I. STATEMENT OF THE FACTS

1. The Empire of Avalon has very traditional cultural and social structures. As a part of its culture, whale meat has always been among the traditional food appreciated on a few, special occasions throughout the year. Nevertheless, Avalon is aware of the danger of extinction whales are facing today. As a consequence, it signed and ratified the 1946 International Convention For The Regulation Of Whaling (ICRW) and since the moratorium on commercial whaling came into force in 1982, Avalon has authorized the taking of whales only upon a special permit issued to allow scientific research. This right is guaranteed by Article VIII paragraph 1 of the ICRW. During the 1990s, Japan, Russia and Norway had permitted limited whaling. During the same period, Avalon had issued around 500 permits per year, most of them for the taking of minke whales, a species whose population size was estimated in 1989 to around 760,000 animals in the Southern Hemisphere.[1] The abundant population of minke whales is thus in no way threatened by the small research take of less than 500 animals a year. Moreover, Article VIII paragraph 2 provides that "any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted". The Convention, in other words, requires the utilization of meat and other by-products of the research. It is therefore perfectly legal and fully consistent with these provisions of the ICRW that some of the whale meat, which had been used or could not serve the research, was sold on the domestic market in order to finance a part of the scientific research. Notwithstanding this serious efforts undertaken by Avalon, several international NGOs launched a infamous lobbying campaign against its whale research program. Although it might be correct that very occasionally whale meat had been exported by a few Avalon companies in violation of the Convention on International Trade in Endangered Species (CITES), this is not true for the majority of the fishing companies which comply fully with both the ICRW and the CITES. Despite these facts , the Bohemian Union adopted in late 2000, under the pressure of the public and a number of Bohemian fishing companies, which had been struggling against the competition from Avalon, an import ban on tuna from all fishing companies in Avalon which were engaged in taking whales of any kind. The fishing of tuna, however, causes no harm to the whales. The only link between the banned tuna and the whales is then, that both are taken by the same company. Yet, most of the Avalon fishing companies are taking whales in full compliance with international environmental law. In reaction to the import ban on certain tuna from its territory Avalon addressed, already in mid-2001, a formal request for consultations to Bohemia and copied this to the Dispute Settlement Body (DSB) of the WTO and to the Council for Trade in Goods. Since the parties were unable to settle the dispute bilaterally, Avalon, after additional negotiations, formally requested the DSB to establish a Panel.

II. SUMMARY OF ARGUMENTS

2. Avalon alleges that the import ban imposed by the Bohemian government on some of its tuna violates Articles I, II, XI and XIII of the GATT 1994 because it denies advantages accorded to all other WTO Members and restricts the quantity of tuna allowed to be imported to the Bohemian Union. Further, Avalon claims that the Bohemian

[1] Resource: http://www.iwcoffice.org/Estimate.htm.

Union is not able to demonstrate that its measure can be justified under Article XX. In the following paragraph, Avalon will present the reasons why it rejects the hearing of any NGOs under Article 13 DSU.

III. LEGAL ARGUMENTS

A. HEARING OF NGOS UNDER ARTICLE 13 DSU

3. The Panel asked the parties if it should hear the NGOs who had compiled fact sheets on Avalon's whaling practices. At the outset of its answer, Avalon recalls the two fundamental principles governing the dispute settlement before a panel, the intergovernmental character and the confidentiality of the procedure.

4. The DSU contains only one exception to these principles, Article 13 DSU. According to this provision a panel shall have the right to seek information from any individual or body it deems appropriate (para. 1) or from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter (first sentence of para. 2). A panel can also request an advisory report from an expert review group. The establishment and procedure of the expert review group are set forth in Appendix 4. According to para. 3 of this Appendix "citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute". Although stated only for such groups, Avalon considers that the requirement of impartiality has a general character and therefore applies to all subjects a panel may seek information from. In addition, the impartiality in order to be effective, should be understood in a broad sense so as to include not only citizens of a party, but all partial conduct. This derives also from the Panel's duty to make an objective assessment.[2]

5. The previous activities of the NGOs in question throws very serious doubts on their impartiality. Not only did they led, supported by the Bohemian tuna industry, an infamous lobbying campaign against the Avalonian whale research program, but they even promoted the import restriction on Avalon's tuna. What is more, they sent the compiled fact sheets to the Bohemian Union, the UE and the USA, but not to Avalon, party to this dispute, and the Panel itself. To Avalon they thereby clearly marked their support to the Bohemian Union and should consequently not be heard.

6. In case, the NGOs would all the same submit the compiled fact sheets to the Panel, Avalon asks the Panel to consider them as unsolicited information and to refuse them. Avalon firmly contests the practice of the admission of amicus curiae briefs. It is of primary importance to note that the DSU in its current wording does not allow a panel to receive unsolicited information because it contains an exhaustive list of subjects that have the right to be heard by the Panel. This clearly derives from the intergovernmental and confidential character of the procedure before the panel. The silence about the admission of amicus curiae briefs has therefore to be interpreted as a qualified silence. Hence, the Appellate Body's practice on amicus curiae briefs before the panels, confirmed in the EC – Sardines Report[3], is not conform to the DSU. One cannot with good faith read a distinction into the DSU that gives Members the right to

[2] See Articles 14 and 11 DSU.

participate in panel, while a panel has no legal duty to accept or consider *amicus* briefs. A panel simply does not have the right to accept unsolicited information. Since the WTO dispute settlement system does not follow a stare decisis doctrine it would be no problem to overturn an older decision and to return to a DSU conform jurisprudence. The fact sheets, should they be submitted, are consequently to be treated as unsolicited information and the Panel must refuse them.

7. In case, the Panel should however reject these arguments, Avalon would like to recall the relevant factors for admission identified by the Appellate Body in US - Shrimp: "It is in particular within the province and authority of a panel to determine the need for information and advice in a specific case, to ascertain the applicability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received."[4] In addition, the Appellate Body in *EC – Sardines* mentioned the timing of the submission as further criterion.[5] Panels have rejected briefs whenever they were submitted untimely.[6] It is also important to note that the panels have applied each of these factors with great rigour.

8. Avalon does not see how the submitted information could be of any relevancy. The present dispute is about an import ban imposed by the Bohemian Union on Avalon's tuna in order to protect the Bohemian fishing industry. Since the submitted fact sheet concern the taking of whales, and are not about the fishing of tuna, they will not be of relevance to the present case, in particular, because they will not establish that the fishing of tuna causes any harm to the whales. As stated above, the fact sheets were only submitted to the EU, the United States and the Bohemian Union. Avalon has not been informed about the content of those fact sheets although it is one of the two parties to this dispute. This constitutes a violation of due process since, even if Avalon is informed about its own fishing industry, it has a right to know what allegations are brought against it in the procedure so that it can present its comments on the briefs. Lastly, Avalon claims that the *amicus* briefs would be untimely since the parties will already have submitted their final written memorials. In other words either Avalon will not have the opportunity to comment sufficiently on the fact sheets or the procedure will be delayed and the extremely tight timetable surcharged. This would have negative consequences on the quality of the report and endanger the development of a mutual satisfactory solution of the dispute. Under these circumstances, the Panel is not enabled to hear the NGOs.

B. ARTICLE I:1 OF GATT 1994

9. Avalon claims that, by adopting in late 2000 a ban on imports of tuna caught by certain Avalonian fishing companies, the Bohemian Union violates its obligations under Articles I:1 of GATT 1994 which reads "*any* advantage,

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[3] Appellate Body Report, *European Communities - Trade Description of Sardines*, (hereinafter *EC – Sardines*), WT/DS231/AB/R, 26 September 2002, (02-5137), adopted 26 September 2002.
[4] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (hereinafter *US – Shrimp*), WT/DS58/AB/R, adopted 12 October 1998, para. 104.
[5] Appellate Body Report, *EC – Sardines*, para. 167.
[6] Panel Report on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel…*(hereinafter *US – British Steel*), WT/DS138/R, para. 6.3, Panel Report on *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, WT/DS135/R, para. 6.4 concerning the brief submitted by the NGO "Only Nature Endures".

favour, privilege or immunity granted by *any* contracting party to *any* product originating in or destined for *any* other country shall be accorded *immediately* and *unconditionally* to the like product originating in or destined for the territories of *all* other contracting parties."(emphasis added) Avalon asks the Panel to observe that the Bohemian Union imports all tuna from all other Members unconditionally, while certain tuna from Avalon is not allowed to enter the Bohemian Union. The import ban establishes a condition for the importation of Avalonian tuna and thereby denies an advantage accorded to all other exporting Members. Following, Avalon will prove that its tuna is a "like product" compared to tuna from other exporting Members and that consequently the difference in treatment established by the import ban violates Article I:1.

10. The "likeness" of products has to be established by referring to the criteria of the *Border Tax Adjustment* report.[7] The balancing of the criteria identified in this report is intended to approximate the competitive relationship between relevant goods. There are four criteria to be examined – the physical properties of the products in question; their end-uses; consumer tastes and habits *vis-à-vis* those products and tariff classification.

11. Before beginning the analysis, Avalon would like to remind that the Appellate Body in *EC-Asbestos* held, that it "believe[s] that physical properties deserve a separate examination that should not be confused with the examination of end-uses." and it goes on: "We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way."[8] Avalon fully agrees with this and will hence analyse each criterion distinctly from the others.

1. <u>The Physical Properties of the Products in Question</u>

12. The tuna from Avalon has the same physical characteristics as tuna from other countries, at least as far as the question concerned at stake.[9] Of course, there is a difference in weight, size, colour and other characteristics between tuna from different regions, but this does not make tuna from Avalon "unlike" other tuna in the sense of Art. I:1. Further, it is evident that the tuna is not affected physically by the fact that the company, that caught it, is engaged in whaling.

13. In addition, in *EC-Asbestos* the Appellate Body held: "In such cases, in order to overcome this indication that products are not 'like', a higher burden is placed on the complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all the evidence, taken together, demonstrates that the products are 'like' under Article III:4 of GATT 1994."[10] *A contrario*, there is *prima facie* evidence that

[7] Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97, for an example of application by the Appellate Body, see *EC – Asbestos*, paras. 101 to 154.
[8] Appellate Body Report, *EC-Asbestos*, para. 111.
[9] We note what the Appellate Body in *EC-Asbestos* held: "In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.", para. 114.
[10] Appellate Body Report, *EC-Asbestos*, para. 121.

goods that are physically similar are competing with each other.[11] The defendant will in this case bear a higher burden to proof that the products, although having the same physical characteristics, are sufficiently 'unlike' in the light of the other criteria to conclude that they are not in a competitive relationship and therefore are not 'like' products.

14. As it has been shown, tuna from Avalon caught by fishing companies engaged in whaling and tuna from other companies have similar or even identical physical characteristics and consequently there is strong *prima facie* evidence that they are 'like' products.

2. The Extent to which the Products are Capable of Serving the Same or Similar End-Uses

15. Tuna from Avalon caught by companies engaged in whaling and tuna caught by companies non engaged located in other member States of the WTO have the same end-uses, they are nutrition. Furthermore, there are no different end-uses one could think of for these products. Thus, also under the second criterion the products are "like" products.

3. Consumer Tastes and Habits

16. Avalon notes that prior to the year 2000 no one's attention was drawn on the engagement of its fishing companies in whaling and therefore it is very unlikely that consumers made any distinction between tuna caught by companies engaged in whaling and other tuna at that time. Moreover, it was impossible for the consumer to distinguish between these tuna since there was no labelling at all that would have indicated its origin from within Avalon. After implementing the import ban, which entered into force on the 1st of January 2002, there was no more tuna caught by companies engaged in whaling available on the Bohemian market. Thus, the only relevant period of time to observe consumer habits is the one between the year 2000 and the 1st of January 2002. The campaign led against its whaling policy at that time may have had an effect on the consumer habits in the Bohemian Union, but it most likely did not drive the large majority of the consumers to cease the purchase of the later banned tuna, since the Council of Ministers still considered it to be necessary to adopt and implement a ban. Such a strongly restrictive measure would not have been necessary if a majority of consumers had given up buying Avalonian tuna. From this derives that a large number of consumers continued to buy tuna in full knowledge of Avalon's engagement in whaling. This can be explained by three main reasons. Firstly, a group of consumers which was well informed about Avalon's whaling did know that Article VIII of the ICRW authorises the contracting governments to grant special permits for the killing of whales for the purposes of scientific research. Thus, this group of consumers was not irritated about Avalon's whaling policy and had no reason to change its habits. Secondly, another group of consumers did prefer the tuna from Avalon for reasons, such as the better taste or lower price, which it considered to be preponderant over environmental concern. Thirdly, consumers of both groups found that there was no relation between the tuna from Avalon and its whaling policy and therefore continued to buy Avalonian tuna.

[11] See, Gabrielle Marceau and Joel P. Trachtman, *A Map of the World Trade Organization Law of Domestic Regulations of Goods*, JWT 36(5), 2002, page 36.

17. This observation shows that there was still a significant number of Bohemian consumers that would have bought Avalon's tuna if there had been no import ban. In other words, the tuna from Avalonian fishing companies engaged in whaling continued to be in a competitive relationship with other tuna. Accordingly, the products have to be considered as 'like' products under the third criteria of the test.

4. The International Classification of the Products for Tariff Purposes

18. Tuna, fresh or frozen, is classified under the same code. Moreover, the Appellate Body in *Canada – Automobiles*, seems to consider the classification of any product regarding what kind of manufacturer had produced the product in question as a violation of Article I:1.[12] This demonstrates that to distinguish products by looking at their manufacturer, is inconsistent with the world trade law. It is evident that, since Avalon has found the products to be "like" products under all four criteria of the *Border Tax Adjustment* test, the evidence considered as a whole leads to the same conclusion.

5. Violation of Article I:1

19. In *Canada – Automobiles* the Appellate Body found: " …we observe that Article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or *de facto*, discrimination. Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'."(emphasis added)[13] Since the import ban decreed by the Bohemian government targets exclusively Avalon it is not even "origin-neutral" on its face but clearly discriminates Avalon. Tuna from Avalon, although it is "like" tuna from all other Members, it is not granted the same treatment. It is only upon the condition that the fishing company which caught the tuna is not engaged in whaling, that the Bohemian Union accepts tuna from Avalon. This constitutes a *de jure* discrimination. In addition, even if Avalon applied the measure to all other Members, it would remain inconsistent with Article I:1, since, as stated above, de facto discriminations are prohibited as well.

C. ARTICLE II OF GATT 1994

20. The import ban on tuna imposed by the Bohemian Union against certain tuna originating in Avalon and exported into the Bohemian market by some companies from Avalon is incompatible with Article II:1 of the GATT 1994. Article II:1(a) has the following wording: "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.". According to this provision the obligations of the Members are established by the rates of duty appearing in the schedules. Any change in the rate can be made only under some procedure for the modification of concessions. The procedures to follow are those in Article XXVIII.

[12] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (hereinafter *Canada – Automobiles*), WT/DS142/AB/R, adopted 31 May 2000, paras. 64 to 86.
[13] Appellate Body Report, *Canada – Automobiles*, paras. 78 and 79.

21. Since the Bohemian Union adopted its import ban without respect to the procedure of Article XXVIII, its measure could not have valuably modified the schedule at issue. This means, that tuna from Avalon is still guaranteed to be treated independently of the company it is coming from. Thus, to refuse tuna caught by companies involved in whaling results in a treatment less favourable than that provided in the appropriate schedule.

22. In this regard, Avalon would also like to remind that in the 1989 Panel Report on "*United States – Restriction on Imports of Sugar*" the Panel found "that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provision in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1."[14] Since the schedules concern tariffs it is excluded that a Member introduces non-tariff barriers in its schedule and thereby seeks to elude its substantive obligations. This finding applies plainly to the import ban imposed by the Bohemian Union since, as Avalon will demonstrate here after, it constitutes a quantitative restriction inconsistent with Article XI:1 of GATT 1994 and, as shown above, it violates Article I:1.

23. For the reasons stated in the preceding paragraphs, the Bohemian measure, which deprives certain tuna from Avalon from the treatment conceded in the appropriate schedule and which is not justifiable under paragraph 1(b), violates Article II:1 of GATT 1994.

D. ARTICLE XI:1 OF GATT 1994

24. Article XI:1 GATT 1994 provides for the general elimination of quantitative restrictions on imports and exports. The provision applies to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges. The embargo imposed by the Bohemian Union is a quantitative restrictions of importation made effective through the ban of tuna not meeting certain policy standards.[15] Avalon has provided evidence that prior to the import ban the percentage share of tuna market was significant and that the reduction caused by this ban is noticeable. In other words, the embargo had an effect on the volume of trade. As for all economic sanction this was what the Bohemian Union aimed at. Further, the measure complained is a ban on tuna and as such does not fall under the exempted "duties, taxes or other charges".[16] Hence, the measure at stake constitutes a quantitative restriction inconsistent with Article XI:1 of GATT 1994.

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[14] Panel Report on *United States – Restrictions on Imports of Sugar*, L/6125, adopted on 22 June 1989, 36S/331, 342-343, para. 5.7, cited in Analytical Index of the GATT, page 74.
[15] Panel Report, *United States- Restriction on Imports of Tuna* (hereinafter *US - Tuna II*), DS29/R, June 16, 1994, not adopted, para. 5.10.
[16] Ibidem, para. 5.10.

E. ARTICLE XIII OF GATT 1994

25. Article XIII:1 of GATT 1994 provides that "no prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting part …, unless the importation of the like product of all third countries … is similarly prohibited or restricted." Avalon established the "likeness" of the products at issue under Article I:1 of GATT 1994 above. What has been said there is also valid here, since there is no difference between the concept of "likeness" under Article XIII:1, a simple *lex specialis*[17] adopted for the case of quantitative restrictions, and the former provision. Further, having established that the import ban is inconsistent with Article XI:1 it must also be considered a restriction in the sense of Article XIII:1 and hence, the general obligation of non-discriminatory administration of quantitative restriction applies to the measure at issue. The Bohemian Union, however, imposed its ban exclusively on tuna from Avalon while no similar prohibition has been taken on "like" tuna from any other Member and this, although Avalon is not the only Member of the WTO who is engaged in whaling. Japan, Russia and Norway have also issued special permits to their fishing companies who took, according to the evidence compiled by some NGOs, whales. In other words, the Bohemian embargo is already on its face discriminatory. To restrict the importation of tuna from Avalon while "like" tuna from all other Members is imported without any restriction is discriminatory and consequently inconsistent with Article XIII:1.

F. ARTICLE XX OF GATT 1994

26. The burden that a measure falls under one of the general exceptions provided for in Article XX is on the party, the Bohemian Union, invoking that provision. The Bohemian Union invokes paragraphs (b) and (g) of Article XX. Avalon notes that the analysis of Article XX (g) is two-tiered, this means, first the measure must meet the conditions of paragraph (g) and, second, it must be justified under the introductory clauses of Article XX.[18] The exception of Article XX (b), on the contrary, is, according to the most recent practice of the Appellate Body, only a single-tired analysis.[19] Avalon will follow this analysis. Should the Panel, however, apply for both exceptions a double-tired scrutiny, then the claimant would ask it to consider the observations on the chapeau at the end of its examination and for both paragraphs. In any case, Avalon claims that the respondent is not able to demonstrate that its import ban falls within the scope of either of these exceptions, nor to justify it under the introductory clauses.

1. Article XX paragraph (g) of GATT 1994

(a) "Policy related to the Conservation of Exhaustible Natural Resources"

27. Avalon would like to recall that this case is not about the conservation of whales, but about the imposition of an import embargo, that is a *economic sanction*, on its tuna. The claimant does not contest that Article XX of the GATT 1994

[17] Panel Report on *European Economic Community – Restriction on Imports of Dessert Apples*, L/6491, adopted on 22 June 1989, 36S/93, page 37, para. 12.28.
[18] See e.g. Appellate Body Report, *US – Shrimp*, para. 118.

allows all WTO members to take *trade restrictions* in order to protect the environment. But since the GATT is an agreement concerning international trade of goods, the trade restriction, in the present case the import ban, must be "related to" the conservation policy, that is the protection of whales.

28. In *US-Shrimps* the Appellate Body confirmed its jurisprudence developed in *United States – Gasoline* where it held that the term "related to" had to be interpreted as to requiring a substantial relationship between the measure at stake and the legitimate policy of conserving exhaustible national resources.[20] Applying this method on the case, it found that "requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles" was "directly connected with the policy of conservation of sea turtles." And it went on: "It is undisputed…that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant *cause* of sea turtle mortality."[21] (emphasis added) The stated passage makes clear that, if the harvesting had not affected the sea turtles, the Appellate Body would not have admitted the substantial relationship. This is reinforced by the statements the Appellate Body makes in the following paragraph: "In its general design and structure…Section 609 is not a simple blanket prohibition of the importation of shrimp imposed *without regard to the consequences* (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles."[22] (emphasis added) The import ban at stake in the present dispute does perfectly match the given description of a blanket prohibition since the mode of fishing tuna has no consequence on the life of whales. This leads to the conclusion that, since lacking any link with the mortality of whales, the import ban on tuna cannot be considered as relating to the conservation of whales.

(b) "If Such Measures are Made Effective in conjunction with Restriction of Domestic Production and Consumption"

29. Should the Panel all the same acknowledge a substantial relationship between the import ban on tuna and the goal of conserving whales, it has to examine whether the import ban on tuna from Avalon is imposed in conjunction with restrictions of domestic consumption. According to the Appellate Body in *United States – Gasoline* "[t]he clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[23] Since the Bohemian Union has no domestic whaling industry the examination is limited on the restrictions on its domestic consumption.

30. Avalon notes that the Bohemian Union has only banned tuna from fishing companies engaged in whaling from Avalon while it has not taken any similar measure to restrict the import of tuna from Russia, Japan and Norway,

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[19] Appellate Body Report, *EC – Asbestos*, paras. 156 to 174, where the Appellate Body, although the chapeau was appealed, did not examine it separately. See also Gabrielle Marceau, at footnote 165, page 32.
[20] Appellate Body Report, *US – Shrimps*, para. 135.
[21] Appellate Body Report, *US – Shrimps*, para. 140.
[22] Appellate Body Report, *US – Shrimps*, para. 141.
[23] Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline* (hereinafter *US – Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, pages 20-21.

countries that have also issued special permits for the killing of whales. Consequently, it is very likely that there is still tuna on the Bohemian market that origins from companies engaged in whaling. Avalon recalls that only some of its fishing companies have exported whale meat in violation of the CITES. So, the Bohemian Union does not take the same measures for tuna that was caught under identical conditions in Avalon and in Russia, Norway or Japan. Avalon considers that the Bohemian Union has not sufficed to the condition of conjunct restrictions of the domestic consumption of tuna. Hence, none of the conditions of Article XX (g) are met by the import ban and it consequently cannot be justified under this provision.

2. Chapeau of Article XX of GATT 1994

31. Should the Panel find that the import ban falls within the scope of the stated exception, it has to examine and the Bohemian Union has to prove that the measure is ultimately to be justified under the chapeau of Article XX. This requires that the exempted measure is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…".

32. In *United States – Gasoline* the Appellate Body stated, that, "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'." And it went on to say that: "…The chapeau is animated by the principal that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to legal duties of the party claiming the exception and the legal rights of the other parties concerned."[24]

33. After having recalled these earlier findings, the Appellate Body in *US-Shrimps* concluded, that this "embodies the recognition on the part of the WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX … on the on hand, and the substantive rights of the other Members under the GATT 1994 on the other hand."[25] And it noted, that, "[t]he task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium" between these two sets of rights "so that neither of the competing rights will cancel out the other and thereby distort or nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."[26]

34. Having set in this manner the frame of interpretation, Avalon will now go on to demonstrate that the import ban constitutes: an "arbitrary and unjustifiable discrimination"[27] between countries where the same conditions prevail and that this measure is a "disguised restriction on international trade". Avalon notes that the violation of either of these concepts is sufficient to disqualify the measure under Article XX.

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[24] Appellate Body Report, *US – Gasoline*, page 22.
[25] Appellate Body Report, *US – Shrimp*, para. 156.
[26] Ibidem, para. 159.
[27] Avalon will not examine separately the arbitrary and the unjustified character since it considers the Appellate Body's distinct scrutiny unsatisfactory.

(a) "Arbitrary and Unjustifiable Discrimination"

35. In *US – Shrimp* the Appellate Body considered the measure at stake, in its application, as "an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic trawlers."[28] The import ban in the present case is, contrary to the measure in *US – Shrimp*, not imposed on all other Members, but exclusively on Avalon. The measure is, in other words, *prima facie* discriminatory. It could satisfy the requirements of the chapeau only, if the Bohemian Union can prove that between Avalon and all other exporting Members conditions prevail that are different enough to justify an import ban only on tuna from Avalon.

36. This will be very difficult to establish since Russia, Japan and Norway have also issued special permits to their fishing companies for the taking of whales. However, these countries had not to face up any trade restriction at all. The Bohemian Union, in order to justify this differential treatment, claims that the fishing companies from Avalon are violating the CITES and the ICRW. But, no fishing company has taken whales without a special permission and there is evidence for only few companies to have exported whale meat. It is, indeed, very likely that there are fishing companies that have violated neither the CITES nor the ICRW. To impose an import ban on companies, which comply fully with international law, is a clear breach of the GATT 1994 and cannot be justified by one of the exceptions of Article XX.

37. These observations make obvious that the Bohemian Union has not respected the necessary flexibility in the application of its measure.[29] Avalon would like to note with the Appellate Body, that, "an import prohibition is…the heaviest 'weapon' in a Member's armoury of trade measures"[30]. Therefore, such a measure must be designed and applied to take into account all the relevant circumstances and to treat differently situations that differ one from the other. These requirements have not been respected by the Bohemian Union since it imposes and applies its import ban on *all* the companies that are engaged in the taking of whales regardless of factors as important as compliance with the ICRW and the CITES or the kind and number of whales taken. Consequently, tuna caught by companies from Avalon that observe all international obligations is refused entry while tuna from companies from Russia, Norway and Japan which take whales under the same conditions is not refused. To ban tuna for the taking of whales of any kind, without providing exceptions, clearly constitutes an unjustifiable discrimination of Avalon's tuna.

38. In case the Bohemian Union argued that there was not sufficient data available to distinguish between the different companies within Avalon, the claimant would ask the Panel to reject this allegation as unfounded. To underline the insufficiency of this claim Avalon would like to state the following finding, the Appellate Body made in the *US – Gasoline* Report: "There are, as the Panel Report found, established techniques for checking, verification,

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[28] Ibidem, para. 161.

[29] In *US – Shrimp* the Appellate Body examined under the title "Unjustified Discrimination" the flexibility of the measure at stake and found the measure as such to permit a sufficient degree of flexibility. The Appellate Body went on: "However, any flexibility that may have been intended by Congress when enacted the statutory provisions has been effectively eliminated in the implementation of that policy…", para. 156.

[30] Ibidem, para. 171.

assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow. The United States must have been aware that for these established techniques and procedures to work, *cooperative arrangements* with both foreign refiners and the foreign governments concerned would have been necessary and appropriate".(emphasis added)[31] In *US-Shrimp*, the Appellate Body, referring to the most pertinent international conventions, confirmed the obligation under the chapeau of Article XX to "recourse to diplomacy as an instrument of environmental protection policy".[32] Turning to the discrimination, Avalon would like to highlight the following statement in the *US – Shrimp* Report: "We believe that discrimination results … when the application of the measure at issue does not allow for any inquiry into appropriateness of the regulatory program for the conditions in those exporting countries."[33] Avalon considers that these findings can perfectly be applied to the present case since in the fishing industry there are very sophisticated techniques available for the checking and enforcement of data. This is particularly true for whaling where every single whale can only be taken upon a special permit. So, for the Bohemian Union, there would have been the obligation to negotiate an agreement allowing the implementing of measures appropriate for the banned Avalonian companies. However, the Bohemian Union has not merely pursued the possibility of entering into cooperative arrangements with the government of Avalon.

39. Moreover, the Bohemian Union, by imposing an import prohibition, disregards the efforts undertaken by Avalon to protect the populations of whales. In fact, 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."[34] One has to bear in mind, that the ICRW sets up a minimum standard of protection. In other words, a state is free to go further in protecting whales than prescribed, but cannot be less requiring. The Bohemian Union has decided to prohibit all taking of whales while Avalon permits whaling upon a special permit. By doing so, Avalon fully complies with Article VIII of ICRW. This even, if some of the whale meat is sold on the Bohemian market. As it has been explained above, the ICRW allows such proceeding of whale meat accordingly to Article VIII paragraph 2. It is true that a very small number of companies have violated the CITES by exporting whale meat. The CITES prescribes, however, that either the concerned party takes himself measures to ensure the enforcement under Article VIII or the Conference of the Parties recommends international measures under Article XIII. But, nowhere in the Convention, there is a right conferred to the Bohemian Union to adopt unilateral measures. This means that unless the Conference of the Parties has recommended a measure, the violation remains a national affair. Thus, the imposition of an import prohibition tries to

[31] Appellate Body Report, *US - Gasoline*, page 30.
[32] Appellate Body Report, *US – Shrimp*, para. 167.
[33] Ibidem, para. 165.

force Avalon to adopt essentially the same regulatory program, to know the total prohibition of whaling, as the one of the Bohemian Union. Yet, its regulatory program goes further than what is required by the ICRW. Hence, Avalon has the right not to adopt the same policy as the respondent since the international community has agreed, by concluding the ICRW, that whales are sufficiently protected if their taking is allowed only upon a special permit. Furthermore, the regulatory program of Avalon is in perfect compliance with the right of the sustainable use of resources.

(b) "Disguised Restriction"

40. The disrespect of the fundamental international obligation of cooperation is revealing of the bad faith of the Bohemian Union. As it can be deduced from the fact that the Bohemian authorities apply the import ban on companies engaged in whaling of any kind and regardless of whether they have exported whale meat or not, there has not been created a administrative support of the import prohibition that could have taken into account the particularities of every banned company. On the contrary, pushed by its domestic tuna industry, the Bohemian Union abused the whaling in Avalon as a pretext to protect its own fishing companies. That is the reason why the Bohemian Union was not even interested in establishing a administrative support that could have prevented unjustified discriminations. The implementation of the import ban appears thus to be "singularly informal and thereby denies the basic fairness and due process"[35]. This leads to the discrimination of tuna from Avalon and accordingly the measure is not justified under the chapeau of Article XX neither.

3. Article XX paragraph (b) of GATT 1994

41. Under Article XX(b) the Appellate Body in *EC-Ashestos* has examined the following three aspects of the contested measure - the measure's contribution to the realization of the end pursued, the common interests or values concerned and the impact of the measure upon imported products. Then it went on to look if there was an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition. Avalon will adopt this approach to evaluate the import ban on its tuna.

(a) "Protection of Human, Animal or Plant Life or Health"

42. According to the enunciated test, the Bohemian Union has first of all to establish that its import ban on tuna contributes to the protection of the whales' life or health. In other words, the Bohemian Union has to be able to demonstrate that its importation of tuna from companies engaged in whaling presents a risk for the health or life of whales. It is clear that this has to be denied. The fishing of tuna does in no manner affect the health or life of whales and therefore the import ban cannot be considered to contribute to the end pursued. However, should the Panel agree with the Bohemian Union, the defendant still had to proof that its measure is necessary.

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[34] See, *US – Shrimp*, para 164. In this case, the regulatory program, referred to as Section 609, was established by national law. Avalon notes, however, that the statement can be applied also in the case that the regulatory program was established by international law, as it is the case at stake.
[35] Ibidem, para. 181.

(b) "Necessary"

43. The Bohemian Union evokes the Appellate Body's finding in *EC-Asbestos* that: "[t]he more vital or important [the] common interest or values" pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends". Avalon does not contest that the protection of whales is a common interest. It has itself signed the ICRW and the CITES and in respect of these texts allows the killing of whales only upon special permits. Avalon does, however, point out that the Appellate Body did not state that a very important common interest would even set free the measure from contributing the protection of human or animal life. Since the import ban does not contribute to the conservation of whales, the measure cannot be considered as either. Moreover, the Appellate Body in *EC-Asbestos* noted, "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." The Bohemian Union imposes the most far-reaching trade restriction, an import ban, on the tuna from Avalon. This had a significant impact on the percentage share of the tuna market held by Avalon. For the stated reasons, the complaint measure cannot be qualified as "necessary" in the sense of Article XX (b).

(c) "Less Trade Restrictive Measure"

44. According to Avalon, the Bohemian Union would have had at least three less trade restrictive measures at hand. First, the respondent should have entered into negotiations with Avalon over the conservation of whales. This even more in the light of the existing international conventions both states have signed and ratified. Second, the Bohemian Union could have labelled the tuna from fishing companies engaged in whaling instead of a total ban of the product at stake. Avalon recalls that the United States adopted this measure effectively to protect dolphins. And third, the respondent should have. made a distinction between companies which violate the CITES and those which do not violate any international environmental law. In the view of Avalon, to respect this fourth condition of Article XX (b) does not require that a Member has a completely different measure at hand, but that if there is only one measure, he applies it the least trade restrictive possible. Hence, the Bohemian Union did not meet this last condition because it applied the import prohibition indifferently on all fishing companies from Avalon. Therefore, the import ban is not justified, under paragraph (b) of Article XX neither.

G. CONCLUSION

45. Conclusively, the import ban imposed by the Bohemian Union on certain tuna from Avalon must be considered as a clear infringement of Articles I, II, XI and XIII of the GATT 1994 and is not justifiable under Article XX. It thus constitutes a "nullification or impairment" within the meaning of Article XXIII:1 of GATT.