

On Submission to the
Panel of the World Trade Organization

at the
Centre William Rappard,
Geneva, Switzerland

BOHEMIAN UNION - IMPORT RESTRICTIONS ON TUNA
FROM THE EMPIRE OF AVALON

SUBMISSION OF THE APPLICANT
EMPIRE OF AVALON

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List of Abbreviations

Art.	Article
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Doc.	Document
DSB	Dispute Settlement Body
DSU	Understanding of Rules and Procedures Governing the Settlement of Disputes
ed. / eds.	editor / editors / edition
<i>e.g.</i>	<i>exempli gratia</i> , for example
<i>et seq.</i>	<i>et sequens</i> , and the following
<i>et al.</i>	<i>et alia</i> , and others
E.C.	European Communities
E.P.I.L.	Encyclopaedia of Public International Law
FSC	Foreign Sales Corporations
GATT 1994	General Agreement on Tariffs and Trade 1994
ICJ	International Court of Justice
ICRW	International Convention on the Regulation of Whaling
ILC	International Law Commission
I.L.M.	International Legal Materials
<i>Lit.</i>	<i>literat</i> , subsection
MEA / MEAs	Multilateral Environmental Agreement / Multilateral Environmental Agreements
METI	Ministry for Economy, Trade and Industry
NGO / NGOs	Non-Governmental Organisation / Non-Governmental Organisations
para. / paras.	paragraph / paragraphs
RdC	Recueil des Cours
SAARC	South Asian Association for Regional Co-operation
UNRIAA	United Nations Reports of International Arbitral Awards
U.S.	United States of America
U.N.T.S.	United Nations Treaty Series

v.	versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WTO	World Trade Organisation

Statement of Facts

AVALON is a constitutional monarchy which combines traditional cultural and social structures, *inter alia* related to whaling, with a modern and efficient economy. BOHEMIA constitutes an important market for the products of the AVALON fishermen.

Both countries are very active WTO members and parties to CITES and ICRW. With respect to scientific benefits, AVALON decided to grant an adequate number of special permits for whaling to local fishermen.

Recently, a number of NGOs blamed AVALON of having infringed the regimes of CITES and ICRW. This occasion was used to originate a lobbying campaign against traditional whaling, failing to take into account that Japan and Norway also have caught whales ever since. BOHEMIA's fishing industry, which had been struggling against competition from AVALON anyway, supported these efforts. In late 2000, the Council of Ministers of the BOHEMIAN UNION felt obliged to impose an import ban on tuna, which the NGOs alleged that it has been the source of income behind AVALON's traditional whaling.

Trying to reach a compromise, AVALON negotiated with BOHEMIA in mid 2001 and beyond. However, BOHEMIA refused to lift the import ban on tuna.

Summary of Arguments

Claim 1: This Panel has jurisdiction over the case because, first, the dispute falls within the scope of GATT 1994 and not under that of CITES or ICRW as the measure in question is a trade measure, second, it concerns a violation of obligations under GATT 1994 to which BOHEMIA has committed itself, and, third, the DSB has a mandatory jurisdiction for such a violation complaint under Art. 23.1 DSU.

Claim 2: The Panel should not hear representatives of NGOs because, first, NGOs have no legal entitlement to be heard in WTO Panel proceedings as the Panel's discretion from Art. 13 DSU is neither limited through Art. 11 DSU nor through customary international law. Second, hearing NGOs undermines the WTO dispute settlement system for it slows down the proceedings and can not be brought in accordance with the intergovernmental character of the WTO.

Claim 3: BOHEMIA has violated GATT 1994 namely, first, Art. XI by imposing a quantitative restriction, second, Art. XIII by imposing it only on AVALON, third, Art. I by disobeying the Most-Favored-Nations Treatment Clause, and, fourth, Art. II by imposing 'duties or charges of any kind'.

Claim 4: BOHEMIA's import ban is not justified under Art. XX GATT 1994 because, first,

the ban does not fall under the scope of Article XX lit. g as (a) whales are not an exhaustible resource, (b) the ban is not in relation to the conservation objectives towards whales, (c) the ban has not been made effective in conjunction with domestic restrictions and (d) the ban falls outside the territorial and jurisdictional scope of the provision. Second, the ban does not fall under the scope of Art. XX lit. b as it does not fulfill the requirement of necessity and falls outside the territorial and jurisdictional scope of the provision. Third, the Chapeau Clause does not offer justification as (a) BOHEMIA did not engage in serious negotiations, (b) BOHEMIA did not apply similar measures against Japan and Norway thus arbitrarily discriminating AVALON, (c) the ban reveals as a disguised restriction on international trade with protectionist character, (d) the procedural requirements were not fulfilled as the ban did not provide for an appropriate phase-in period and (e) the ban does not constitute a legitimate reprisal for (1) the WTO dispute settlement excludes recourse to reprisals in general, (2) the prerequisites of a reprisal are not fulfilled in the particular case since (first) the scientific research program is in full conformity with ICRW and CITES which have thus not been violated, (second) BOHEMIA cannot take actions inconsistent with the compliance control procedure of the MEAs, (third) BOHEMIA was not entitled to recourse to a reprisal, as it did neither suffer damage from the scientific research program nor was it entitled to enforce obligations *erga omnes* and (fourth) there has been no prior notification before taking the countermeasure.

Arguments

I. Jurisdiction of the WTO Dispute Settlement Body

AVALON submits that this case is subject to the jurisdiction of the WTO Dispute Settlement Body's because, first, the dispute falls within the scope of the WTO Agreements, second, it concerns a violation of obligations under the covered agreements and, third, therefore, the jurisdiction of the WTO Dispute Settlement Body is mandatory.

1. The Dispute Falls within the Scope of the WTO Agreements

The import ban adopted by BOHEMIA is to be qualified as a trade measure, thus falling within the scope of the General Agreement on Tariffs and Trade 1994¹. BOHEMIA cannot argue that trade measures allegedly taken to ensure compliance with Multilateral

¹ General Agreement on Tariffs and Trade of 15 April 1994, I.L.M. 33 (1994), 1125 (1154), hereinafter: GATT 1994.

Environmental Agreements (MEAs) are falling within the scope of the Convention on International Trade in Endangered Species of Wild Fauna and Flora² or the International Convention for the Regulation of Whaling³. Even the clear wording of the texts of these two MEAs provides for the adoption of trade measures as a response to violations of their respective obligations. Therefore, the import ban, even if adopted as a countermeasure to an alleged violation of CITES or ICRW, does not lose its character as a trade measure whose legality being solely determined by the legal regime created by GATT 1994.

2. *Violation of Obligations*

Furthermore, AVALON submits that BOHEMIA has violated obligations it has committed itself to when signing GATT 1994. Pursuant to Art. 1.1 Understanding on Rules and Procedures Governing the Settlement of Disputes⁴ in connection with Appendix 1 DSU, the DSU applies to disputes arising under GATT 1994. Therefore, the claim brought forward by AVALON is to be qualified as a violation complaint in accordance with Art. 23.1. DSU.

3. *Mandatory Jurisdiction*

Since Art. 23.1 DSU constitutes a mandatory jurisdiction of the Dispute Settlement Body (DSB) for violation complaints,⁵ BOHEMIA cannot argue that the Panel has no competence to decide on the dispute. AVALON respectfully submits that the mandatory jurisdiction of the Panel, established under the DSU and recognized by BOHEMIA, is in no way affected by possible dispute settlement mechanisms established under CITES or ICRW.⁶

II. **The Panel Should Not Hear Representatives of Non-Governmental Organizations (NGOs)**

AVALON respectfully submits that the Panel should not hear representatives of NGOs because, first, NGOs have no legal entitlement to be heard in WTO panel proceedings, and, second, a hearing of NGOs would undermine the established and successful system of dispute settlement under the WTO.

² Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, I.L.M. 12 (1973), 1085 (1088), hereinafter: CITES.

³ International Convention for the Regulation of Whaling of 2 December 1946, 161 U.N.T.S. 72, hereinafter: ICRW.

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, I.L.M. 33 (1994), 1125 (1226), hereinafter: DSU.

⁵ *U.S.-Section 301*, Report of the Panel, para. 7.43.

⁶ See generally *Marceau*, *Journal of World Trade* 35 (2001), 1088 (1122 *et seq.*).

1. *NGOs Have No Legal Entitlement to Be Heard in WTO Panel Proceedings*

NGOs have no legal right to be heard in WTO panel proceedings since, first, it is according to Art. 13 DSU within the discretion of the Panel whether to consider information provided for by NGOs, and, second, this discretion is not limited by the obligation to make an objective assessment of the facts under Art. 11 DSU or customary international law.

a) Panel's Discretion under Art. 13 DSU

According to Art. 13 DSU, it lies within the discretion of the Panel whether to consider information provided for by NGOs.⁷ This proposition is also clearly evidenced by recent findings of the Appellate Body that held in *U.S.-Shrimp* that only Members have a legal right to make submissions to a panel, and, therefore, "a panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding."⁸ However, panels are under no legal duty to consider the content of submissions made by NGOs under Art. 13 DSU⁹ and are likewise not obliged to hear NGOs in proceedings.

In addition, AVALON submits that in the light of a systematic interpretation, giving NGOs the opportunity to be heard in the proceedings would impair the outbalanced approach of Art. 10.2 DSU. According to this provision, third parties enjoy the right to be heard only if they have a substantial interest in the matter. Therefore, endowing NGOs with an unconditional legal entitlement would grant them more rights than WTO Members enjoy, a consequence which has already been widely criticised by WTO Members.¹⁰

b) Discretion is Not Limited

The Panel's discretion whether to consider information by NGOs is not limited through the

⁷ *Nichols*, University of Pennsylvania Journal of International Economic Law 17 (1996), 295 (310); *Ala'i*, Fordham International Law Journal 23 (2000), 62 (83); *Peel*, Colorado Journal of International Environmental Law and Policy 13 (2001), 47 (68); *Shoyer/Solovy*, Law and Policy in International Business 32 (2000), 677 (686).

⁸ *U.S.-Shrimp*, Report of the Appellate Body, para. 101; with regard to the equivalent discretion of the Appellate Body to hear NGOs see *U.S.-Lead Bars*, Report of the Appellate Body, para. 41.

⁹ *Appleton*, Journal of International Economic Law 2 (1999), 477 (484); *Mavroidis*, in: von Bogdandy *et al.* (eds.), Studies in Honour of Ehlermann, 317 (320).

¹⁰ See only Statement of Argentina, WT/DSB/M/83, para. 14; Statement of Uruguay, WT/GC/M/60, para. 7; Joint Statement by the SAARC Commerce Ministers, WT/L/412, para. 9; see also *Charnovitz*, in: Charnovitz (ed.), Trade Law, 495 (505 *et seq.*).

provision of Art. 11 DSU. BOHEMIA cannot argue that the obligation to make an objective assessment of the facts can only be fulfilled through a mandatory consultation of NGOs. AVALON submits that NGOs are in their overwhelming majority pursuing only very specific interests,¹¹ are with regard to their membership very rarely of a representative nature,¹² and usually originate only from developed countries¹³. Therefore, a legal entitlement of NGOs would not at all lead to an objective assessment of the facts in accordance with Art. 11 DSU. Quite to the reverse, it is the discretion of the Panel granted through Art. 13 DSU whether to consult NGOs which ensures an objective assessment of the facts.

Furthermore, BOHEMIA cannot claim that the Panel's discretion is limited through any rules of customary international law, since no such norm exists granting rights of participation to NGOs in international proceedings. The respective lack of uniform state practice and *opinio iuris* as being the necessary elements for a norm of customary international law¹⁴ is clearly demonstrated by the fact that international courts and tribunals in general do not entitle NGOs to a right to be heard in their proceedings.¹⁵ Even if the Panel should hold that such a norm exists, AVALON submits that for the purpose of the WTO dispute settlement system, Art. 13 DSU conclusively regulates the possible participation of NGOs and thus derogates as *lex specialis* any customary law rule.

¹¹ *Dunoff*, Journal of International Economic Law 1 (1998), 433 (438); *Wedgwood*, in: Hofmann (ed.), Non-State Actors, 21 (29); *Riedinger*, Rolle nichtstaatlicher Organisationen, 281.

¹² *Jackson*, Journal of International Economic Law 4 (2001), 67 (76); *Spiro*, Washington Quarterly 18 (1995), 45 (51); *Reinisch/Irgel*, Non-State Actors and International Law 1 (2001), 127 (132).

¹³ *Hoekman/Kostecki*, Policitical Economy, 469; *Benedek*, in: Benedek *et al.* (eds.), Essays in Honour of Ginther, 228 (246); *Dunoff*, Journal of International Economic Law 1 (1998), 433 (438); *Shaffer*, in: Kennedy/Southwick (eds.), Essays in Honor of Hudec, 349 (378); *Chayes/Handler Chayes*, New Sovereignty, 270; *Nowrot*, Indiana Journal of Global Legal Studies 6 (1999), 579 (601).

¹⁴ *North Sea Continental Shelf Case*, ICJ-Reports 1969, 1 (44); *Asylum Case*, ICJ-Reports 1950, 266 (277); *Jennings/Watts*, Oppenheim's International Law, Vol. I/1, 25 *et seq.*, *Brownlie*, Principles, 4 *et seq.*; *Cassese*, International Law, 119 *et seq.*; *Cheng*, in: Anghie/Sturgess (eds.), Essays in Honour of Weeramantry, 377 *et seq.*; *Wolfke*, International Custom, 1 *et seq.*

¹⁵ *Beyerlin*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 61 (2001), 357 (367).

2. *Hearing of NGOs Undermines the WTO Dispute Settlement System*

Furthermore, a hearing of NGOs would undermine the established and successful WTO dispute settlement system because first an unrestricted involvement of these entities in the proceedings would inevitably lead to capacity overload and undue delay in the work of the panels. The consideration of *amicus curiae* briefs by the Panel would bind huge amounts of recourses and thus hinder a fast and effective dispute settlement procedure as envisioned by drafters of DSU.¹⁶ Second, giving NGOs the opportunity to be heard in panel proceedings would also be inconsistent with the character of the WTO as an intergovernmental body where “governments can speak clearly to each other”.¹⁷

III. BOHEMIA Has Violated Provisions of GATT 1994

In the following, AVALON will demonstrate that the import ban adopted by BOHEMIA violates, first, Art. XI, second, Art. XIII, third, Art. I, and, fourth, Art. II of GATT 1994.

First, BOHEMIA’s import ban is in clear violation of Art. XI:1 GATT 1994, because it constitutes a prohibition on the importation of products contrary to the elimination of quantitative restrictions under this provision. Second, the measure is inconsistent with the requirements of Art. XIII:1 GATT 1994, since by imposing an import ban on tuna only against AVALON and not against all third countries, BOHEMIA adopts a prohibition on importation in an unlawful discriminatory manner. Third, the import ban is also in breach of the Most-Favoured-Nation Treatment Clause enshrined in Art. I:1 GATT 1994, because BOHEMIA illegally withholds from AVALON trade advantages granted to other Members. Fourth, BOHEMIA’s import ban is in violation of Art. II:1 lit. b GATT 1994. Despite the fact that from its wording this provision only refers to “other duties or charges of any kind”, the underlying purpose of this regulation is to reduce obstacles to international trade,¹⁸ thus covering *a fortiori* according to the well recognized principle *a minore ad maius*¹⁹ also even more adverse measures like import bans.

¹⁶ *Jackson*, Journal of International Economic Law 4 (2001), 67 (76); *Koepp*, WTO-Streitbeilegungsverfahren, 193.

¹⁷ *Esty*, Journal of International Economic Law 1 (1998), 123 (140); *Nichols*, University of Pennsylvania Journal of International Economic Law 17 (1996), 295 (310); *Dunoff*, Journal of International Law 1 (1998), 433 (438).

¹⁸ Art. XXVIIIbis:1 GATT 1994 clearly recognize customs duties as serious obstacles to trade.

¹⁹ *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/3, 648.

IV. BOHEMIA's Import Ban is Not Justified Under Art. XX GATT 1994

AVALON submits that BOHEMIA's import ban is not justified under Art. XX GATT 1994 because, first, the measure does neither fall within the scope of Art. XX lit. g nor, second, within the scope of Art. XX lit. b, and, third, the import ban does not fulfil the requirements set forth by the Chapeau Clause of Art. XX GATT 1994.

1. Art. XX lit. g GATT 1994

BOHEMIA cannot claim that its import ban finds provisional justification under Art. XX lit. g GATT 1994 since, first, whales are not to be regarded as exhaustible natural resources, second, the measure is not relating to the conservation of exhaustible natural resources, third, there is no conjunction with restrictions on domestic production or consumption, and, fourth, the import ban does not fall within the territorial and jurisdictional scope of the application of this provision.

a) Exhaustible Natural Resource

AVALON submits that animals like whales cannot be regarded as exhaustible natural resources pursuant to Art. XX lit. g GATT 1994. It is generally accepted and continuously stated by the DSB that exceptions such as Art. XX GATT 1994 have to be interpreted narrowly.²⁰ Taking into account the ordinary meaning of the words, the phrase "natural resource" is commonly understood to cover only non-living materials like coal and iron.²¹ Furthermore, from the word "exhaustible" it clearly follows that only materials are covered by this term that are, contrary to living creatures, unable to reproduce themselves. According to customary law rules of treaty interpretation as codified in Art. 31 (1) of the Vienna Convention on the Law of Treaties²² and referred to in Art. 3.2 DSU²³, the ordinary meaning is one of the decisive factors of treaty interpretation. Furthermore, if natural resources under

²⁰ *U.S.-Shrimp*, Report of the Appellate Body, para. 121, 157; *U.S.-Shrimp (21.5)*, Report of the Appellate Body, para. 137; *U.S.-Section 337*, Report of the Panel, para. 5.9; *Tietje, Grundstrukturen*, 311; *Klabbers*, *Journal of World Trade* 26 (No.2, 1992), 63 (88).

²¹ *Collin*, *English Business Dictionary*, 190; *Flynn/Wallace*, *Business English Dictionary*, 143.

²² Vienna Convention on the Law of Treaties of 23 May 1969, 1155 U.N.T.S. 311, hereinafter: VCLT.

²³ *U.S.-Shrimp*, Report of the Appellate Body, para. 114; *U.S.-Gasoline*, Report of the Appellate Body, 17; *India-Patent Protection*, Report of the Appellate Body, paras. 45-46; *Argentina-Footwear*, Report of the Appellate Body, para. 47; *E.C.-Computer Equipment*, Report of the Appellate Body, para. 85; *Pauwelyn*, *American Journal of International Law* 95 (2001), 535 (542).

Art. XX lit. g would comprise living resources, the regulation of Art. XX lit. b GATT 1994, which deals specifically with the protection of animal life and health, would be rendered inutile.²⁴ Such an interpretation would run contrary to the generally recognized principle of effective treaty interpretation requiring that interpretation must give meaning and effect to all the terms of the treaty.²⁵ Finally, also the drafting history demonstrates that the discussions with regard to the exception reflected in Art. XX lit. g GATT 1994 focused only on “raw materials”, “products”, and “minerals”.²⁶

In the face of this overwhelming evidence, BOHEMIA cannot solely rely on former practice under GATT and WTO, since AVALON respectfully submits that there is no doctrine of *stare decisis* under WTO law with the consequence that this Panel is not bound by previous decisions.²⁷

b) No Relation to the Conservation Objective

Even if the Panel should consider whales to be exhaustible natural resources, AVALON submits that the measure is under Art. XX lit. g GATT 1994 not relating to the conservation of whales. In conformity with the principle of restrictive interpretation of exceptions the term “relating to” has to be interpreted narrowly in the sense of requiring a close and genuine relationship of ends and means.²⁸ Taking into account the context of a rule as a means of treaty interpretation, the term “relating to” cannot be understood as constituting lower requirements than the term “necessary to” in Art. XX lit. b GATT 1994, because the protection of human life and health cannot be seen as being less important than the conservation of exhaustible natural resources.²⁹ Therefore, an interpretation of the term

²⁴ *Appleton*, Journal of International Economic Law 2 (1999), 477 (482 *et seq.*).

²⁵ *U.S.-Underwear*, Report of the Appellate Body, 16; *Japan-Alcoholic Beverages*, Report of the Appellate Body, 12; *U.S.-Gasoline*, Report of the Appellate Body, 23; *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I/2, 1280 *et seq.*; *Shaw*, *International Law*, 656; *Thirlway*, *British Yearbook of International Law* 62 (1991), 1 (16 *et seq.*).

²⁶ See, e.g., E/PC/T/C.II/QR/PV/5, 79; E/PC/T/A/PV/25, 30, cited after *U.S.-Shrimp*, Report of the Panel, para. 3.238.

²⁷ *Japan-Alcoholic Beverages*, Report of the Appellate Body, 15; *U.S.-FSC*, Report of the Appellate Body, para. 108; *Waincymer*, WTO Litigation, 511; *Bhala*, *American University International Law Review* 14 (1999), 845 (938).

²⁸ *U.S.-Shrimp*, Report of the Appellate Body, para. 136.

²⁹ *Appleton*, Journal of International Economic Law 2 (1999), 477 (483); *Schoenbaum*, *American Journal of International Law* 91 (1997), 268 (276).

requiring the measure to be “not merely incidentally or inadvertently aimed at”³⁰ would be inconsistent with the meaning of “relating to” under Art. XX lit. g GATT 1994.

Contrary to previous cases where such a close relationship might have existed on reasons of harmful harvesting methods,³¹ no such connection between the fishing of tuna and AVALON’s scientific program on whales can be established.

c) No Conjunction With Domestic Restrictions

Furthermore, the import ban adopted by BOHEMIA is not justified under Art. XX lit. g GATT 1994 as it was not made effective in conjunction with restrictions on domestic production and consumption. With its import ban exclusively targeted at AVALON and not supported by domestic restriction, BOHEMIA has not fulfilled the prerequisite of even-handedness.³² BOHEMIA also cannot argue that no domestic production and consumption exist thereby rendering domestic restriction superfluous, because the measure adopted does not take into account any potential domestic production and consumption in the future.

d) Import Ban Falls Outside the Territorial and Jurisdictional Scope of Art. XX lit. g GATT 1994

Finally, AVALON submits that the import ban falls outside the territorial and jurisdictional scope of Art. XX lit. g GATT 1994 since this provision protects only natural resources within the territorial jurisdiction of the country concerned.³³ It is a well-established principle of international law that states should refrain from unilateral actions dealing with environmental challenges outside their respective jurisdiction, which has been repeatedly expressed and reiterated in a variety of international declarations³⁴ and by WTO Members.³⁵ The wording of Art. XX lit. g GATT 1994 does not indicate that its drafters intended to

³⁰ As interpreted by the Appellate Body in *U.S.-Gasoline*, Report of the Appellate Body, 19.

³¹ *U.S.-Shrimp*, Report of the Appellate Body; *U.S.-Tuna I*, Report of Panel; *U.S.-Tuna II*, Report of the Panel; *U.S.-Tuna from Canada*, Report of the Panel; *Canada-Herring and Salmon*, Report of the Panel.

³² *U.S.-Gasoline*, Report of the Appellate Body, 20; *U.S.-Shrimp*, Report of the Appellate Body, para. 143.

³³ *U.S.-Tuna I*, Report of the Panel, paras. 5.26, 5.31.

³⁴ See, e.g., Principle 12 of the 1992 Rio Declaration on Environment and Development; Paragraph 2.22 (i) of Agenda 21; see also *Tietje*, in: Delbrück (ed.), *Cooperation*, 45 (62); *Ackerman*, *Boston College International and Comparative Law Review* 25 (2002), 323 (333).

³⁵ METI, Report on the WTO Consistency, 306.

deviate from this principle. On the contrary, BOHEMIA's measure allegedly intends to protect whales which are far from being solely within its territorial jurisdiction.

Even if the Panel should hold that this provision does not only apply to resources located within the territory of the Member invoking the provision, AVALON submits that Members can enforce an Art. XX lit. g GATT 1994 restriction extra-territorially only against their own nationals and vessels.³⁶ The prohibition on the extrajurisdictional application of this provision is grounded in the generally recognized principle of personal jurisdiction as being the only valid basis for an extraterritorial enforcement of national regulations by a state.³⁷

Moreover, BOHEMIA cannot argue that its measure can be based on the so-called effects doctrine since this rule does not yet constitute a norm of customary international law because the practice of states with regard to the effects doctrine is currently far from being constant and uniform and has so far mainly been discussed in the area of anti-trust law.³⁸

Since BOHEMIA's import ban imposes obligations not on its own nationals and vessels it can only be qualified as being of an unlawful extrajurisdictional scope which is thus in violation of AVALON's sovereign right to continue to engage in its scientific program on whales.

2. Art. XX lit. b GATT 1994

AVALON submits that the import ban adopted by BOHEMIA does not find provisional justification under Art. XX lit. b GATT 1994, because the measure does not fulfil the requirement of necessity in accordance with this provision. A measure cannot be regarded as being necessary if an alternative measure exists which could reasonably be expected to be employed by the Member and which is less inconsistent with GATT 1994.³⁹ However, before a measure can be qualified as necessary it has to be suitable to serve one of the objectives listed in Art. XX lit. b GATT 1994.⁴⁰ The suitability is only given if a close connection can be established between the ends and means, that is between the behavior targeted by the import

³⁶ *U.S.-Tuna II*, Report of the Panel, para. 5.20; *Schoenbaum*, in: Birnie/Boyle (eds.), *Environmental Law*, 697 (708).

³⁷ *Schoenbaum*, in: Birnie/Boyle, *Environmental Law*, 697 (709); *Meng*, in: E.P.I.L., Vol. II, 337 (338).

³⁸ *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 325; *Pengilly*, *Vanderbilt Journal of Transnational Law* 16 (1983), 833 (851); *Lowe*, *International and Comparative Law Quarterly* 34 (1985), 724 (746).

³⁹ *Korea-Beef*, Report of the Appellate Body, 165; *Thailand-Cigarettes*, Report of the Panel, para. 74; *U.S.-Section 337*, Report of the Panel, para. 5.26.

⁴⁰ *U.S.-Tuna II*, Report of the Panel, para. 5.30; *U.S.-Gasoline*, Report of the Panel, para. 6.21; *E.C.-Asbestos*, Report of the Panel, para. 8.194; *Diem*, *Freihandel und Umweltschutz*, 68.

ban and the objective pursued. As already proven, no such connection between the fishing of tuna and AVALON's scientific program on whales exists. In addition, BOHEMIA's import ban falls outside the scope of territorial and jurisdictional application of Art. XX lit. b GATT 1994 as demonstrated in connection with Art. XX lit. g GATT 1994.

3. *Chapeau Clause of Art. XX GATT 1994*

AVALON submits that the import ban does not fulfil the requirements set forth by the Chapeau Clause of Art. XX GATT 1994. The measure constitutes an arbitrary and unjustified discrimination as well as a disguised restriction on trade because, first, BOHEMIA did not fulfil its obligation to engage itself in serious negotiations, second, no similar measures were adopted against Japan and Norway, third, the measure reveals as a disguised restriction in international trade, fourth, it did not fulfil the procedural requirements with regard to the design of the measure, and, fifth, the import ban does not constitute a legitimate reprisal.

a) Violation of the Obligation to Engage in Serious Negotiations

BOHEMIA does not fulfil the requirements of the Chapeau Clause of Art. XX GATT 1994 since it has violated its obligation to undertake a cooperative effort to engage in serious negotiations. The Chapeau Clause, in fact, constitutes an expression of the principle of good faith which is intended to prevent Members to use the exception-clause of Art. XX GATT 1994 in an abusive way as has also been continuously reiterated by the Appellate Body.⁴¹ It is, therefore, generally accepted that in pursuing objectives with regard to environmental protection, states are required to undertake serious, across-the-board negotiations.⁴² Before the adoption of the import ban by the Council of Ministers of BOHEMIA in 2000, no negotiations at all have been initiated by BOHEMIA. Quite to the contrary, it was AVALON who asked for consultations and serious negotiations in the course of the DSU procedure.

b) Arbitrary Discrimination of AVALON

Furthermore, BOHEMIA's import ban represents an arbitrary discrimination of countries where the same conditions prevail expressly prohibited by the Chapeau Clause of Art. XX

⁴¹ *U.S.-Shrimp*, Report of the Appellate Body, para. 158; *U.S.-Gasoline*, Report of the Appellate Body, 23; *Tietje*, *Europarecht* 35 (2000), 285 (291); *Stoll/Schorkopf*, *WTO*, 64 *et seq.*

⁴² *U.S.-Shrimp*, Report of the Appellate Body, para. 168; *U.S.-Shrimp (21.5)*, Report of the Appellate Body, para. 122, 123; *U.S.-Shrimp (21.5)*, Report of the Panel, 5.29; Principle 12 of the 1992 Rio Declaration on Environment and Development; Art. 5 Convention on Biological Diversity; Art. II (3) (c) Convention on the Conservation of Migratory Species of Wild Animals; *Tietje*, in: Delbrück (ed.), *Cooperation*, 45 (59 *et seq.*).

GATT 1994. By initiating an import ban solely against AVALON and not against the WTO Members Japan and Norway who are engaged in a research program very similar to the one conducted by AVALON and thus are countries where the same conditions prevail, BOHEMIA has applied a different treatment to these countries in comparison to AVALON in an arbitrary and thus unlawful manner.

c) Disguised Restriction on International Trade

BOHEMIA submits that the import ban in fact reveals as a disguised restriction on international trade which cannot find justification under the Chapeau Clause of Art. XX GATT 1994. The import ban actually provides for the protection of BOHEMIA's fishing industry that had been struggling against the competition from AVALON and evidently supported the adoption of the measure rather than the alleged purpose of environmental protection brought forward by BOHEMIA. Thus, the protectionist character of the import ban and its illegality as a disguised restriction on international trade are more than obvious.

d) Nonfulfilment of the Procedural Requirements

AVALON submits that BOHEMIA did not fulfil the requirements with regard to the design of the measure, since the import ban does not provide for an appropriate phase-in period. The Chapeau Clause of Art. XX GATT 1994 sets forth not only substantive but also procedural requirements concerning a measure which seeks justification under this provision. *Inter alia*, Art. XX GATT 1994 obliges Members to provide for a sufficient time period in order to allow the trading partners to adjust themselves to the measure.⁴³ Especially in the light of the traditional embedment of whales in the cultural structure of AVALON's society as well as its long-term scientific research program, the time period of about one year between the adoption and the entering into force of BOHEMIA's import ban was far from being appropriate.

e) The Import Ban Does Not Constitute a Legitimate Reprisal

AVALON further submits that BOHEMIA's import ban does not constitute a legitimate reprisal because, first, recourse to reprisals by Members is generally excluded through the existence of the WTO dispute settlement system, and, second, even if this Panel should hold that reprisals are not generally prohibited under the WTO regime, the prerequisites for the adoption of a reprisal are not met.

⁴³ *U.S.-Shrimp*, Report of the Appellate Body, para. 174; *Chang*, Southern California Law Review 74 (2000), 31 (40).

(1) The WTO Dispute Settlement System Excludes Recourse to Reprisals

BOHEMIA cannot argue that its import ban amounts to a lawful reprisal since such countermeasures are solely regulated by the WTO dispute settlement system. It is generally recognized that a multilateral treaty regime can renounce the possibility of countermeasures being taken in relation to its subject matter.⁴⁴ This is the case with regard to the WTO system, because Arts. 3.7, 22 DSU require prior authorization of the adoption of countermeasures and Art. 23 DSU, as shown above, sets up a mandatory dispute settlement system.⁴⁵ Therefore, BOHEMIA cannot take recourse to a reprisal since such a countermeasure is excluded through the *lex specialis* regulations established by the DSU. By imposing its import ban against AVALON, BOHEMIA has thus violated the prohibition of unilateral countermeasures often qualified as being one of the cornerstones of the WTO.⁴⁶

(2) Prerequisites of a Reprisal are Not Fulfilled

Even if the Panel should hold that reprisals are not generally excluded through the existence of the WTO dispute settlement system, AVALON submits that the prerequisites for a lawful reprisal are not fulfilled as, first, AVALON has not violated any applicable norms of international law, second, BOHEMIA did not fulfil the requirements of the compliance-control mechanism under CITES, third, BOHEMIA was not entitled to take recourse to a reprisal, and, fourth, BOHEMIA has not fulfilled the requirement of a prior notification.

(i) No Violation of Applicable Norms of International Law

Contrary to BOHEMIA's accusations, AVALON has neither violated its obligations under CITES nor under ICRW as being an essential prerequisite for the lawfulness of a reprisal⁴⁷. The granting of special permissions for scientific research by AVALON is in full conformity with Art. VIII ICRW as a legitimate basis to take whales for the purpose of scientific research. The sale of the whale meat is in compliance with the ICRW since Art. VIII (2) ICRW requires

⁴⁴ ILC-Report 2001, 337; *Pauwlyn*, *American Journal of International Law* 95 (2001), 535 (542).

⁴⁵ *Crawford*, *Third Report State Responsibility*, para. 420; *Garcia-Rubio*, *WTO Dispute Settlement Organs*, 53.

⁴⁶ *Garcia-Rubio*, *WTO Dispute Settlement Organs*, 54.

⁴⁷ *Gabcikovo-Nagymaros Project*, ICJ-Reports 1997, 7 (55); ILC-Report 2001, 180; *Doehring*, *Völkerrecht*, 444.

that all whales are processed so far as practicable.⁴⁸ Any trade with whale meat was in accordance with the prerequisites set forth in Art. III CITES.

(ii) No Exhaustion of Available Compliance-Control Mechanisms

Even if the Panel should hold that AVALON has violated certain provisions of CITES or ICRW, BOHEMIA cannot take actions inconsistent with the compliance control procedure laid down by these MEAs. This would have required, for instance, BOHEMIA to base there measure on a prior recommendation of the Standing Committee of CITES. This requirement is reflected in the general practice of the parties to CITES. For example in the case of the imposition of trade sanctions by the United States against Taiwan in 1994,⁴⁹ these sanctions were based on a prior recommendation by the Standing Committee of CITES.⁵⁰

(iii) No Entitlement to Take Recourse to a Reprisal

BOHEMIA was not entitled to take recourse to a reprisal since it was not entitled to invoke the alleged violation of CITES or ICRW. It is a well-founded prerequisite for the adoption of a reprisal that only states that are injured or at least specially affected by an international wrongful act are allowed to take recourse to countermeasures.⁵¹ BOHEMIA has neither suffered any specific damage from AVALON's scientific program on whales nor is it in any other way in comparison to other states individually or specifically affected by it. BOHEMIA cannot argue that it is entitled to a reprisal only because of the fact that it is also a party to CITES and ICRW since the mere fact of a common membership in a multilateral treaty alone is in the absence of further indications of a specific affection not sufficient to entitle a state to take recourse to countermeasures.⁵² BOHEMIA also cannot claim that it had a right to adopt a reprisal as the enforcement of an obligation *erga omnes* since this far reaching concept is generally regarded as being only very selective and meant to apply according to the International Court of Justice only to a limited number of international obligations such as

⁴⁸ *Greenberg/Hoff/Goulding*, California Western International Law Journal 2002, 151 (159 *et seq.*).

⁴⁹ See *Charnovitz*, American University Journal of International Law and Policy 9 (1994), 751 (769); *Crawford*, Georgetown International Environmental Law Review 7 (1995), 555 (564).

⁵⁰ CITES, Decision of the Standing Committee of 1993.

⁵¹ *Verdross/Simma*, Universelles Völkerrecht, 907; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/1, 92; *Malanczuk*, Akehurst's International Law, 271; *Partsch*, in: E.P.I.L., Vol. IV, 200 (201).

⁵² *Frowein*, Recueil des Cours 248 (1994), 345 (402); *Hutchinson*, British Yearbook of International Law 59 (1988) 151 (174); *Hahn*, Aussetzung von GATT-Verpflichtungen, 100.

the prohibition of genocide, slavery, and racial discrimination⁵³ and thus does not cover the individual protection of specific kinds of sea mammals. This restrictive application is also evidenced by the fact that in virtually all treatises of the most highly qualified publicists of the various nations on obligations *erga omnes*, the protection of sea mammals is not even discussed as a potential candidate to which this legal concept could apply.⁵⁴

(iv) BOHEMIA Violated the Requirement of Prior Notification

BOHEMIA also cannot argue that its import ban is justified as a reprisal, since that would have required prior notification of the countermeasure which was not given by BOHEMIA. Considering the exceptional and potentially serious consequences of countermeasures, it is a generally recognized principle of international law that a state may only lawfully take recourse to reprisals if the state affected by that measure is given prior notification about the intended countermeasure.⁵⁵ AVALON, however, received no such prior notice from BOHEMIA before the adoption of the measure by the Council of Ministers.

The Government of the EMPIRE OF AVALON therefore asks the Panel to recommend that the DSB request the BOHEMIAN UNION to bring its measure found to be inconsistent with Art. I, II, XI, XIII GATT 1994 and not justified under Art. XX GATT 1994 into conformity with the obligations of the BOHEMIAN UNION under that Agreement.

⁵³ *Barcelona Traction Case*, ICJ-Reports 1970, 3 (32); *Ragazzi*, *International Obligations Erga Omnes*, 162.

⁵⁴ See only *Simma*, *Recueil des Cours* 250 (1994), 217 (293 *et seq.*); *Crawford*, *Indiana Journal of Global Legal Studies* 8 (2001), 303 *et seq.*; *Rosenne*, in: *Anghie/Sturgess* (eds.), *Essays in Honour of Weeramantry*, 509 *et seq.*; *Frowein*, in: *Bernhardt et al.* (eds.), *Festschrift Mosler*, 241 *et seq.*; *Ragazzi*, *International Obligations Erga Omnes*, 154 *et seq.*

⁵⁵ *Gabcikovo-Nagymaros Project*, ICJ-Reports 1997, 7 (56); *Air Service Agreement of 27 March 1946*, UNRIAA 17 (1978), 417 (445 *et seq.*); Art. 52 (1) (b) ILC-Draft Articles on State Responsibility, in: ILC-Report 2001, 345; *Schachter*, *International Law*, 186; *Shearer*, *Starke's International Law*, 472; *Seidl-Hohenveldern/Stein*, *Völkerrecht*, 349; *Doehring*, *Völkerrecht*, 447.