First, the Panel made a legal interpretation that accepting nonrequested information from NGOs was "incompatible" with the provisions of the DSU.¹⁹⁵ Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs of the NGOs as part of its own submission.¹⁹⁶

The Appellate Body looked first to the language of Article 13 of the DSU and noted that pursuant to Article 13.2 of the DSU, a panel has the discretion to seek information from any relevant source.¹⁹⁷

In its interpretation of Article 12.1 of the DSU, the Appellate Body also noted that the panel is authorized to depart from, or to add to, the working procedures set forth in Appendix 3 of the DSU and can, in effect, develop their own working procedures.¹⁹⁸ Read together, Articles 12 and 13 give the panel "ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."¹⁹⁹

In light of the broad authority vested in panels by the DSU, the Appellate Body stated that the Panel had interpreted the word "seek" in a too literal and technical manner and that the "authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel."²⁰⁰ Thus, "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."²⁰¹ The Appellate Body therefore found that "the Panel erred in its legal interpretation that accepting

193. *See id.* paras. 29, 46.

194. *See id.* para. 100.

195. *See id.*

196. *See id.*

197. *See id.* paras. 102, 103.

198. *See id.* para. 105.

199. *Id.* para. 106.

200. *Id.* paras. 107, 108.

201. *Id.* para. 108.

nonrequested information from nongovernmental sources is incompatible with the provisions of the DSU.”²⁰²

B. Whether Section 609 is Within the Scope of Article XX

As a preliminary matter, the Appellate Body noted that on June 4, 1998, the United States Court of Appeals for the Federal Circuit had vacated the CIT’s October 8 and November 25, 1998 decisions.²⁰³ The Appellate Body noted, however, that in practice, “exemption from the import ban for TED-caught shrimp from noncertified countries remained unavailable while this dispute was before the Panel and before us.”²⁰⁴

1. Arguments of the Parties

The primary argument made by the United States was that Section 609 was within the scope of the chapeau of Article XX and that the Panel’s interpretation that the chapeau required panels to determine whether a measure constituted a “threat to the multilateral trading system” was erroneous.²⁰⁵ The United States urged that it was legal error to “jump from the observation that the GATT 1994 is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules.”²⁰⁶ According to the United States, if the Panel’s interpretation was adopted, “it would add an entirely new obligation under Article XX of the GATT 1994: namely that Members may not adopt measures that would result in certain effects on the trading system.”²⁰⁷

The United States also argued that the Panel did not address the rationale of the United States for differentiating between shrimp harvesting countries and that it incorrectly found that Section 609 constitutes “unjustifiable discrimination between countries where the same conditions prevail.”²⁰⁸ According to the United States, the rationale for Section 609 was that “sea turtles are threatened with extinction worldwide; most nations, including the Appellees, recognize the

202. *Id.* para. 110. The Appellate Body also found that the Panel had acted within its discretion in allowing any party to the dispute to attach briefs by NGOs to its own submissions. *See id.*

203. *See id.* para. 5.

204. *Id.*

205. *Id.* para. 10.

206. *Id.* para. 16.

207. *Id.* para. 13.

208. *Id.* paras. 10, 12.

importance of conserving sea turtles; and shrimp trawling without the use of TEDs contributes greatly to the endangerment of sea turtles.”²⁰⁹ Accordingly, it was “reasonable and justifiable for Section 609 to differentiate between countries whose shrimp industries operate without TEDs, and thereby endanger sea turtles, and those countries whose shrimp industries do employ TEDs in the course of harvesting shrimp.”²¹⁰

With respect to Articles XX(b) and (g), the United States noted that neither it nor the Joint Appellees appealed the decision of the Panel’s “chapeau down” approach which first addressed the chapeau of Article XX and did not reach the issues of Articles XX(b) and (g).²¹¹ Both the United States and the Appellees nevertheless agreed that the Appellate Body could address Articles XX(b) and (g) if it found that Section 609 met the criteria of the chapeau.²¹²

The United States urged that Article XX(g) should be addressed first since it was the “most pertinent” and that Article XX(b) need only be reached if Article XX(g) was found inapplicable.²¹³ According to the United States, Section 609 met each element required under Article XX(g): turtles are an “exhaustible natural resource”; Section 609 “relates to” the conservation of sea turtles; and a “substantial relationship” exists between Section 609 and the conservation of sea turtles.²¹⁴

The Joint Appellees claimed that the United States had misinterpreted the Panel’s decision—the Panel did not invent a new interpretation of “unjustifiable” to mean “a threat to the multilateral trading system.”²¹⁵ Rather, the Panel had merely followed past GATT/WTO practice and the accepted rules of interpretation set forth in the Vienna Convention.²¹⁶

The Joint Appellees also argued that the United States had failed to accept that “conditioning access to markets for a given product upon the adoption of certain policies by exporting Members, can violate the WTO Agreement.”²¹⁷ Thus, the

209. *Id.* para. 11.

210. *Id.*

211. *See id.* para. 24.

212. *See id.*

213. *See id.*

214. *Id.* paras. 25, 26. Since the Appellate Body did not reach Article XX(b), the parties’ arguments with respect to that Article have been omitted.

215. *Id.* para. 34.

216. *See id.* paras. 34, 47

217. *Id.* para. 35.

threat to the multilateral trade system cited by the Panel is unrelated to the appellant's support for TEDs or turtle conservation. The threat is much simpler: the United States has abused Article XX by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down the multilateral path [upon which the] multilateral trade system is based.²¹⁸

In the view of the Joint Appellees, the Panel correctly addressed the chapeau in terms of the manner in which the measure is applied and correctly found that Section 609 was applied "in an abusive manner so as to frustrate the substantive rights of the Appellees under the WTO Agreement."²¹⁹ The Joint Appellees also requested that the Appellate Body make legal findings regarding Articles XX(b) and (g) in the event that it reversed the Panel's legal findings with respect to the chapeau and incorporated by reference their submissions to the Panel with respect to these articles.²²⁰

2. Findings of the Appellate Body

As a preliminary matter, the Appellate Body noted:

[t]he Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. . . . [T]hese rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved.²²¹

Here, the Panel did not examine the ordinary meaning of the words of Article XX—that the chapeau of Article XX refers to "the 'manner' in which measures sought to be justified are 'applied.'"²²² Contrary to the WTO's analysis in *Reformulated Gas*,²²³ 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."²²⁴

The Appellate Body went on to fault the Panel for focusing

218. *Id.* para. 35.

219. *Id.* para. 40.

220. *See id.* para. 45.

221. *Id.* para. 114.

222. *Id.* para. 115.

223 Report of the Appellate Body in *United States—Standards for Reformulation and Conventional Gasoline*, May 20, 1996, 35 I.L.M. 603.

224. *Id.*

repeatedly on the design of the measure itself," rather than on its application.²²⁵ The Appellate Body also criticized the Panel for looking into "the object and purpose of the whole of the GATT 1994 and the WTO Agreement . . . [which led to] the very broad formulation that measures which 'undermine the WTO multilateral trading system' must be regarded as 'not within the scope of measures permitted under the chapeau of Article XX.'"²²⁶

In addition, the Appellate Body rejected the Panel's "chapeau down" approach stating that "[t]he above flaw in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis."²²⁷ According to the Appellate Body, under *Reformulated Gas*, the appropriate analysis is "two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."²²⁸

The Appellate Body noted that this sequence of steps was not random and that it prevented "the abuse or misuse of the specific exemptions provided for in Article XX."²²⁹ Moreover, since the standards of the chapeau are necessarily broad in scope and reach, it was necessary to first analyze the measure under the exception since "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."²³⁰

Having found that the Panel's "chapeau down" approach was in error,²³¹ the Appellate Body turned its attention to whether Section 609 was justified under Article XX(g) and if so, whether the requirements of the chapeau were met.

a. Article XX(g)

The Appellate Body began "with the threshold question of whether Section 609 is a measure concerned with the conservation of 'exhaustible natural resources' within the meaning of Article XX(g)."²³²

225. *Id.* para. 116.

226. *Id.* citing *Panel Report*, *supra* note 4, para. 7.44 and 7.62, respectively.

227. *Id.* para. 117.

228. *Id.* para. 118.

229. *Id.* para. 120.

230. *Id.*

231. *See id.* para. 122.

232. *Id.* para. 127.

In the Joint Appellees' view, this term only applied to finite resources such as minerals and not to living natural resources, such as sea turtles, which can reproduce.²³³ Perhaps in light of the significant amount of scientific evidence that was presented to the Panel regarding the plight of the sea turtle, the Appellate Body had no trouble in rejecting the Joint Appellees' arguments.²³⁴

The Appellate Body recognized that,

[o]ne 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 to depletion, exhaustion and extinction, frequently due to human activity. Living resources are just as 'finite' as petroleum, iron ore and other nonliving resources.²³⁵

Moreover, the Appellate Body stated that the term "exhaustible natural resources," which was "crafted more than 50 years ago," must be interpreted "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."²³⁶ In light of the international community's concerted effort to take action to protect living natural resources, the Appellate Body held that "measures to conserve exhaustible natural resources, whether living or nonliving, may fall within Article XX(g)."²³⁷ Thus, the Appellate Body went on to find that the five sea turtles at issue were "exhaustible."²³⁸

The Appellate Body next addressed whether Section 609 "relat[ed] to the conservation of exhaustible resources"²³⁹ by examining "the relationship between the general structure and design of [Section 609] and the policy goal it purports to serve, that is, the conservation of sea turtles."²⁴⁰

The Appellate Body noted that Section 609 "imposed an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles."²⁴¹ The purpose of the import ban was to influence countries to adopt programs requiring the use of

233. *See id.*

234. *See id.* para. 128.

235. *Id.*

236. *Id.* para. 129.

237. *Id.* para. 131.

238. *Id.* para. 132. Indeed, the Appellate Body noted that it would have been difficult to find otherwise in light of the fact that all species of sea turtles are listed in Appendix 1 of CITES. *See id.*

239. *Id.* para. 135.

240. *Id.* para. 137.

241. *Id.* para. 138.

TEDs.²⁴² In light of the vast amount of scientific evidence presented to the Panel about the mortality rates of turtles due to shrimp trawling vessels and the effectiveness of TEDs, the Appellate Body had no difficulty in finding that Section 609 was a measure "relating to" the conservation of exhaustible natural resources.²⁴³

Finally, the Appellate Body found that Section 609 was a "measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g)" since the US domestic regulations required the use of TEDs and contained penalties for enforcement.²⁴⁴ Having found that Section 609 came within the terms of Article XX(g), the Appellate Body next addressed whether Section 609 satisfied the requirements of the chapeau of Article XX.²⁴⁵

b. The Chapeau of Article XX

The Appellate Body commenced its analysis by noting that the "precise language of the chapeau requires that a measure not be applied in a manner which would constitute a means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' or a 'disguised restriction on international trade.'"²⁴⁶

i. Unjustifiable Discrimination

In scrutinizing whether Section 609 had been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail," the Appellate Body noted that the most "conspicuous flaw" of Section 609 was that it was an economic embargo that required all exporting Members to adopt essentially the same policy as that of the US domestic shrimp trawlers.²⁴⁷

The Appellate Body noted that as enacted, Section 609 appeared to permit a degree of discretion and flexibility in determining how standards for comparability might be applied.²⁴⁸ The Appellate Body also noted, however, that "any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996

242. *See id.*

243. *See id.* paras. 140–42.

244. *Id.* para. 145.

245. *See id.* para. 147. Because Section 609 satisfied Article XX(g), the Appellate Body did not address Article XX(b). *Id.* para. 146.

246. *Id.* para. 150.

247. *See id.* para. 161.

248. *See id.*

Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.”²⁴⁹ The Appellate Body thus found that in practice, the only way a country could become certified was if it had a regulatory program that required the use of TEDs.²⁵⁰

According to the Appellate Body,

it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.²⁵¹

Moreover, the United States “did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609.”²⁵² The Appellate Body found this “difficult to reconcile with the declared policy objective of protecting and conserving sea turtles.”²⁵³ Thus, it was suggested that as applied, Section 609 was “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.”²⁵⁴

The Appellate Body also deemed significant the failure of the United States to engage in serious negotiations with the Appellees for bilateral or multilateral agreements for the protection and conservation of sea turtles.²⁵⁵ Specifically, the Appellate Body noted that there was “no evidence that the United States actually undertook negotiations . . . which . . . included the complainants before the imposition of the import ban as a result of the CIT judgment.”²⁵⁶ The Appellate Body expressed the view that “[e]nvironmental measures addressing transboundary or

249. *Id.*

250. *See id.* para. 162.

251. *Id.* para. 164.

252. *Id.* para. 165. “In other words, shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States.” *Id.*

253. *Id.*

254. *Id.*

255. *See id.* para. 166.

256. *Id.*

global environmental problems [such as the threat to the migratory sea turtles] should, as far as possible, be based on international consensus.”²⁵⁷ In this case, the Appellate Body felt that the “Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles.”²⁵⁸ The Appellate Body clearly felt that the fact that the United States had negotiated seriously with some members but not with other members was “plainly discriminatory” and “unjustifiable,” especially regarding Section 609’s explicit mandate to initiate negotiations.²⁵⁹

Other evidence of differential treatment under the application of Section 609 was the fact that the initially affected “countries had a ‘phase-in’ period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs.”²⁶⁰ As a result of the CIT order directing the Department of State to apply the import ban on a worldwide basis not later than May 1, 1996, newly affected countries, including the Joint Appellees, had just months to comply, rendering compliance onerous.²⁶¹

The Appellate Body also noted that diverse treatment of various countries was “observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries.”²⁶² The Appellate Body found that far greater efforts were made to the initially affected countries than to the later affected countries, which included the Joint Appellees.²⁶³

In light of the foregoing differences in the application of Section 609 to the various shrimp-exporting countries, the Appellate Body found that there was “unjustifiable discrimination” within the meaning of the chapeau of Article XX.²⁶⁴

ii. Arbitrary Discrimination

In addressing whether Section 609 was applied in a manner constituting “arbitrary discrimination,” the Appellate Body noted:

257. *Id.* para. 168.

258. *Id.* para. 170.

259. *Id.* para. 172.

260. *Id.* para. 173.

261. *See id.* paras. 173–74.

262. *Id.* para. 175.

263. *See id.*

264. *Id.* para. 176.

[It had] already observed that Section 609 . . . impose[d] a single, rigid and unbending requirement that countries applying for certification under Section 609 . . . adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions.²⁶⁵

In the Appellate Body's view, "this rigidity and inflexibility also constitute[d] 'arbitrary discrimination' within the meaning of the chapeau."²⁶⁶

The Appellate Body also took issue with the lack of "transparency" of the process for certification utilized by the United States and noted that the certification process consisted primarily 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."²⁶⁷ Thus, there was "no formal opportunity for an applicant country to be heard, or to respond to any argument that may be made against it, in the course of the certification process before a decision to grant or deny certification [was] made."²⁶⁸ Moreover, countries are not notified of the approval or denial of the certification application and "[n]o procedure for review of, or appeal from, a denial of an application is provided."²⁶⁹

It was clear to the Appellate Body that certain minimum standards for transparency and procedural fairness required under Article X:3 of GATT 1994²⁷⁰ were not met with respect to the application of Section 609.²⁷¹ The Appellate Body accordingly found that as applied, Section 609 amounted to "'arbitrary discrimination' between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX."²⁷²

The Appellate Body concluded that the "United States' measure, while qualifying for provisional justification under Article XX(g), failed to meet the requirements of the chapeau of Article XX, and was

265. *Id.* para. 177.

266. *Id.*

267. *Id.* para. 180.

268. *Id.*

269. *Id.*

270. *See* Appendix F *infra* (Article X:3).

271. *See* Appellate Report, *supra* note 186, para. 183.

272. *Id.* para. 184.

therefore not justified under Article XX of GATT 1994.”²⁷³ The Appellate Body recommended that the DSB request that the United States bring its measure into conformity with its obligations under the GATT.²⁷⁴

VI. IMPLICATIONS FOR THE FUTURE

On November 6, 1998, the United States formally accepted the WTO's Appellate Body ruling that its restrictions on imported shrimp violated its obligations under the GATT.²⁷⁵ The United States left open the issue of whether and how it would change its laws, indicating that “the Clinton administration was consulting with Congress and would advise the WTO of its plans.”²⁷⁶ Regardless of how the United States responds to the WTO's decision, the *Shrimp-Turtles* decision has numerous international and domestic implications for the future of environmental-trade disputes.

A. International Implications

There are several international implications of the *Shrimp-Turtles* decision. The most significant is the possibility that a member country can impose its domestic environmental regulations on other members so long as certain safeguards are met. Another implication pertains to whether the United States can comply with the WTO's decision. Lastly, the Appellate Body decision has significant implications for future submissions to the WTO by NGOs.

1. Right of a Member Country to Impose Environmental Regulations on Other Members

Perhaps the single most important implication of the *Shrimp-Turtles* decision is that it is the first WTO decision suggesting that an environmental measure could potentially be consistent with WTO rules.²⁷⁷ In so doing, the WTO seemed to go out of its way to emphasize that the protection of the environment is of significance to WTO

273. *Id.* para. 187(c).

274. *See id.* para. 188.

275. *See US Agrees to Shrimp Restrictions*, ASSOCIATED PRESS, Nov. 7, 1998, available in 1998 WL 22416163.

276. *Id.*

277. *See* Rossella Brevetti, *Environment: USTR to Consult With Interested Parties on How to Respond to Shrimp Ruling*, 15 Int'l Trade Rep. (BNA) 1768 (Oct. 21, 1998).

members and that member countries should try to protect endangered species:

In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should.²⁷⁸

In recognizing the importance of the protection to the environment, the WTO Appellate Body also recognized that unilateral measures aimed at protecting the environment could be valid under Article XX.²⁷⁹ Indeed, as noted by the Appellate Body, if such measures were not valid, the exceptions found in Article XX would be superfluous:

[C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character.²⁸⁰

Thus, the general consensus appears to be that contrary to earlier WTO decisions,²⁸¹ the *Shrimp-Turtles* decision made clear that "there are no systemic inconsistencies between national environmental measures and the rules of the international trading system."²⁸²

278. Appellate Report, *supra* note 186, para. 185.

279. The Panel also recognized that unilateral measures might be permissible, "particularly after serious attempts have been made to negotiate." *Panel Report, supra* note 4, para. 7.61.

280. Appellate Report, *supra* note 186, para. 121.

281. Indeed, the Panel endorsed "the very broad formulation that measures which undermine the WTO multilateral trading system must be regarded as not within the scope of measures permitted under the chapeau of Article XX." *Id.* para. 116.

282. Bhushan Bahree, *WTO Panel Accuses U.S. of Unfairly Enforcing Ban*, ASIAN WALL ST. J., Oct. 13, 1998, at 2 (quoting Keith Rockwell, WTO spokesman). *See also* John Zarocostas, *US Loses Appeal on Saving Sea Turtles*, J. COM. Oct. 14, 1998, at 1A (the *Shrimp-Turtles* decision "vindicates the idea that there is enough room under the WTO for environmental regulation." *Id.*); *Spotlight Story Turtles: WTO Panel Rejects US's Use of Protection Law*, 7 AM. POL. NETWORK—GREENWIRE, Oct. 13, 1998, available in WESTLAW, APN-GR Database (the ruling "shows a much deeper appreciation of the need for an environmental exception to trade rules when compared to

Although the Appellate Body opened the door for a single country to take strong measures to protect shared global resources such as sea turtles, the Appellate Body also established stringent requirements pertaining to the implementation of such measures. In finding that Section 609 was applied in a manner that constituted arbitrary and unjustifiable discrimination contrary to the chapeau of Article XX, the Appellate Body cited the following reasons:

- i. As applied, Section 609 required all exporting members to adopt the same policy and enforcement program as that of US domestic shrimp trawlers and did not take into consideration different conditions which may occur in the territories of those other members;²⁸³
- ii. Shrimp caught using methods identical to those employed in the United States were excluded from the US market if they were caught in waters of noncertified countries;²⁸⁴
- iii. The failure of the United States to engage in serious negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles;²⁸⁵
- iv. Differential treatment among various countries including the length of the "phase-in" period and the amount of effort the United States made to transfer TED technology;²⁸⁶
- v. A lack of flexibility in how officials made the determination for certification;²⁸⁷ and
- vi. The fact that the certification process under Section 609 consisted principally of administrative *ex parte* inquiry or verification without any formal opportunity for an applicant country to be heard, or to respond to any argument that were made against it prior to the decision to grant or deny certification.²⁸⁸

That the Appellate Body explicitly cited these reasons is significant since it provides a set of criteria for member countries to follow in enacting and applying environmental legislation. In light of the

previous WTO rulings." *Id.*).

283. Appellate Report, *supra* note 186, paras. 161–64.

284. *See id.* para. 165.

285. *See id.* paras. 166–72.

286. *See id.* paras. 163–75.

287. *See id.* para. 177.

288. *See id.* paras. 180–83.

significant amount of discussion devoted to the WTO's preference for multilateral agreements, the most important criteria is arguably the necessity for member countries to attempt to negotiate multilateral agreements prior to imposing their own domestic environmental regulations on other members. Indeed, the United States was chastised by the CIT, the Panel, and the Appellate Body for its failure to negotiate with other members. The importance of negotiations was also stressed by some member countries who stated that "the only circumstance in which unilateral action would be acceptable is 'if genuine efforts to develop internationally agreed standards had previously been made.'"²⁸⁹

2. Ability of the United States to Comply with the WTO's Decision

It would seem that the United States could comply with the WTO's decision without any legislative changes to Section 609 since the Appellate Body took issue with the application, and not the language, of Section 609.²⁹⁰ Upon closer analysis, however, it appears that even without the need for legislative action, it will be very difficult for the United States to remedy all of the flaws that the WTO found.

As noted above, the first flaw the Appellate Body found was that, as applied, Section 609 required all exporting members to adopt essentially the same TED program as that of the United States.²⁹¹ The Appellate Body noted that although Section 609 permitted a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, US officials only looked to see whether there is a regulatory program requiring the use of TEDs.²⁹²

The problem the United States will have in remedying this flaw stems in part from the fact that sea turtles are migratory. Indeed, the justification for the US TED requirement is that unless it is conclusively demonstrated that sea turtles are not present, the use of TEDs is the only

289. *EU/WTO: US Shrimp Ruling Raises Trade and Environment Issues*, EUR. REP., Oct. 17, 1998, available in 1998 WL 19803608 (quoting EU Trade Commissioner, Sir Leon Brittan).

290. The United States has taken the position that "the Appellate Body did not find any inconsistency between the legislation at issue and US obligations under the WTO, although it did fault certain aspects of the way the law was administered." Daniel Pruzin, *Environment: WTO Formally Adopts Shrimp-Turtles Ruling as Thailand Fears Victory*, 15 Int'l Trade Rep. (BNA) 1884 (Nov. 11, 1998). The United States has also indicated that since "[t]he Appellate Body report does not suggest" that the United States weaken its environmental laws, it does not intend to do so. *Environment: WTO Appeals Body Faults Implementation of Shrimp-Turtles Law*, 15 Int'l Trade Rep. (BNA) 1698 (Oct. 14, 1998).

291. See Appellate Report, *supra* note 186, paras. 161-64.

292. See *id.* paras. 161, 162.

effective way to protect sea turtles.²⁹³ In light of the migratory nature of sea turtles, it would be virtually impossible to determine whether sea turtles might be present.

Another problem in remedying this flaw is that under Section 609(b)(2)(B), the average rate of incidental taking of sea turtles by vessels of the harvesting nations must be comparable to that of the United States. Since the US fishing vessels use TEDs which are estimated to reduce sea turtle mortality by approximately ninety-seven percent,²⁹⁴ any other program would have to be just as effective. To date, there is no other method or program as effective as TEDs.²⁹⁵

The second flaw the Appellate Body found was that shrimp caught using methods identical to those employed in the United States (e.g., the use of TEDs) were excluded from the US market if they were caught in waters of noncertified countries.²⁹⁶ The problem in remedying this flaw rests with litigation still pending in the CIT. Recall that the CIT held that shrimp could not be allowed entry into the United States unless the shrimp came from a nation that had been certified under Section 609(b)(2).²⁹⁷ In a bizarre twist, in June 1998, the Federal Circuit later reversed this ruling on technical grounds.²⁹⁸

Perhaps in anticipation of the WTO's ruling, the United States issued revised Guidelines that went into effect on August 28, 1998 providing that shrimp caught with TEDs are not subject to the import prohibition even if the shrimp come from a noncertified nation.²⁹⁹

Earth Island has challenged these guidelines, claiming that they create "a mile-wide loophole that defies the plain language [of Section 609], the government's own prior interpretation of the law, and the economic incentive Congress wisely created to protect sea turtles

293. See discussion *supra* Part II.B.3.

294. See discussion *supra* Part II.A.

295. See discussion *supra* notes 15-16, 113.

296. See Appellate Report, *supra* note 186, para. 165.

297. See discussion *supra* Part III.A and accompanying footnotes.

298. See *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). Earth Island brought a motion to enforce the CIT's December 29, 1995 order. Earth Island subsequently withdrew its motion, reserving the right to challenge the government's interpretation of the law in a separate action. The CIT refused to allow Earth Island to withdraw its motion and subsequently granted Earth Island's motion, which resulted in the CIT's ruling that only shrimp from certified nations could enter the United States. On appeal, the Federal Circuit found that Earth Island's motion to withdraw divested the CIT of jurisdiction over the matter and therefore vacated the CIT's order. See *id.* at 1358.

299. See Rossella Brevetta, *Environment: U.S. State Department Issues New Guidelines for Shrimp Imports*, 15 Int'l Trade Rep. (BNA) 1485 (Sept. 9, 1998).

worldwide.”³⁰⁰ Moreover, the new guidelines eliminate the incentive for nations to pass laws requiring the use of TEDs and “send ‘mixed messages’ to shrimp-exporting nations that can be used against the United States in the [WTO].”³⁰¹ Earth Island’s continued challenge to the Guidelines issued by the United States will make it difficult for the United States to comply easily with the WTO’s ruling.

The third flaw was the US failure to engage in serious negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles.³⁰² In response to the WTO’s ruling, the United States has said “it will step up efforts to secure international agreements protecting turtles.”³⁰³ It is possible that the United States will aggressively pursue a treaty similar to that of the Inter-American Convention.³⁰⁴ The negotiation of a treaty, however, is a long and complex process. Moreover, it is unclear how much negotiation is required before a country can resort to unilateral action.

The fourth flaw was the difference in “phase-in” periods and the varying amounts of effort the United States made to transfer the TED technology to member nations.³⁰⁵ While the United States could probably remedy the problem of transferring TED technology by establishing a universal transfer program, the “phase-in” issue is much more problematic because the varying amounts of time given to comply results from the CIT’s ruling that newly affected nations must comply by May 1, 1996. Moreover, the CIT noted that any modification to the deadline imposed by Section 609 had to be made by Congress, and not by the court. Given the fact that the CIT seemed at least willing to consider the one-year extension sought by the government, it might be possible to seek a modification of the CIT’s order in light of the WTO’s ruling. Whether this is both legally and practically feasible is unclear.³⁰⁶

The fifth and six flaws pertain to the lack of flexibility in how officials made the determination for certification and that the certification process under Section 609 consisted principally of administrative *ex parte* inquiry or verification without any formal

300. *Environment: Environmental Groups Renew Attack on Guidelines on Shrimp Imports*, 15 Int’l Trade Rep. (BNA) 1600 (Sept. 23, 1998) (quoting Louisa Daniels of the Legal Strategies Group).

301. Brevetti, *supra* note 299.

302. See Appellate Report, *supra* note 186, paras. 166–72.

303. *Turtle Soup*, ECONOMIST, Oct. 17, 1998.

304. See discussion *supra* Part V.

305. See Appellate Report, *supra* note 186, paras. 163–75.

306. The interesting issue of whether this is possible is beyond the scope of this paper.

opportunity for an applicant country to be heard.³⁰⁷ These "procedural fairness" issues should be relatively easy to remedy.

3. *Rights of NGOs in Future WTO Cases*

The Appellate Body's decision is also significant for its groundbreaking ruling that allows NGOs the right to submit *amicus* briefs directly to the WTO. NGOs have long advocated for better access to the WTO.³⁰⁸ Prior to the *Shrimp-Turtles* case, NGOs had to request permission to submit briefs and such requests were often denied.³⁰⁹ As a result of the Appellate Body's decision, NGOs can now submit an *amicus* brief directly to a WTO panel.³¹⁰ Thus, "[i]n the long run . . . the *Shrimp-Turtles* case may be remembered more for [this than anything else]."³¹¹

B. *Domestic Implications*

Perhaps one of the most interesting aspects of the *Shrimp-Turtles* case is that it demonstrates how effective domestic environmental organizations can be in ensuring that US environmental laws are enforced. In other words, domestic NGOs function as a "check and balance system" in those cases, such as the *Shrimp-Turtles* case, where the US government is reluctant or unwilling to enforce its own environmental laws.

Although environmentalists have historically been skeptical of the CIT as a forum for resolving environmental disputes,³¹² the CIT

307. See Appellate Report, *supra* note 186, paras. 177, 180–83.

308. See James Cameron & Stephen J. Orava, *WTO Opens Disputes to Private Voices*, NAT'L L.J., Dec. 7, 1998, at B5.

309. For example, the WTO denied a request by the Sierra Club Legal Defense Fund to send a brief to the WTO panel regarding the meat hormone dispute. See Steve Charnovitz, *Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 353–54 (1997).

310. Although the panel has the discretion to disregard *amicus* briefs, the ability of NGOs to submit briefs directly to the panel has been considered a victory by many. USTR Charlene Barshefsky reported that "she was 'particularly pleased' that the Appellate Body recognized the right of [NGOs] to file briefs in WTO disputes—a position that the United States has advocated."

311. Cameron & Orava, *supra* note 308.

312. Since the CIT was charged with resolving trade-related disputes, environmentalists had long been skeptical of the CIT's ability (or willingness) to evaluate environmental issues for fear that environmental concerns would be subordinated to free trade considerations. Environmentalist mistrust of the CIT increased as a result of the 1991 GATT dispute panel ruling that a US law banning the import of

litigation in the *Shrimp-Turtles* case demonstrates that “[t]he CIT is rapidly becoming a sympathetic forum where [environmental] groups can successfully force the US government to enforce its existing environmental laws against other nations.”³¹³ In the future it is likely that more environmental disputes will be brought before the CIT.

The *Shrimp-Turtles* case also “reaffirms the historical method of governance of the United States, which leaves relations with foreign sovereigns and between the two political branches of the national government essentially beyond the hale of the federal judiciary.”³¹⁴ As was evident in the *Earth Island* case, the three branches often have difficulty in reconciling trade and environmental objectives. For example, Congress enacted Section 609, giving the executive branch little discretion in responding to shrimping practices of foreign nations. In attempting to “fit” the law into its foreign affairs practice, the Executive Branch ran afoul of the law’s mandatory embargo language. As a result, disputes arose in both domestic and international forums. In the future it is likely (or at least hopeful) that the three branches will do a better job of communicating and coordinating with each other to better reconcile trade and environmental objectives. Had this been done in the CIT litigation, it is possible that the dispute might not have ended up in the WTO.³¹⁵

tuna caught in driftnets violated the US GATT obligation. In the eyes of the environmentalists, the CIT was subject to the same shortcomings as the GATT. It was for these reasons that the *Earth Island* suit was initially filed in the district court since it was perceived that this would be the “path of least resistance.” Kibel, *supra* note 10, at 66–67 (citations omitted).

313. Amy Blackwell, *The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Environmental Law*, 23 N.C. J. INT’L & COMP. REG. 313, 316 (1998). In the Italian Driftnet case, several US environmental groups sought to stop driftnetting by Italian fisherman. These groups “successfully brought an action against the federal government in the CIT, alleging that the Department of Commerce had not taken the actions required by the [High Seas Driftnet Fisheries Enforcement Act] against Italy after acquiring knowledge of illegal Italian driftnetting. The victory in the CIT forced the Department of Commerce to threaten sanctions against Italian fish products and persuaded the European Union to seriously address the driftnet issue.” *Id.* (citations omitted).

314. *Earth Island Inst. v. Christopher*, 922 F. Supp. 616, 624 (Ct. Int’l Trade 1996) (noting that Section 609(a) had been held nonjusticiable).

315. For example, the CIT seemed willing to consider an extension of the May 1, 1996 deadline but ultimately denied the government’s request, finding that the government had utterly failed in putting forth any evidence that certain nations could not comply within that time period. In light of the international tensions that must have been present at the time, query whether evidence did in fact exist and if so, why it was not put forward.

VII. CONCLUSION

The CIT's rulings in the *Earth Island* case indicate that at least at the domestic level, environmentalists have managed to make some progress on the international trade front. As a result of the WTO's decision, however, the future of the sea turtle remains somewhat uncertain. Regardless of the action the United States takes to comply with the WTO's ruling, it is clear that the *Shrimp-Turtles* case affects more than just the sea turtles' struggle for survival. It also gives important insight into how the WTO will address future efforts to protect the global environment, and thus has far-reaching importance with respect to the evolving relationship between the WTO rules of trade and environmental conservation measures adopted by WTO members.

APPENDICES

Appendix A

Section 609(a) provides:

- (a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulation promulgated by the Secretary of Commerce on June 29, 1987—
 - (1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;
 - (2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;
 - (3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
 - (4) initiate the 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 in order to make such treaty consistent with the purposes and policies of this section; and
 - (5) provide to the Congress by not later than one year after the date of enactment of this section [Nov. 21, 1989]
 - (A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;
 - (B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and
 - (C) a full report on—
 - (i) the results of his efforts under this section; and

- (ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

Section 609(b) provides:

- (1) In general.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
- (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 the 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 that of the United States; and
 - (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
 - (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Appendix B

Section 1581(i) provides, in relevant part:

- (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International trade shall have exclusive jurisdiction of any civil action commenced against the United States, it agencies, or its officers, that arises out of any law of the United States providing for—

....

- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

Appendix C

In addition to Mexico, the preliminary list identified the following countries:

- Central America: Honduras, Panama, Guatemala, El Salvador, Nicaragua, Costa Rica and Belize;
- Caribbean and South America: Ecuador, Venezuela, Brazil, Colombia, Guyana, Trinidad and Tobago, Suriname, French Guinea;
- Europe: Italy, Portugal, and Spain;
- Middle East: Oman, United Arab Emirates, Bahrain, Egypt, Israel, Turkey;
- South Asia: India, Bangladesh, Pakistan, Sri Lanka;
- Southeast Asia: Thailand, Indonesia, Philippines, Singapore, Malaysia, Burma, Vietnam;
- East Asia: China, Taiwan, Macao, Japan, South Korea, Hong Kong;
- Oceania: New Zealand, Australia, and French Polynesia; and
- Africa: Nigeria, Cote d'Ivoire, Tunisia, Mozambique, Gabon, Madagascar, South Africa.*

* *State Department Identifies Nations Potentially Subject to Shrimp Embargo*, 13 Int'l Trade Rep. (BNA) 340 (Feb. 28, 1996).

Appendix D

Article 13 of the DSU provides:

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.

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 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.

Appendix E

GATT Article XX provides in relevant part:

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

....

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

....

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

Appendix F

GATT Article X:3 provides in relevant part:

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.

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.