

1. Statement of the facts

Over several years, Avalon has always applied an extraordinarily wide interpretation of the issuing of special permits under the ICRW, so that most of the whales killed are used for domestic consumption. Moreover, Avalon trades in whale products in violation of CITES. These actions undermine the objective of protecting whales from being extinguished in an extremely serious and substantial manner. All of the large whales killed by Avalon are threatened with extinction, while there is a real risk of extinction in respect of one of the types, blue whales. Out of concern for the environment, the Bohemian Union has finally adopted a measure conditioning access of tuna to the Bohemian market upon the fact that no whales are killed by the companies fishing the tuna and no trade is made in whale products. Avalon has complained to the DSB that this measure is in violation of GATT. The consultations having failed, Avalon has formally required the DSB to establish a panel.

2. Summary of the arguments

As to the procedural question, the Bohemian Union contends that representatives of the NGOs should be heard as experts by the Panel. In respect of the substantive issues, it is submitted that the measure does not breach Art.I, II, XI and XIII of the GATT. The measure does not fall within Art.I, since tuna from companies killing whales cannot be considered to be "like" other tuna. Moreover, given that the measure does not reduce the tax level for tuna fixed in the Schedules, there is no violation of Article II of the GATT. The Bohemian measure is not in breach of Articles XI:1 and XIII:1 either, since it does not constitute a 'prohibition' or a 'restriction' within the meaning of those articles. Therefore Avalon has not met the burden of proving the violations it enumerates.

Should the panel conclude that there is such a violation, the Bohemian Union contends that its measure is fully justified as a matter of law under Art.XX of the GATT. It is necessary to protect animal life (Art.XX(b)) as well as relating to the conservation of an exhaustible natural resource (Art.XX(g)). Also, the measure does not constitute arbitrary or unjustifiable discrimination nor is it a disguised restriction on trade. Therefore, as demonstrated in this submission, the measure does not violate the GATT.

3. Procedural issues

First of all, the BU strongly recommends that the panel hear certain representatives of the NGOs, which have compiled the fact sheets on Avalon's whaling practices, pursuant to Art.13.1 and the first sentence of Art. 13.2 DSU. The panel's authority to consult with experts has been asserted in several cases. Given the controversy about the issuance of special

permits under the ICRW, the BU submits that consultation with experts is crucial in the present dispute. Therefore, representatives of the NGOs shall be heard.

Besides, it is clear from the wording of para.3 of Appendix 4 that representatives of organisations are not precluded from standing as experts *per se*, but that they must merely “serve in their individual capacities and not as representatives ... of any organisation”. Therefore, it is suggested that the representatives shall be heard in their individual capacities. What is more, these representatives have investigated Avalon’s practice in relation to the killing of whales extensively and can provide important additional information on the use of these whales within the territory of Avalon, while they are also experts for environmental questions generally, and can hence assess the consequences of the killing of whales in a global context. Consequently, they have professional standing and experience in the field in question.

In the event that the Panel receive unsolicited *amicus curiae* briefs, the BU contends that the Panel would have the authority to consider them in accordance with its discretion under art. 12.2 and 13.1 DSU. The panel’s authority to do so has been confirmed by the Appellate Body in *Shrimps*, where it was ruled that a “... panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*”¹ This is settled practice and can hardly be contested. If the WTO Members do not agree with the interpretation of the WTO Agreements adopted by the Appellate Body, they may take action pursuant to Art.IX:2 of the Marrakesh agreement establishing the WTO and adopt an interpretation of Art.13 DSU or propose a clarifying amendment pursuant to Art.X:8 of the WTO Agreement.

4. Article I of GATT

The burden of proving the violation of Art. I:1 of GATT is on Avalon. The BU, therefore, demonstrates below that Avalon has not discharged this burden.

The BU does not contest that the measure on the importation of tuna from certain Avalonian fishing companies is a rule “in connection with importation and exportation” pursuant to Art.I:1. Nor is it disputed that tuna from these companies is not given the “advantage, favour, privilege or immunity”, which other tuna from Avalon and other countries is given. However, tuna from companies fishing whales in violation of the ICRW and tuna coming from companies which pursue their activities in accordance with ICRW cannot be considered as like for the purpose of Art. I:1 of GATT.

¹ Appellate Body Report, *Shrimps*, at para. 108

The requirement of “likeness” in the context of Art. III:4 was held to include four criteria: “(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.”² Given the same underlying objective of creating equality in competitive relations in Art.I and Art.III of GATT the meaning of “likeness” must be the same in respect of Art.I.

In *EC- Asbestos*, the Appellate Body decided that more weight might be placed on one of the characteristics than on others, in that case physical characteristics, so that “a very heavy burden is placed on [the other party] to show, under the second and third criteria, that [the products] are in such a competitive relationship.”³ However, the Appellate Body has not decided that special weight will always be given to physical characteristics. Conversely, the Appellate Body clearly refers to the fact that the carcinogenicity of the asbestos, which poses a risk to human health, leads to the conclusion that the physical characteristics of the products in that case are not “like”. This indicates that the reason for attributing special weight to the first criterion was that the physical differences were significant in terms of human health⁴. In this case, however, the risk of extinction of whales is not reflected in the first criterion of physical characteristics, but rather in the third criterion of consumers’ tastes and habits. Hence, where serious environmental concerns are at stake, consumers’ tastes and habits should be given such weight as to reverse the *prima facie* evidence that goods are physically like.

Even though “like” in terms of the first and the second criterion, tuna coming from companies killing whales irrespective of quotas and schedules from the International Whaling Commission and not caught for scientific purposes cannot be considered “like” tuna coming from other companies in respect of consumers’ perception and behaviour. Before the enactment of the measure in question, the public of the BU put strong pressure on the Council of Ministers of the BU in order to take action against those fishing companies in Avalon. This demonstrates a considerable awareness within the BU as to the ongoing killing of whales by some Avalonian companies. Therefore, the Bohemian public clearly perceives tuna from the Avalonian companies, which kill whales so as to risk their extinction, to be different from tuna coming from other companies. Given this strong perception of difference between the two types of tuna, tuna coming from Avalonian companies engaged in the killing of whales can in no circumstances be held to be “like” other tuna.

² Appellate Body Report, *EC-Asbestos*, at para. 101

³ *Ibid.*, at para. 118

⁴ Howse and Tuerk, at p.304

Since heavy weight must be attributed to the criterion of consumers' tastes and habits in cases of such fundamental environmental concerns, the *prima facie* finding of "likeness" according to the criteria of physical characteristics and end-uses must be reversed and Art.I:1 of GATT has not been breached.

5. Article II of the GATT

The BU contests that the measure violates Art.II:1 of GATT. No customs duties are charged on tuna imported from companies in Avalon in excess of those set out in the schedules annexed to the agreement. The policy of implementing a ban on tuna coming from companies in Avalon engaged in the killing of whales is not aimed at providing a different tariff regime to Avalon from that agreed in the schedule. Consequently, customs duties for the import of tuna from Avalon into the BU have remained the same and are still those agreed on in the schedule. All of the tuna imported into the BU is therefore imported at the agreed tax level.

Furthermore, "treatment no less favourable than that provided for" in the Schedules for the purpose of Art. II:1 has never been interpreted so as to cover a qualitative requirement for the importation of a certain product. According to the Appellate Body in *EC -Asbestos*, "the term ['less favourable treatment'] must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears"⁵. Therefore, "treatment less favourable" must be interpreted in the context of Article II: 1, which clearly refers to the Schedules of Concessions, and as relating to the level of taxes only, but not including qualitative requirements of the products. As stated above, the level of taxes for tuna is still the one agreed on in the Schedule and Art.II:1 is not violated.

6. Article XI of the GATT

The measure at stake does not constitute a restriction within the meaning of Art. XI:1. First of all, it does not concern a contracting party as a whole, but merely single companies. Thus, it is not a measure on the importation of a product of another state, but rather of the product of certain companies.

Furthermore, according to public international law, the 'fundamental rule of treaty interpretation' is that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context, and in light of the object and purpose of the

treaty'⁶. As early as in *Us Gasoline*, and later in *EC –Asbestos*, the Appellate Body made clear that the words of the GATT agreement, as well as those from the other agreements, were to be given their 'ordinary meaning'. The Oxford Dictionary defines 'prohibition' as the *action of formally forbidding* something, that is to say *commanding people not to do it*. By giving to the word 'prohibition' its ordinary meaning as the Appellate Body several times suggested to be the right approach to treaty interpretation, it is clear that the measure that the Bohemian Union adopted does not constitute a prohibition because it is not commanding companies in Avalon not to export tuna anymore. It is only imposing a condition upon the importation of tuna into its internal market.

Similarly, the ordinary meaning of 'restriction' is the *action of putting a limit on something*. The Bohemian Union is conscious that in its report *India – Quantitative Restrictions on Imports of Textile and Industrial Products*, upheld by the Appellate Body, the Panel made clear that the word restriction was to be given a broad meaning, and decided on that basis that the Indian measure was in breach of article XI:1. However, there is a fundamental difference between the Indian and the Bohemian measure in that the former applied to all the imports from a particular country whereas the latter only applies to certain companies. Clearly, the Bohemian measure is directed neither at Avalon nor at all Avalonian companies. Therefore, the measure at stake is not a 'restriction' within the ordinary meaning of this term because it does not put any limit on the importation of tuna. In effect, the measure does not provide for any quantitative limit on the amount of tuna imported into the Union. It rather imposes a condition, and a condition is fundamentally different in nature from a limit. It is to the entire discretion of companies in Avalon, to choose their commercial policy so as to favour tuna at the expense of whales or vice-versa.

Therefore, Avalon's claims that the Bohemian Union is violating Article XI:1 are ill-founded.

7. Article XIII of the GATT

It first has to be noted, as a matter of policy that the BU does accept the importation of tuna from Avalon. On a more specific level, the BU contest that it is administering a quantitative restriction in a discriminatory fashion in breach of Article XIII:1 of the GATT. The measure at stake can only be in breach of Article XIII:1 if it constitutes a prohibition or a restriction on the importation of tuna. Such terms also appear in Article XI:1. The ordinary meaning of the terms 'prohibition' and 'restriction' is the same in Articles XI:1 and XIII:1.

⁵ Appellate Body Report, *EC-Asbestos*, at para. 88

Moreover, the general purpose of Articles XI:1 and XIII:1 can be said to be the same as well, namely, to prevent quantitative restrictions from arising so as to favour trade in general. Therefore, we must conclude that the terms have the same meaning in Articles XI:1 and in Article XIII:1. We have already examined and demonstrated in paragraph 4 of this submission that the Bohemian measure does not constitute a prohibition or restriction within the meaning of Article XI:1 and, by analogy, there is no breach of Art.XIII:I either.

Nevertheless, if the panel was to conclude that the measure does constitute a prohibition or a restriction, it would still not be in breach of Article XIII:1. In effect, there is no discrimination for the purpose of XIII:1 since tuna imported from companies engaged in the killing of whales in violation of the International Convention on the Regulation of Whaling is not “like” tuna fished by companies which do not violate this Convention. Thus, the BU treats tuna from Avalon in the same way as it does tuna from third countries. The only reason why the measure is not aimed at companies other than in Avalon is that the latter are not violating the ICRW. Our measure is aimed at companies violating the ICRW, not at providing an arbitrary and unjustified disadvantage on Avalon in trade of tuna. There is neither a restriction or prohibition on the importation of tuna nor discrimination as to the regime of importation for Avalon and third countries. Therefore, the BU fully complies with its obligations under Article XIII of the GATT.

8. Article XX of GATT

(a) Preliminary observations

Should the Panel not follow the arguments made by the Bohemian Union as to Art. I, II, XI and XIII, the Bohemian Union contends that the measure is justified under Art.XX.

This dispute concerns a measure taken for the protection and conservation of whales. All of the whales concerned are threatened with extinction and all the parties to this dispute agree on this. They are parties to CITES, which lists whales in Appendix 1. Appendix 1 lists the most endangered among CITES-listed animals. Moreover, all are also parties to the ICRW. The measure in this case is taken in furtherance of these aims.

Yet, it seems to be suggested that the Members of the WTO have, by signing the WTO Agreement, acknowledged that trade will take precedence over global environmental problems. However, a contrary view is expressed by the WTO Negotiators in the Preamble to the WTO Agreement which refers to “optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the

⁶ Article 31 of the Vienna Convention on the Law of Treaties 1969

environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”⁷. Thus, it is clear that the WTO Agreement does not in general prohibit the protection of the environment, only because it may interfere with the objective of an optimal use of the world’s resources. Quite on the contrary, it is emphasised in the Preamble that the world’s resources shall only be used in a way, which is in accordance with the objective of sustainable development. Moreover, the broad membership of WTO Members to multilateral environmental agreements demonstrates that it is recognised by the majority of WTO Members and the international community as a whole that environmental concerns are often of a global dimension and can only be addressed globally.

The GATT 1994 clearly allows for measures to protect the environment where they are within the scope of Art.XX(b) or Art.XX(g). When these paragraphs are read in the light of the Preamble, they must not only apply to measures in order to protect the domestic environment, but rather be seen in a broader context of global environmental protection and the need to protect the environment of the world as a whole, with a view to sustainable development.

It is, thus, clear that, where no measure directly linked to the objective of environmental protection is available, the GATT must be read as allowing for the most directly linked measure available to be taken. A narrower interpretation of Art.XX would seriously undermine the objective of sustainable development, which “adds colour, texture and shading to [the] interpretation of the agreements annexed to the WTO Agreement”⁸.

In respect of Art.XX, the BU will follow the approach, which the Appellate Body established in *US-Gasoline* for applying the Art.XX exceptions: “first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.”⁹

(b) Art. XX (b)

Art. XX (b) allows for measures to be taken if they are „necessary for the protection of animal or plant life or health“. This recognises a Members right to take action in the context of environmental protection, where there is a certain degree of connection between the measure and the end pursued. In *Korea-Beef*, the AB interpreted the term ‘necessary’ as being close to

⁷Preamble to the *WTO Agreement*, first paragraph.

⁸ Appellate Body Report, *Shrimps*, at para.153

⁹ Appellate Body Report, *US--Gasoline*, at p. 22

“indispensable”¹⁰. Nonetheless, the Appellate Body emphasised that a “measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d)”¹¹. The determination of whether a measure is necessary “ involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by [the measure], the importance of the common interests or values ..., and the accompanying impact of the law or regulation on imports or exports”.

This ruling made in the context of Art.XX(d) was referred to in the context of Art.XX(b) in *EC-Asbestos* by the Appellate Body and it was held “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”¹².

This confirms that the general test under the necessity requirement in Art. XX(b) of whether a WTO-consistent alternative measure is reasonably available constitutes a ‘weighing and balancing process’ taking into account different factors: the extent to which the measure contributes to the realization of the end pursued, the importance of the common interests or values protected, and the accompanying impact of the measure on trade. It therefore follows, that generally the requirement will more easily be satisfied in the context of Art. XX(b) than Art. XX(d), since the common interests and values concerned by Art.XX(b) measures, namely the protection of animal or plant life or health, are recognised as important to the international community as a whole.

I. Contribution of the measure to the realization of the end pursued

The ban on tuna is intended to protect the life of animals, namely whales, by requiring that companies importing tuna into the BU refrain from killing whales, unless for scientific research, and not irrespective of schedules and quotas, as well as from trade in whale products. In order to achieve this aim, the BU sees itself compelled to resort to a ban on products other than whale products, because no whale products are being imported into the BU. In order to target only those companies, which are engaged in the killing of whales, the measure must be one, which only affects these companies without having an effect on other companies in Avalon. Further, in order to achieve the protection of the life of whales, the measure must be such that it affects those companies in a way, which prompts them to change their fishing policies. The companies engaged in whaling are making considerable profits with tuna, which is imported into the BU. The killing of whales is, however, not very

¹⁰ Appellate Body Report, *Korea--Beef*, at para. 161

¹¹ *Ibid.*, at para. 164

¹² Appellate Body Report, *EC-Asbestos*, at para. 172

profitable, so that these companies in order to be able to fish whales, depend on the profits they make with other fish, including tuna. Therefore, the ban is on tuna coming from these specific companies. It seeks to withdraw the financial support, which the export of tuna gives them, thereby disabling them to continue the killing of whales. Yet, it is not disproportionate in reach so as to ban all of their products. The measure thereby makes the most substantial contribution to the protection of the life of whales, which is reasonably available.

II. Importance of the common interests or values protected

The common interest or value protected by the measure is the life of whales. All whales are threatened with extinction as a consequence of overfishing by mankind. Despite the fact, that action against the overfishing has been taken on an international basis, reflected in the ICRW and in CITES, updated estimates of the year 2000 show that the action taken has, for some reason, still not produced the desired results. Especially the estimated global populations of large whales continue to be very low, and there is a real risk of extinction in respect of blue whales. Whales killed by fishing companies of Avalon are minke, humpback and blue whales, all of which are large whales.

The common interest in protecting large whales from extinction can be illustrated by reference to several arguments. First of all, it is in the interest of human mankind to sustain biological diversity in this world. Biodiversity is important to the preservation of the web of life that sustains all living things. Biodiversity, including genetic variation, cannot be diminished without having an impact on humanity itself. Therefore, it is in the common interest of humanity to protect whales from extinction. Moreover, it is in the interest of human mankind that the ecosystem maintains its balance. The extinction of one species causes serious disruption to the ecosystem concerned. Loss of one species may cause a chain reaction resulting in a change to the ecosystem itself. The consequences on the whole ecosystem cannot be predicted, but modern biology argues that such a disruption may eventually have negative effects on human mankind.

Therefore, the protection of animals from extinction, and especially those, which are endangered, is vital to the common interests and values of this world, given that the whales that are killed by Avalonian fishing companies all belong to the most endangered animals in this world. Given the undisputed importance of the protection of whales, this is a case, where the requirement of necessity will be more easily satisfied.

III. The accompanying impact on trade

Even though Avalon earns more than 50 % of its GDP by exports and despite the fact that fish is being exported in large quantities and the BU is a major importing country, the impact of the ban on trade is as much limited as is possible in order to achieve the aim. The ban on tuna is restricted to companies in Avalon engaged in the killing of whales. Furthermore, it is limited to only one of their products, tuna.

If the measure would not affect trade, but be formulated in the context of some other matter, it would be impossible to limit its reach to the companies fishing whales. Trade is the only direct link, which exists between the BU and those fishing companies. Any other measure would necessarily impact on the whole of Avalon and not target these specific companies.

A different trade restricting measure, on the other hand, as for instance mere labelling requirements or a ban on a different kind of fish, which would be exported in a limited number only, would not have the necessary effect. The aim of protecting the whales from being killed is an 'all-or-nothing' goal, where a measure can only achieve the goal, if it is such that companies prefer to change their fishing policies completely and stop killing whales at all. If the effect of the measure is insignificant to the companies, the objective of the measure will never be achieved. Therefore, the ban on tuna coming from certain companies in Avalon is the least trade restrictive measure reasonably available and thus 'necessary for the protection of animal life'.

(c) Article XX (g)

I. Policy to conserve exhaustible natural resources

It is not at dispute here that whales are an exhaustible natural resource in the ordinary meaning. It has further been established by the Appellate Body in the *Shrimps* case that the term 'exhaustible natural resource' in Art.XX(g) includes "living natural resources"¹³.

Also, whales are exhaustible. All of the large whales are listed in Appendix 1 of the CITES, which includes "all species threatened with extinction". As mentioned above, all the parties to the dispute are also parties to this Convention. The exhaustibility of whales can therefore not be contested.

Whales are a highly migratory species. Blue whales, humpback whales and minke whales migrate to the Antarctic waters in the summer and into subtropical coastal waters during winter and spring. They are known to occur in the waters of the BU. Therefore, there is

¹³ Appellate Body Report, *Shrimps*, at para. 131

a sufficient nexus between the migratory and endangered marine populations of whales and the BU for the purpose of Art. XX(g).

Moreover, in the light of present environmental concerns, a sufficient nexus for the purpose of Art. XX(g) should exist, where a serious environmental concern, such as the extinction of an endangered species is concerned.

II. Relating to the Conservation of [Exhaustible Natural Resource]

In *United States-Gasoline*, the Appellate Body defined „relating to“ as a “substantial relationship” between the measure and the objective of conservation¹⁴. It further referred to this relationship in *Shrimps* as “a close and genuine relationship of ends and means.”¹⁵ Therefore, “the relationship between the general structure and design of the measure here at stake ... and the policy goal it purports to serve”¹⁶ must be examined.

The measure here at stake imposes an import ban on tuna coming from fishing companies in Avalon engaged in the killing of whales. The measure is designed to influence the fishing companies to stop fishing whales irrespective of stock status and quotas or schedules adopted by the International Whaling Commission. It is important to note that the Appellate Body ruled in *Shrimps* that a measure conditioning access to the Member’s market is not, as such, outside the scope of Art.XX¹⁷.

Therefore, the measure is not *a priori* outside the scope of Art.XX(g). The most substantial, and thus close and genuine, relationship of a measure and the policy of the conservation of whales would be a ban on whale products. But since there are no imports of whale products into the BU, it must be resorted to the next most genuinely and closely linked measure available. Therefore, the ban is on tuna. Tuna is of such importance to the companies that a ban on that product may indeed influence the companies to change their policies. In fact, the product banned has been wisely chosen. There is no other product, which would serve the aim of conservation effectively and yet not be disproportionate. As noted above in paragraph 6(c)I, these companies killing whales largely depend on the high profits they make with other fish, including tuna. The BU thus directly supports companies engaged in the fishing of whales financially, if it lets other fish coming from those companies into its domestic market. Consequently, a ban on other fish products genuinely relates to the fishing of whales by those companies. Tuna is one of the types of fish, which those

¹⁴ Appellate Body Report, *US--Gasoline*, at p.19

¹⁵ Appellate Body Report, *Shrimps*, para. 136

¹⁶ *Ibid.*, at para. 137

¹⁷ *Ibid.*, at para. 121

companies make substantial profits with. Thus, tuna has been chosen as the most appropriate product to be banned.

The ban is not on all tuna coming from Avalon, but only on tuna coming from companies that kill whales. Hence, the import ban is not a simple blanket prohibition either imposed on all fishing companies in Avalon or banning all products from those companies. It has regard to the consequences of the importation of tuna, which offers financial support for Avalonian companies to engage in the killing of whales. Therefore, the import ban on tuna coming from certain companies in Avalon is “relating to” the conservation of an exhaustible natural resource within the meaning of Article XX(g) of GATT.

III. “If Such Measures are Made Effective in conjunction with Restrictions on Domestic Production or Consumption”

In *United States-Gasoline*, the Appellate Body held that this third requirement under Art.XX(g) “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.”¹⁸ This even-handedness is required in respect of the restriction, which would be the ban on tuna. However, it cannot follow in this case that this requirement refers to the ban on tuna only, regardless of the policy it serves. This would mean that wherever the restriction on the restricted product, which is tuna, is not necessary in the country itself, because it has adopted an even stronger restriction on the product of the policy, which are whales, this requirement would not be met. This would completely convert the meaning and sense of Art.XX. Therefore, this looks at the question of whether the Member imposing a measure applies that policy with even-handedness. The BU applies a very strong policy on the protection of whales and respects its obligations under CITES and the ICRW. Not only does it prohibit the fishing of whales, but also are no special permits for scientific research issued. Moreover, no whale products are being imported into the BU. Hence, it is at present not necessary to formulate a measure similar to the ban on tuna for Bohemian fishing companies, because even stronger measures relating to the conservation of whales are in force.

(d) The Chapeau of Article XX of GATT

After the measure has now been provisionally justified under Art.XX(b), or alternatively Art.XX(g), it is also justified under the Chapeau of Art.XX. The purpose of Art.XX is

¹⁸Appellate Body Report, *US--Gasoline*, at pp. 20-21.

“generally the prevention of 'abuse of the exceptions of [Article XX]’.”¹⁹ The Appellate Body further commented on the chapeau that “it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations”²⁰.

This balancing of the rights and obligations between the rights of a Member to invoke Art.XX and the substantive rights of the other Members involves three standards: Firstly, that the measure must not constitute arbitrary discrimination between countries where the same conditions prevail. Secondly, that the measure must not constitute unjustifiable discrimination between countries where the same conditions prevail. And thirdly, that the measure must not constitute a disguised restriction on international trade. In respect of the first and second requirement, the Appellate Body elaborated a three-stage-test in *Shrimps*: “First, the application of the measure must result in *discrimination*... Second, the discrimination must be *arbitrary or unjustifiable* in character... Third, this discrimination must occur *between countries where the same conditions prevail* [which includes discrimination] between exporting Members and the importing Member concerned.”²¹

Despite the wording of the chapeau of Art.XX, the BU suggests that for the present dispute it would be more helpful to first examine, whether the same conditions as those in Avalon prevail in the other Members of the WTO.

The conditions, which need to be considered here, include the killing of whales, since this is essential to the measure at stake. Only if whales are being killed irrespective of schedules and quotas adopted by the IWC, the tuna coming from those companies engaged in the killing of these whales is banned. There are at present no other countries, where the same conditions prevail. Other countries fishing whales, such as Japan and Norway only do this for the purpose of scientific research with regard to the quotas and schedules of the IWC. This is supported by evidence from numerous NGOs, which makes clear that Avalon, in contrast to Norway and Japan, applies the exemption of scientific research in a rather generous manner, so that the whales are used in domestic consumption. Therefore, those countries act in accordance with the ICRW while Avalon breaches its obligations under Art. VIII of the ICRW, which only allows permits for the purpose of scientific research. It is crucial that such permits only apply to scientific research purposes. Furthermore, Avalon disregards the recommendations made by the IWC pursuant to Art.IV of the ICRW. In order to ensure that the objectives of the ICRW are not undermined, it is important to issue special permits only if the whale is genuinely used for scientific research and to take into account the

¹⁹*Ibid.*, p. 22.

²⁰ Appellate Body Report, *Shrimps*, at para. 156

schedules and quotas of the IWC. Moreover, Avalon trades in whale products in violation of Art. III of CITES. Norway, Japan and Russia do not engage in the trade of whale products, in contrast to Avalon. Consequently, the conditions in Avalon cannot be considered the same as the conditions in Norway or Japan.

Additionally, the conditions in Avalon are essentially different from the conditions in Bohemia and other WTO Members, which do not kill whales at all, and do not engage in the trading of whales either. All of these countries respect their obligations under CITES and the ICRW and therefore protect the life of whales. Therefore, the violations of CITES and ICRW render Avalon a country where different conditions prevail.

The fact that the ban only concerns companies in Avalon is not indicative of discrimination. Given that it is not against Avalon as a country, but only against certain companies, there is no discrimination against Avalon itself. Had there been companies from other WTO Members violating Art.VIII of the ICRW and Art.III of CITES, the same conditions would have been formulated for the tuna coming from the companies of those Members. Therefore, there has neither been discrimination against Avalon, nor do the same conditions prevail in Avalon and other countries.

Furthermore, the ban is not unjustifiable. The purpose of Art.XX is not only to allow Members to protect certain goods or values within their own boundaries. As demonstrated above under paragraph 6(a) a broader view must be taken, so that the complex interconnection of many environmental problems of today's world are seen in context. A number of Multilateral Environmental Agreements signed by a majority of the WTO Members supports this view. It is, therefore, clear that Art.XX would be ripped of its significance in the environmental context, if measures transcending the boundaries of a state would be *a priori* unjustifiable. The killing of whales for consumption without respect to their stock status and trade in whale products will risk the extinction of some types of whales. The extinction of an animal is of concern to all countries in this world as discussed under paragraph 6(b)II.

No less restrictive measures would have been open to the BU. They could not have demanded reparation, for this was impracticable. Nor could it be said that the BU failed to negotiate with Avalon given that there are already two international conventions on the issues concerned in force, to which both of the countries are parties. Therefore, the ban on tuna was the only measure reasonably available to Bohemia in order to achieve the goal and

²¹*Ibid.*, para. 150

justified by Avalon's violations of the ICRW and CITES. Therefore, the measure is not unjustifiable.

Nor is the measure arbitrary. The conditions, which have to be complied with, namely no trading in whales and no killing of whales for consumption, are clear. Therefore, companies, which cannot import their tuna into the Bohemian Union, are aware of the reasons, for which they cannot import it. The fact that the measure applies to Avalon only is not indicative of arbitrariness either, since, as observed above, Avalon is the only country in which there are companies not complying with the conditions.

Furthermore, the measure does not constitute a disguised restriction on trade, only because domestic fishing companies had been struggling against the competition from Avalon and are now profiting from the ban. It is, however, impossible that regard may only be had to the effect of the measure. If such a test was to be applied, Art.XX would hardly ever apply to any situation where the country taking a measure conditioning access to the domestic market did comply with the condition and other WTO Members did not. If the country taking the measure complies with the requirements of the measure while other countries do not comply with it, the import of those products will be reduced and it will be very likely that there is a positive effect on the domestic market. This would, again, convert the meaning of Art.XX, given that countries applying a strong policy within their own territory would then not be able to justify a more lenient policy taken against other countries.

Therefore, it is necessary not only to look at the effect on the domestic market, but also to consider whether any alternative measures without such effect are reasonably available. As considered above, the only alternative measure reasonably available is a ban on a different fish product. Any other measure, such as labelling requirements would not have the necessary effect on the companies in Avalon, which is to stop killing whales for consumption immediately, and would therefore not further the aim of animal protection or conservation. Hence, the BU could have banned a different fish product. However, the ban of any other fish product would have the same effect on the domestic market as the ban on tuna. Therefore, the ban on tuna is no disguised restriction on trade.

Thus, the measure is justified under the chapeau of Art.XX.