

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 RESPONDENT
BOHEMIAN UNION

*Table of Contents***A. General**

<i>Table of Contents</i>	I
<i>List of References</i>	III
I. Conventions, Treaties	III
II. Cases	IV
1. <i>WTO and GATT</i>	IV
2. <i>International Court of Justice</i>	V
III. Treatises, Restatements, Digests	VI
IV. Articles and Contribution	VIII
V. Materials	XIII
<i>List of Abbreviations</i>	XIV

B. Arguments

<i>Statement of Facts</i>	1
<i>Summary of Arguments</i>	1
<i>Arguments</i>	2
I. The WTO Dispute Settlement Body Has no Jurisdiction	2
1. <i>Limitation on the Jurisdiction of WTO Panels</i>	2
2. <i>Specific Mechanisms of Dispute Settlement Under MEAs</i>	3
II. The Panel Should Hear Representatives of Non-Governmental Organizations (NGOs)	4

1. <i>Legal Obligation to Consult NGOs</i>	4
a) <u>Objective Assessment of the Facts</u>	<u>4</u>
b) <u>Principle of Transparency</u>	<u>5</u>
2. <i>Enhancing the Legitimacy of the WTO Dispute Settlement System</i>	5
III. BOHEMIA's Measure Is Justified Under Art. XX GATT 1994	6
1. <i>Art. XX lit. g GATT 1994</i>	6
a) <u>Exhaustible Natural Resource</u>	<u>6</u>
b) <u>The Measures Is Related to the Conservation of Whales</u>	<u>7</u>
c) <u>The Requirement of Domestic Restrictions Is not Applicable in this Case</u>	<u>8</u>
d) <u>BOHEMIA Enjoys Jurisdiction</u>	<u>8</u>
2. <i>Art. XX lit. b GATT 1994</i>	9
3. <i>Chapeau Clause of Art. XX GATT 1994</i>	10
a) <u>The Measure Does not Constitute an Unjustifiable Discrimination</u>	<u>11</u>
b) <u>BOHEMIA Does not Arbitrarily Discriminate AVALON</u>	<u>11</u>
c) <u>The Measure Cannot Be Qualified as a Disguised Restriction on International Trade</u>	<u>12</u>
d) <u>The Measure Constitutes a Legitimate Reprisal</u>	<u>12</u>
(1) <i>The Prerequisites of a Reprisal Are Fulfilled</i>	13
(2) <i>The WTO Dispute Settlement System Does not Generally Exclude Recourse to Reprisals</i>	15

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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
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>litterat</i> , subsection
MEA / MEAs	Multilateral Environmental Agreement / Multilateral Environmental Agreements
NGO / NGOs	Non-Governmental Organisation / Non-Governmental Organisations
para. / paras.	paragraph / paragraphs
RdC	Recueil des Cours
StICJ	Statute of the International Court of Justice
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties
v.	versus
Vol.	Volume
WTO	World Trade Organisation

Statement of Facts

BOHEMIA is a western customs union composed of 24 democratic states. Its strong economy is closely linked to the one of AVALON. Both are coastal countries with abutting populations of tuna and whale. In addition, both have fishing fleets, nevertheless BOHEMIA imports large quantities of fish caught by AVALON trawlers.

The two countries are very active WTO members and did sign CITES and ICRW. These treaties were initiated for the protection of endangered species and proscription of trade in and killing of the respective animals, such as whales faced with a real risk of extinction.

Recently, public demands forced the Council of Ministers of the BOHEMIAN UNION to adopt an import ban against AVALON tuna from enterprises engaged in whale killing. The pressure arose after it turned out that the concerned enterprises had made particularly attractive profits in tuna by which they subsidised their unprofitable whale killing. This was revealed by several international NGOs who delivered sound evidence for breaches of ICRW and CITES. Not only were so called 'special permits' for whale killing granted numerously, but also had the whale meat been exported to other Asian countries.

AVALON, trying to prevent the import ban, started negotiations in mid 2001. As AVALON refused to bring its whaling policy in conformity with the protection regimes it had agreed upon, the ban entered into force on 1 January 2002.

Summary of Arguments

Claim 1: This Panel does not have jurisdiction over the case because, first, the jurisdiction of WTO Panels is limited to disputes in the field of international trade while the measure in question is not a trade measure, and, second, the applicable MEAs provide for specific mechanisms of dispute settlement.

Claim 2: The Panel should hear representatives of NGOs, because, first, the Panel has a legal obligation to hear them as (a) according to Art. 11 DSU it has to conduct an objective assessment of the facts, (b) it has to fulfil the fundamental WTO principle of transparency, and, second, hearing NGOs does not run contrary to the WTO dispute settlement system since their consultation would greatly enhance the legitimacy of the WTO.

Claim 3: BOHEMIA is justified by Art. XX GATT 1994 namely first by Art. XX lit. g as (a) whales are an exhaustible natural resource, (b) the measure is related to the conservation of whales, (c) the requirement of domestic restrictions is not applicable to this case and (d) the measure falls in the territorial and jurisdictional scope of the application of this provision,

second by Art. XX lit. b as the measure is directed towards the preservation of animal life, necessary to achieve this objective and falls under the territorial and jurisdictional scope of the provision and third by the Chapeau Clause which does offer justification as (a) the measure does not unjustifiably discriminate AVALON for no bilateral solution has to be sought when a multilateral basis already exists and the phase-in period was appropriate as AVALON had 20 years to adjust as of the moratorium on commercial whaling, (b) BOHEMIA has not arbitrarily discriminated AVALON, (c) the measure cannot be qualified as a disguised restriction on international trade for it has been openly announced and AVALON's import share will be taken over by other competitors worldwide, (d) the measure constitutes a legitimate reprisal for (1) this countermeasure is recognized in international law and its prerequisites are fulfilled in this case since (first) AVALON has violated its obligations under CITES and ICRW, (second) BOHEMIA was entitled to take recourse to a reprisal as of its obligation *erga omnes* and (third) a lawful reprisal does not require explicit prior notification, (2) recourse to reprisals is not excluded in general through the WTO dispute settlement system since the WTO is not a self-contained-regime but part of the realm of international law and thus the general regulations on countermeasures are applicable.

Arguments

I. The WTO Dispute Settlement Body Has no Jurisdiction

BOHEMIA respectfully submits that this case is not subject to jurisdiction of this Panel, because, first, WTO panels are authorized to settle disputes only in the field of international trade law while the adopted restriction is not a trade measure *strictu sensu* but solely aimed at environmental protection, and, second, the applicable multilateral environmental agreements (MEAs) provide for specific mechanisms of dispute settlement.

1. Limitations on the Jurisdiction of WTO Panels

The jurisdiction of WTO panels extends solely to disputes arising in the field of international trade law in order to provide security and predictability to the multilateral trading system as stated in Art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes¹ and thus does not cover other areas of international law. This is clearly expressed

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, I.L.M. 33 (1994), 1125 (1226), hereinafter: DSU.

in Art. 1.1 DSU by restricting the application of the DSU to the agreements listed in Annex I DSU, which does neither contain the Convention on International Trade in Endangered Species of Wild Fauna and Flora² nor the International Convention for the Regulation of Whaling³ as being the decisive international agreements in this dispute nor any other MEA. This general limitation on the jurisdiction of WTO panels is further reflected in the WTO Committee on Trade and Environment's Report of 1996 highlighting that "if a dispute arises between WTO Members, Parties to an MEA (...) over the use of a trade measure they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanism available under the MEA".⁴

BOHEMIA's environmental protection measure is exclusively aimed at ensuring AVALON's compliance with its obligations under CITES and ICRW and thus governed only by the requirements under the respective regimes of these two MEAs.

2. Specific Mechanisms of Dispute Settlement Under MEAs

In addition, BOHEMIA submits that the lack of jurisdiction follows, in the light of the general principle of law under Art. 38 (1) (c) of the Statute of the International Court of Justice⁵ of *lex specialis derogat legi generali*⁶, which does not only apply to substantive law but also to procedural issues, from the well-established rule of international law that conflicts shall be resolved by dispute settlement organ having the closest relationship to the subject matter at issue.⁷ Consequently, "disputes between parties to both trade and environmental regimes must be allocated to the respective dispute settlement forums in accordance with their primary subject-matter".⁸ Therefore, the dispute has to be decided by the respective

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

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

⁴ Report (1996) of the Committee on Trade and Environment, para. 178.

⁵ Statute of the International Court of Justice, 15 U.N.C.I.O. 355, hereinafter: StICJ.

⁶ Cheng, General Principles, 26; Dahm/Delbrück/Wolfrum, Völkerrecht, Vol. I/3, 648.

⁷ See Stoll/Vöneky, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 62 (2002), 21 (22), referring to the argumentation of Chile in the *Swordfish Case*; Wirth, Review of European Community & International Environmental Law 7 (1998), 237 (242); Guruswamy, in: Anghie/Sturgess (eds.), Essays in Honour of Weeramantry, 543 (548 *et seq.*).

⁸ Ohlhoff/Schloemann, in: Cameron/Campbell (eds.), Dispute Resolution, 302 (325).

mechanisms of dispute settlement available under Art. IX (4) ICRW as well as Art. XVIII (2) CITES.

II. The Panel Should Hear Representatives of Non-Governmental Organizations (NGOs)

In case the Panel should hold to have jurisdiction, BOHEMIA submits that the Panel should hear representatives of NGOs because, first, the Panel is in this case under a legal obligation to consult NGOs, and, second, a participation of NGOs would further enhance the legitimacy of the WTO dispute settlement system.

1. Legal Obligation to Consult NGOs

This Panel is under a legal obligation to hear NGOs since, first, in order to conduct an objective assessment of the facts in this case consultation of NGOs is obligatory, and, second, the principle of transparency requires hearing NGOs.

a) Objective Assessment of the Facts

Although recognizing that panels do commonly have discretion in accordance with Art. 13 DSU whether to consult NGOs,⁹ BOHEMIA submits that in the light of the facts, the only way to lawfully exercise the discretion in this case is to hear NGOs. From Art. 11 DSU, requiring the Panel to make an objective assessment of the facts, it follows that all relevant information must be taken into consideration.¹⁰ This obligation is further strengthened by Art. 12.2 DSU calling for flexible procedures to ensure high-quality panel reports. Parties to panel proceedings often lack the resource to, or, may be unwilling, to provide the relevant information necessary to enable panels to deliver an elaborated judgment.¹¹ NGOs, however, usually combine the capacity to obtain crucial information with the ability to present them in a well-reasoned and objective manner.¹² In a case of particular complexity where only NGOs can provided the relevant information, the non-consideration of these information would

⁹ *U.S. – Shrimp*, Report of the Appellate Body, para. 108; *Appleton*, Journal of International Economic Law 2 (1999), 477 (484).

¹⁰ *U.S.-Lead Bars*, Report of the Appellate Body, paras. 36 *et seq.*; *U.S.-Shrimp*, Report of the Appellate Body, para. 106; *E.C.-Hormons*, Report of the Appellate Body, para. 116; *Steger*, in: von Bogdandy *et al.* (eds.), European Integration, 419 (420).

¹¹ *Jackson*, Journal of International Economic Law 4 (2001), 67 (76); *Steger*, in: von Bogdandy *et al.* (eds.), European Integration, 419 (421); *Dunoff*, Journal of International Economic Law 1 (1998), 433 (436); *Esty*, Journal of International Economic Law 1 (1998), 123 (145).

¹² *Esty*, Journal of International Economic Law 1 (1998), 123 (133); *Dunoff*, Journal of International Economic Law 1 (1998), 433 (435); *Epiney/Scheyli*, Umweltvölkerrecht, 54 *et seq.*; *Pauwelyn*, International and Comparative Law Quarterly 51 (2002), 325 (330).

amount to an abuse of discretion leading to a violation of the duty to make an objective assessment.¹³ In this case it were only the NGOs who discovered and collected the relevant facts with regard to the extensive killing of whales and trade in whale meat authorized and tolerated by AVALON. Therefore, they play a crucial and unique role in enabling this Panel to gather all the facts necessary for the objective assessment required by Art. 11 DSU.

b) Principle of Transparency

BOHEMIA further submits that hearing the NGOs is mandated by the principle of transparency. Transparency, constituting one of the fundamental principles of the WTO regime¹⁴ and being reflected in a variety of provisions such as Art. X General Agreement on Tariffs and Trade 1994¹⁵, requires with respect to the DSU that the dispute settlement procedure has to be made accessible to outside interests.¹⁶ Therefore, transparency within the DSU requires not only the disclosure and exchange of information between the Members among each other and the WTO, but also the involvement of NGOs representing civil society¹⁷ in order to “strengthen public confidence in the multilateral trading system”¹⁸. Hence in the light of the important matter in this case and the awareness of the public, the hearing of NGOs and the use of their information is essential to fulfil the principle of transparency.

2. Enhancing the Legitimacy of the WTO Dispute Settlement System

In addition, BOHEMIA submits that AVALON cannot argue that the hearing of NGOs would undermine the WTO dispute settlement system since, quite the reverse, the consultation of NGOs would greatly enhance the legitimacy of the WTO.

¹³ *Howse*, in: Weiler (ed.), *The EU*, 35 (50).

¹⁴ *Senti*, WTO, 195; *Panitchpakdi*, in: Sampson (ed.), *World Trade Organization*, 29 (33); *Jackson*, *Journal of International Economic Law* 4 (2001), 67 (77); *Tietje*, *Normative Grundstrukturen*, 182 *et seq.*

¹⁵ General Agreement on Tariffs and Trade of 15 April 1994, hereinafter: GATT 1994.

¹⁶ *Cameron/Campbell*, in: Cameron/Campbell (eds.), *Dispute Resolution*, 204 (226); *Hilf*, *Journal of International Economic Law* 4 (2001), 111 (119); *Hilpold*, *Europarecht* 34 (1999), 597 (602).

¹⁷ *Reichert*, *Minnesota Journal of Global Trade* 5 (1996), 219 (246); *Hilf*, in: Classen *et al.* (eds.), *Liber Amicorum Oppermann*, 427 (435); *Reinisch/Irgel*, *Non-State Actors and International Law* 1 (2001), 127 (149); *Bradlow*, *George Washington International Law Review* 33 (2001), 503 (535).

¹⁸ WTO, General Council, WT/GC/M/29, 23.

First, the participation of NGOs would not be incompatible with the alleged character of the WTO as an intergovernmental organization since, as demonstrated by Art. V:2 of the WTO Agreement¹⁹, the involvement of NGOs is expressly provided for by the founding document of the WTO itself. Second, an asserted capacity overload of the Panel can effectively be avoided by the adoption of strict formal requirements for the contribution of NGOs as already practiced by the Appellate Body²⁰ with respect to *amicus curiae* briefs.²¹

III. BOHEMIA'S Measure Is Justified Under Art. XX GATT 1994

In case this Panel should hold that BOHEMIA'S measure to end the killing of whales by AVALON is not in full conformity with some of the provisions of GATT 1994, BOHEMIA submits that it is justified under Art. XX GATT 1994, because the adopted measure, first, falls within the scope of Art. XX lit. g, as well as, second, within the scope of Art. XX lit. b, and, third, it fulfils the requirements of the chapeau clause of Art. XX GATT 1994.

1. Art. XX lit. g GATT 1994

In the following BOHEMIA will show that the measure taken fulfils the prerequisites of Art. XX lit. g GATT 1994, since, first, whales are an exhaustible natural resource, second, the measure is related to the conservation of whales, third, the requirement of domestic restrictions is not applicable in this case, and, fourth, the measure falls in the territorial and jurisdictional scope of the application of this provision.

a) Exhaustible Natural Resource

BOHEMIA submits that whales are to be regarded as exhaustible natural resources pursuant to Art. XX lit. g GATT 1994. AVALON cannot argue that the meaning of 'natural resources' can be reduced to comprise only non-living resources such as minerals. Besides the fact that the historical interpretation according to customary international law as codified in Art. 32 of the Vienna Convention on the Law of Treaties²² only serves as a supplementary means of interpretation, the term 'natural resources' has to be interpreted in the light of the entire legal

¹⁹ Agreement Establishing the World Trade Organization.

²⁰ *E.C.-Asbestos*, Communication from the Appellate Body, WT/DS135/9.

²¹ *Mavroidis*, in: von Bogdandy *et al.* (eds.), *European Integration*, 317 (320); *Marceau/Stikwell*, *Journal of International Economic Law* 3 (2001), 155 (181 *et seq.*).

²² Vienna Convention on the Law of Treaties, hereinafter: VCLT.

system prevailing at the time of interpretation to give it its ordinary meaning.²³ Thus, taking into account the preamble of the WTO Agreement and the therein mentioned objective of “sustainable development”, the term natural resource is evolutionary.²⁴ Accordingly, with reference to a number of contemporary international conventions and declarations²⁵ the Appellate Body held that this term comprises also living resources.²⁶ Such a reading of Art XX lit. g GATT 1994 is in accordance with the principle of effective treaty interpretation and does not render Art. XX lit. b GATT 1994 inutile, since the scope of application overlaps only partly.²⁷

AVALON furthermore cannot claim that living-resources are by definition renewable and, therefore, not exhaustible, since the term ‘exhaust’ means “to use up completely”.²⁸ Thus, a living resource has to be regarded as exhaustible if reproduction is noticeable slower than what is needed to avoid depletion.²⁹ Since the whales killed by AVALON are listed in Appendix I CITES and recognized as ‘threatened with extinction’, they are exhaustible.³⁰ In particular, this is the case with regard to blue whales that face a real risk of extinction.

b) The Measures Is Related to the Conservation of Whales

BOHEMIA submits that the adopted measure is in relation to the conservation of whales, since a substantial relationship between the measure regarding the import of tuna and the objective, namely to stop the killing of whales authorized by AVALON, exists.

²³ *Namibia Case*, ICJ-Reports 1971, 3 (31); *Jennings/Watts*, Oppenheim’s International Law, Vol. I/2, 1282; *Jimenez de Arechaga*, RdC 159 (1978), 1 (49).

²⁴ *U.S. – Shrimp*, Report of the Appellate Body, para. 130.

²⁵ United Nations Convention on the Law of the Sea; Convention on Biological Diversity; Convention on the Conservation of Migratory Species of Wild Animals in connection with the Resolution on Assistance to Developing Countries of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals; Agenda 21.

²⁶ *U.S. – Shrimp*, Report of the Appellate Body, para 130; Previous Panel already held fish to be a natural resource: *U.S. – Tuna I*, Report of the Panel, para. 5.30 *et seq.*; *U.S. – Tuna II*, Report of the Panel, para. 5.13; *U.S. – Tuna from Canada*, Report of the Panel, para. 4.9; *Canada – Herring and Salmon*, Report of the Panel, para. 4.4.

²⁷ *Mavroidis*, Journal of World Trade 34 (2000), 73 (86).

²⁸ *Simpson/Weiner*, Oxford English Dictionary, Vol. V, 534

²⁹ *Mavroidis*, Journal of World Trade 34 (2000), 73 (86); *Diem*, *Freihandel*, 82.

³⁰ With regard to Turtles listed in Appendix I CITES see *U.S. – Shrimp*, Report of the Appellate Body, para. 132.

In accordance with consistent practice a measure is to be seen as relating to the conservation of a natural resource if a genuine relationship between the ends and means can be established instead of aiming merely incidentally or inadvertently at the conservation.³¹ As clearly evidenced, whaling is not very profitable for AVALON's fishing industry and, thus, subsidized by the large profits made with exports of fish such as tuna. In restricting trade with tuna through BOHEMIA's measure the subsidisation of the killing of whales will no longer be possible. AVALON also cannot argue that the term 'relating to' has to be interpreted in the same way as 'necessary to', since the different meaning of this two phrases is already obvious from the ordinary meaning as emphasised by the Appellate Body in overruling the Panel³² in the *U.S. - Gasoline* dispute.³³

c) The Requirement of Domestic Restrictions Is not Applicable in this Case

With regard to the general requirement of domestic restriction under Art. XX lit. g GATT 1994, BOHEMIA submits that this prerequisite is not applicable in this case. This requirement of even-handedness does, of course, only apply to situations where production and consumption of the product at issue takes place.³⁴ Because BOHEMIA is neither killing whales nor consuming whale products, a domestic restriction is obsolete due to a total lack of possible addressees.

d) BOHEMIA Enjoys Jurisdiction

Furthermore, the measure adopted by BOHEMIA in order to protect the whales falls in the territorial and jurisdictional scope of application of Art. XX lit. g GATT 1994, because this provision cannot be interpreted as constituting any territorial limitations with regard to the location of the protected natural resource.³⁵ The wording of this provision does not suggest any limitations since this would have been clearly expressed as done for example in Art. XX

³¹ *U.S. - Shrimp*, Report of the Appellate Body, para. 136; *U.S. - Gasoline*, Report of the Appellate Body, 19.

³² *U.S. - Gasoline*, Report of the Panel, para. 6.40.

³³ *U.S. - Gasoline*, Report of the Appellate Body, 19.

³⁴ *Diem*, *Freihandel*, 140.

³⁵ *U.S.-Tuna II*, Report of the Panel, para. 5.15; *Trebilcock/Howse*, *International Trade*, 409; *Cheyne*, *Georgia Journal of International and Comparative Law* 24 (1995), 433 (454).

lit. f GATT 1994. Furthermore, already Art. XX lit. e GATT 1994 demonstrates a possible extraterritorial scope of this exception-clause.³⁶

Even if this Panel should hold that there is a territorial limitation, BOHEMIA suggests that by regulating the entering of a product into the territory of a state, the necessary basis for jurisdiction already exists, because in the absence of obligations under international agreements every state has the right to regulate the flow of goods into its territory.³⁷ It is the importing country's right to take measures to ensure that its own consumption "does not contribute as a great evil".³⁸ Therefore, BOHEMIA has the sovereign right to abstain from the killing of whales as well as to abstain from allowing companies, engaged in this unprofitable business, to be able to continue whaling because of profits made by trade in tuna.

Furthermore, BOHEMIA would respectfully like to draw the Panel's attention to the fact that whales are a migratory species which also constantly appears within the territorial waters of BOHEMIA. Thus, BOHEMIA submits that there is a sufficient nexus between the endangered whales and BOHEMIA which clearly legitimizes the exercise of jurisdiction.³⁹

In addition, AVALON cannot claim a violation of its sovereignty as the measure adopted by BOHEMIA is directed at the protection of whales living mainly on the High Sea, and therefore, as part of a global common not subject to the jurisdiction of any state.⁴⁰ Thus in protecting those whales BOHEMIA does not interfere with the territorial sovereignty of AVALON which consequently is not entitled to claim a violation of the principle of non-intervention.

2. Art. XX lit. b GATT 1994

BOHEMIA submits that the adopted measure to protect the whales also fulfils the prerequisites of Art. XX lit. b GATT 1994 because the measure is necessary for the protection of animal life.

The adopted measure is intended to end AVALON's killing of whales and therefore directed at the preservation of animal life as required by Art. XX lit. b GATT 1994. Furthermore, the

³⁶ *U.S. – Tuna II*, Report of the Panel, para. 5.16; *Triieb*, *Umweltrecht*, 354; *Cheyne*, *Georgia Journal of International and Comparative Law* 24 (1995), 433 (454).

³⁷ *Triieb*, *Umweltrecht*, 355; *Anderson*, *Temple Law Review* 66 (1993), 751 (754 *et seq.*); *Demaret*, in: *Cameron et al.* (eds.), *Trade and Environment*, Vol. I, 52 (62); *Esty*, *Greening the GATT*, 139 *et seq.*

³⁸ *Howse/Regan*, *European Journal of International Law* 11 (2000), 249 (275).

³⁹ See *U.S.-Shrimps*, Report of the Appellate Body, para. 133.

⁴⁰ *Riedel*, in: *Delbrück* (ed.), *New Trends*, 61 (67).

measure is also necessary to achieve this objective. In accordance with the general practice of the panels, a measure has to be regarded as being necessary if no alternative measure exists which a Member could reasonably be expected to employ and which is less GATT-inconsistent.⁴¹ Thereby it has to be taken into account “that ‘[t]he more vital or important [the] common interests or values’ pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.”⁴² Thus, a process of weighting and balancing is required.⁴³ As demonstrated above, the measure adopted by BOHEMIA is most suitable to prevent AVALON from continuing its illegal killing of and trading with whales. There appears to be no alternative measure being equally effective. In addition, the high common interest at stake has to be taken into account in the determination of the necessity of the measure. In the light of the considerable number of international conventions also aimed at the protection of whales⁴⁴ there can be no doubt that there is such a high common interest of the international community in the protection of these sea mammals⁴⁵ and, therefore, that BOHEMIA’s measure is necessary to protect animal life in accordance with Art. XX lit. b GATT 1994.

AVALON also cannot argue that the adoption of the measure does not fall within the scope of the territorial and jurisdictional application of this provision since, as demonstrated in connection with Art. XX lit. g GATT 1994, various bases for BOHEMIA’s jurisdiction exists in this case.

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

BOHEMIA submits that its adopted measure also fulfils the requirements of the chapeau clause of Art. XX GATT 1994, since the protection of whales by BOHEMIA, first, does not constitute an unjustifiable discrimination against AVALON, second, the fact that no measures were adopted with regard to Japan and Norway does not constitute an arbitrary discrimination of AVALON, third, the adopted measure cannot be qualified as a disguised

⁴¹ With respect to Art. XX lit. d GATT 1994 *U.S.-Section 337*, Report of the Panel, para.526; *U.S.-Malt Beverages*, Report of the Panel, para. 5.52; with regard to Art. XX lit. b GATT 1994 *Thailand-Cigarettes*, Report of the Panel, para. 75.

⁴² *E.C.-Asbestos*, Report of the Appellate Body, para. 172.

⁴³ *E.C.-Asbestos*, Report of the Appellate Body, para. 172.

⁴⁴ ICRW; CITES; United Nations Conference on the Law of the Sea; Convention on Biological Diversity; Convention on the Conservation of Migratory Species of Wild Animals; Convention on the Conservation of Antarctic Marine Living Resources.

⁴⁵ *Ackerman*, Boston College International & Comparative Law Review 25 (2002), 323 (334).

restriction on international trade, and, fourth, the measure is a legitimate reprisal in response to the unlawful killing of whales by AVALON.

a) The Measure Does not Constitute an Unjustifiable Discrimination

BOHEMIA submits that the adopted measure to protect whales does not constitute an unjustifiable discrimination. In accordance with the practice of the Appellate Body, the panels, and the virtually uniform view of the most highly qualified publicists of the various nations, a violation of the duty to cooperate has been stipulated as being an unjustifiable discrimination.⁴⁶ Although this duty to cooperate often requires bilateral negotiations, BOHEMIA submits that with regard to the protection of whales these discussions have to take place on a multilateral basis. The protection of whales has been enshrined in international agreements since the beginning of the 20th Century and both BOHEMIA and AVALON are parties to ICRW as well as CITES. Consequently, both parties do not have to engage in bilateral negotiations but have committed themselves to a solution on a multilateral basis. Both ICRW and CITES already provide for comprehensive fora where all issues with regard to whaling are negotiated between all parties on a regular basis. Therefore, AVALON cannot claim that additional separate negotiations between BOHEMIA and AVALON concerning whaling outside of these treaty regimes are required.

AVALON also cannot argue that BOHEMIA's measure does not allow for an appropriate phase-in period. The time period of more than one year between the adoption and the entering into force of the measure cannot be taken in itself as the only decisive factor for the determination of the appropriateness of the phase-in period. Rather, BOHEMIA submits that the specific circumstances have to be taken into account. Since the measure adopted for the protection of whales fully corresponds to the moratorium on commercial whaling, which had entered into force already about 20 years ago, AVALON had obviously sufficient time to adjust itself to its international obligations.

b) BOHEMIA Does not Arbitrarily Discriminate AVALON

BOHEMIA submits that the fact that no measures were adopted with regard to the other WTO Members Japan and Norway does not constitute an arbitrary discrimination of

⁴⁶ *U.S.-Shrimp*, Report of the Appellate Body, paras. 166 *et seq.*; *U.S.-Shrimp (21.5)*, Report of the Appellate Body, paras. 122 *et seq.*; *U.S.-Shrimp (21.5)*, Report of the Panel, para. 5.29; *Howse*, Columbia Journal of Environmental Law 27 (2002), 491 (507); *Tietje*, in: Delbrück (ed.), Cooperation, 45 (59 *et seq.*); *Charnovitz*, Yale Journal of International Law, 27 (2002), 59 (97); *Chang*, Southern California Law Review, 31 (42).

AVALON. Although offering terms of market access of like products to some WTO Members and not others often constitutes a discrimination, BOHEMIA respectfully submits that this Panel has to consider whether such a possible discrimination is arbitrary.⁴⁷ No evidence exists that also companies from other WTO Members like Japan and Norway have been engaged in an illegal trade in whale meat and products. This fact justifies a different treatment of AVALON by BOHEMIA and thus any potential discrimination would be well-reasoned and hence far from being arbitrary.

c) The Measure Cannot Be Qualified as a Disguised Restriction on International Trade

In addition, the adopted measure also cannot be qualified as a disguised restriction on international trade prohibited under the chapeau clause of Art. XX GATT 1994, because such a disguised restriction is not given if the respective measure has been openly announced to the public.⁴⁸ As the measure has been published immediately after its adoption by BOHEMIA's Council of Ministers, no disguised restriction can be established in this case.

Even if this Panel should hold that the publication of a measure in itself is not sufficient to exclude the possibility of a disguised restriction, BOHEMIA submits that the measure is in conformity with the chapeau clause of Art. XX GATT 1994, because it was neither adopted with the intent nor is it objectively suitable to protect the domestic tuna industry. The measure is solely directed towards the protection of whales. Moreover, BOHEMIA's fishing industry competes with tuna fishing industries worldwide which are likely to take over the share of imports previously held by companies from AVALON. Therefore, any possible positive effects to BOHEMIA's fishing industry are likely to occur only temporarily and consequently have to be regarded as admissible side-effects of BOHEMIA's legitimate attempt to end AVALON's illegal killing of whales.

d) The Measure Constitutes a Legitimate Reprisal

Moreover, the measure is in full conformity with the general principle of good faith of which the chapeau clause of Art. XX GATT 1994 is but one expression⁴⁹ because it is a legitimate reprisal in response to the unlawful killing of whales by AVALON. The adoption of a

⁴⁷ *Howse*, Columbia Journal of Environmental Law 27 (2002), 491 (507).

⁴⁸ *U.S.-Tuna from Canada*, Report of the Panel, para. 4.8.

⁴⁹ *U.S.-Shrimp*, Report of the Appellate Body, para. 158; *U.S. - Gasoline*, Report of the Appellate Body, 22; *Cottier/Schefer*, in: Bronckers *et al.* (eds.), 47 (64).; *Tietje*, *Europarecht* 35 (2000), 285 (291); *Mavroidis*, *Journal of World Trade* 34 (2000), 73 (78); *Howse*, Columbia Journal of Environmental Law 27 (2002), 491 (505).

reprisal, regarded as lawful under international law and not excluded by the WTO legal system, never constitutes an abuse of rights. BOHEMIA submits that the requirements of a lawful reprisal are met since, first, this countermeasure is recognized in international law and its prerequisites are fulfilled in this case, and, second, recourse to reprisals by Members is not excluded in general through the existence of the WTO dispute settlement system.

(1) The Prerequisites of a Reprisal Are Fulfilled

BOHEMIA submits that the measure is justified as a reprisal. Under customary international law in accordance with Art. 38 (1) (b) StICJ, reprisals are recognized as a legitimate countermeasure to bring other states to return to legality.⁵⁰ BOHEMIA will demonstrate that the prerequisites for a lawful reprisal are fulfilled with regard to its adopted measure to end AVALON's illegal killing of whales, since, first, AVALON has violated its obligations under CITES and ICRW, second, BOHEMIA was entitled to take recourse to a reprisal, and, third, a lawful reprisal does not require explicit prior notification.

First, AVALON has violated its obligations under Art. II (1) CITES by allowing trade, i.e. the export of whale meat and the introduction from the sea in accordance with Art. I (c), (e) CITES, in, *inter alia*, blue whales, humpback, and minke whales, all of them listed in Appendix I to CITES, despite the fact that these species face a real risk of extinction, thus further endangering their survival contrary to the prerequisites of this provision. Even if the national authorities of AVALON granted trade permissions under Art. III (2), (5) CITES, this was done with the knowledge of the primarily commercial use contributing to the extinction of these specimens. This undermines the fundamental principle of Art. II CITES in an abusive way. The same applies to AVALON's violation of its obligations under ICRW. Although Art. VIII ICRW provides for the possibility of scientific research, AVALON, by granting such permits despite the obvious commercial purpose of the whaling, has in the light of the purpose of ICRW to protect whales from extinction clearly abused the exception clause of Art. VIII ICRW.⁵¹

Second, BOHEMIA was also entitled to invoke AVALON's violations of its obligations under CITES and ICRW since the protection of the living and non-living components of the

⁵⁰ *Gabcikovo-Nagymaros Project*, ICJ-Reports 1997, 7 (55); ILC-Report 2001, 180; *Cassese*, *International Law*, 232; *Partsch*, in: E.P.I.L., Vol. IV, 200 (201); *Doehring*, *Völkerrecht*, 444; *Malanczuk*, *Akehurst's International Law*, 271; *Shearer*, *Starke's International Law*, 472; *Schachter*, *International Law*, 185.

⁵¹ See with regard to the Japanese whaling program *Triggs*, *Asia Pacific Journal of Environmental Law* 5 (2000), 33 (37).

environment, of which whales are a part of, is recognized as a common interest of the international community.⁵² It is a generally recognized principle of international law that these common concerns of mankind give rise to obligations for every state towards the international community as a whole and that they consequently can be enforced *erga omnes*.⁵³ Therefore, BOHEMIA was entitled to take recourse to the countermeasure in response to AVALON's violation of its *erga omnes* obligations concerning the protection of whales. Even if this Panel should hold that this obligation is not enforceable *erga omnes*, BOHEMIA submits that it was entitled to claim a violation of CITES and ICRW by AVALON since it is also a party to these conventions which constitute a particular regime for the protection of whales. It is a well recognized principle of international law that a state is as an injured state entitled to invoke the responsibility of another state if the breach of the obligation is of such a character as to radically change the position of other states to which the obligation is owed with respect to the further performance of the obligation.⁵⁴ Since AVALON's killing of whales is heavily contributing to the extinction of whales, whereas the obligations under ICRW depend upon the continued existence of these species, also BOHEMIA's position with regard to its further performance of its obligations under ICRW is effected thus qualifying BOHEMIA as an 'injured state'.

Third, AVALON also cannot argue that BOHEMIA's measure is not justified as a reprisal because of the absence of a prior notification. BOHEMIA submits that prior notification is not recognized as a necessary prerequisite for a legitimate reprisal. This is already evidenced by the fact that a considerable number of teachings of the most highly qualified publicists of the various nations do not list prior notification as a necessary element of a lawful reprisal.⁵⁵ Even if this Panel should hold that prior notification constitutes in general a prerequisite for the legitimate recourse to a reprisal, BOHEMIA submits that such a notification specifically

⁵² *Delbrück*, in: Götz *et al.* (eds.), *Festschrift Jaenicke*, 17 (27 *et seq.*); *Tietje*, *Archiv des Völkerrechts* 33 (1995), 266 (281); *Simma*, *RdC* 250 (1994), 217 (238); *Oxman*, in: *Delbrück* (ed.), *New Trends*, 21 (22); *Fitzmaurice*, *RdC* 293 (2001), 9 (164); *Beyerlin*, *Umweltvölkerrecht*, 109.

⁵³ *Barcelona Traction Case*, ICJ-Reports 1970, 3 (32); *Tomuschat*, *RdC* 241 (1993), 195 (365); *Crawford*, *Indiana Journal of Global Legal Studies* 8 (2001), 303 (306); *Ragazzi*, *Obligations Erga Omnes*, 154 *et seq.*

⁵⁴ Art. 42 (a) (ii) ILC-Draft Articles on State Responsibility, in: ILC-Report 2001, 294; *Fitzmaurice*, *RdC* 293 (2001), 9 (174 *et seq.*).

⁵⁵ *Jennings/Watts*, *Oppenheim's International Law*, 419, n. 12; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 92; *Verdross/Simma*, *Universelles Völkerrecht*, 910; *Shaw*, *International Law*, 786.

to AVALON was not necessary as AVALON received notice of the adopted measure through its publication. This is evidenced by the fact that it was AVALON who addressed a formal request for consultations to BOHEMIA already in mid-2001.

(2) The WTO Dispute Settlement System Does not Generally Exclude Recourse to Reprisals

AVALON cannot argue that the existence of the WTO dispute settlement system does in general exclude recourse to reprisals by Members. The WTO legal system does not constitute a so-called self-contained regime⁵⁶ but is part of the realm of international law. Therefore, as pointed out by the Appellate Body, the WTO regime “should not be read in clinical isolation from public international law”.⁵⁷ Hence, the right to take countermeasures under general public international law is applicable despite the existence of the WTO dispute settlement system. That right continues to apply to the extent that the DSU does not provide otherwise.⁵⁸ The application of the principle of *lex specialis* is also stated in the ILC Draft on State Responsibility.⁵⁹ Accordingly, the WTO dispute settlement organs have consistently referred to the ILC work on state responsibility, especially the provisions on countermeasures.⁶⁰ Because the DSU provides for special rules on reprisals only with regard to countermeasures in response to a violation of obligations under the WTO agreements, it does not exclude the adoption of countermeasures in response to a violation of other international obligations. BOHEMIA’s measure was adopted in response to AVALON’s violation of its obligations arising under CITES and ICRW, and, thus, is not excluded by the DSU.

The BOHEMIAN UNION therefore asks the Panel to recommend that the DSB declares the measure at issue to be justified by Art. XX GATT 1994 and thus being in conformity with the BOHEMIAN UNION’s obligations under that Agreement.

⁵⁶ *Pauwelyn*, American Journal of International Law 95 (2001), 535 (539); *Marceau*, Journal of World Trade 33 (No. 5, 1999), 87 (107 *et seq.*); *Garcia-Rubio*, State Responsibility, 34 *et seq.*

⁵⁷ *U.S.-Gasoline*, Report of the Appellate Body, 18.

⁵⁸ *Mavroidis*, European Journal of International Law 11 (2000), 763 (765); *Garcia-Rubio*, State Responsibility, 35 *et seq.*

⁵⁹ Art. 55 ILC-Draft Articles on State Responsibility, in: ILC-Report 2001, 356.

⁶⁰ *E.C.-Bananas*, Decision by the Arbitrators, para. 6.16; *Brazil-Aircraft*, Decision by the Arbitrators, para. 3.44; *Pauwelyn*, American Journal of International Law 95 (2001), 535 (563).