

MONTEREY INSTITUTE OF INTERNATIONAL STUDIES

Project on Negotiation, Mediation, & Conflict Resolution

MULTILATERAL NEGOTIATION SIMULATION

EXERCISE

The WTO Sea Turtle/Shrimp Case
Post WTO Decision Regarding U.S. Embargo of Shrimp
Imports from Pakistan and Malaysia

and

Eco-Labeling Provision of the EU (hypothetical)

COMMON FACTS FOR ALL PARTIES

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**Import Prohibition of Certain Shrimp and
Shrimp Products (United States) and
Eco-Labeling Requirement of the European Union (KU)**

Multilateral Negotiation Simulation Exercise

**European Union
Malaysia
Pakistan
United States**

(Based upon report of the WTO Panel on the United States-Import prohibition of certain shrimp and shrimp products and hypothetical eco-labeling scenario)

prepared by
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Background

On 15 May 1998, a WTO panel issued a report (98-1710) which found the U.S. prohibition on the importation of certain shrimp and shrimp products violates WTO/GATT law. The report of the panel is currently being circulated to WTO members pursuant to the Dispute Settlement Understanding. An appeal may be filed by an interested party to the dispute within sixty (60) days of the report.

The case was brought by letter dated 8 October 1996 signed by Pakistan, Malaysia, India, and Thailand acting jointly and requesting consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII: 1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") regarding the ban imposed upon the importation of certain shrimp and shrimp products from the respective countries by the United States under Section 609 of U.S. Public Law 101-162 ("Section 609"- See Annex 1) and the "Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations". Consultations were held on November, 1996 without resulting in a satisfactory solution of the matter.

In subsequent communications, the complaining parties requested the establishment of a panel by the Dispute Settlement Body (DSB). A panel was convened and a final report issued to the parties on 6 April 1998

Issue Summary

The state of the world's oceans is of grave concern at the national, regional, and international levels; most fisheries stocks have been depleted or are being harvested at maximum yield, and untold species-including many that are endangered - are confronted by unrelenting pressures. Yet, intensity of fishing effort only seems to increase, and modern fisheries are notoriously unselective, impacting far more than the species that are being targeted for human use. One of the clearest manifestations of this dilemma is shown by the statistics of bycatch. The effects of intense unselective fishing-producing millions of tons of bycatch every year- are multifarious and ponderous. These practices seriously afflict fisheries stocks, the marine environment and coastal societies, both at present and in the future.

One of the most destructive of modern fishing practices is bottom trawling, particularly shrimp trawling, for it produces vast amounts of bycatch- most of which is discarded- and alters the ocean floor, reducing the quality of habitats. In addition to direct impacts on fisheries of commercial importance, the bycatch of shrimp trawlers includes countless other species of ecological and conservation importance: endangered species of sea turtles are among these.

Sea turtles face a variety of threats in both the marine and nesting environments. However, the incidental capture and drowning of sea turtles in shrimp trawl nets has caused the greatest number of human-induced sea turtle deaths, accounting for more deaths than all other human activities combined. (1) For this reason, the Marine Turtle Specialist Group of the IUCN (World Conservation Union) identified reduction of sea turtle mortality in such trawling operations as a priority action item. (2) As early as 1982, it was recognized that "shrimp trawlers were considered to capture and drown more sea turtles worldwide than any other form of incidental capture. (3)

At issue in the WTO case is how the United States exercised unilateral and extraterritorial measures without sufficient attention to the methods and procedures developed by the complaining parties for the protection and preservation of sea turtles. Bilateral negotiations with the complaining parties did not take place, or if they did, were insufficient to curtail or modify the U.S embargo on certain shrimp and shrimp products.

Simulation Scenario

The multilateral negotiation simulation exercise will be based on a scenario drawn from the findings of the WTO Panel and will involve parties to the dispute negotiating for environmental safeguards to protect the endangered sea turtles in connection with the harvest of shrimp and shrimp products for export to the United States and other countries. The negotiations are voluntary and designed to minimize the adverse trade impacts of the U.S. embargo while addressing the shared interest of preserving the endangered sea turtle species at risk. In addition, the simulation scenario includes a *hypothetical* eco-labeling regulation to be introduced by the European Union on all shrimp and shrimp product

imports. All parties to the negotiations will be provided with this common set of facts. Each individual party will be offered individualized confidential instructions.

Goals and Objectives of the Simulation Exercise

The goals and objectives of this negotiation simulation exercise include:

1. Development of negotiation strategy;
2. Team building and development of common approach to negotiation;
3. Bilateral negotiations;
4. Multilateral negotiations;
5. Development of timelines and implementation mechanisms;
6. Drafting an agreement including provisions for breach of the agreement.

There is no pre-determined or preferred outcome. The parties are free to develop multiple options designed to successfully settle the dispute. The WTO panel decision may be assumed as a mandate for the United States to halt its current embargo. Assume that the U.S. has appealed the decision to the WTO Appellate Body but that no action has been taken.

Factual Background Common to All Parties

1. Basic Facts About Sea Turtles

Seven species of sea turtles are currently recognized: the green turtle, loggerhead, flatback, hawksbill, leatherback, olive ridley, and Kemp's ridley.

Most species of sea turtles are distributed around the globe, in subtropical or tropical areas. Sea turtles spend their lives at sea, where they migrate between their foraging and their nesting grounds, but reproduce on land. Adult females nest in multi-year cycles, coming ashore to lay clutches of about 100 eggs in nests they dig on the beach. After about 50 to 60 days of incubation, the hatchlings dig their way out of the nest and head for the sea. Few survive and reach the age of reproduction (10-50 years, depending on the species). While maturing, they move through a variety of habitats. Little is known about the existence of sea turtles at sea.

Sea turtles have been adversely affected by human activity, either directly (sea turtles have been exploited for their meat, shells, and eggs), or indirectly (incidental captures in fisheries, destruction of their habitats, pollution of the oceans). Presently, all species of sea turtles are included in Appendix 1 of the 1973 Convention on International Trade in Endangered Species ("CITES"-attached in appendices).

2. The U.S. Endangered Species Act (ESA) and Related Legislation

All sea turtles that occur in U.S. waters are listed as endangered or threatened species under the Endangered Species Act of 1973 ("ESA"). The ESA prohibits take of endangered sea turtles within the United States, the U.S. territorial sea, and the high seas, except as authorized by the U.S. Secretary of Commerce (for sea turtles in marine waters) or the Secretary of Interior (for sea turtles on land).

Research programs in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States led to the conclusion that the incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles. (4) Within the context of a programme aimed at reducing the mortality of sea turtles in shrimp trawls, the National Marine Fisheries Service ("NMFS") developed turtle excluder devices ("TEDs"). A TED is a grip trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net. In 1983, the NMFS began a formal programme to encourage shrimp fishermen to use TEDs voluntarily, so as to reduce the incidental catch and mortality of sea turtles associated with shrimp trawling. As part of the voluntary TED programme, NMFS delivered TEDs to volunteer shrimp fishermen and showed them how to properly install and use the TEDs. However, the voluntary programme did not turn out to be successful because an insufficient number of fishermen used TEDs on a regular basis.

In 1987, the United States government issued regulations, pursuant to the ESA, whereby all shrimp trawlers were required to use TEDs or tow time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp trawls. In offshore waters, all shrimp trawlers 25 feet and longer were required to use qualified TEDs and all shrimp trawlers smaller than 25 feet were required to restrict tow times to 90 minutes or less, or use the TEDs. (5)

In 1989, the United States enacted Section 609 of Public Law 101-102 (6) ("Section 609", see Annex 1). Section 609 calls upon the US Secretary of State, in consultation with the US Secretary of Commerce, *inter alla*, to initiate negotiations on the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries which are engaged in commercial fishing operations likely to affect adversely sea turtles. Section 609 further provides that shrimp harvested with technology that may adversely affect certain sea turtles may NOT be imported into the United States, unless the President certified to Congress by 1 May 1991 and annually thereafter, that the harvesting nation has a regulatory programme and an incidental (bycatch) rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles. (Emphasis added.)

In 1991, the United States issued guidelines ("1991 Guidelines") for assessing the comparability of foreign regulatory programmes with the U.S. programme. To be found comparable, a foreign nation's programme had to include, *inter alla*, a commitment to require all shrimp trawl vessels to use TEDS at all times (or reduce tow times for vessels under 25 feet), or, alternatively a

commitment to engage in a statistically reliable and verifiable scientific programme to reduce the mortality of sea turtles associated with shrimp fishing. Foreign nations were given three years for the complete phase-in of a comparable programme. The 1991 Guidelines also determined that the scope of Section 609 was limited to the wider Caribbean/western Atlantic region, and more specifically to the following countries: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil. It was also determined that the import restriction did not apply to aquaculture shrimp whose harvesting does not adversely affect sea turtles.

In 1993, the United States issued revised guidelines ("1993 Guidelines") providing that, to receive a certification in 1993, affected nations (those determined in 1991 Guidelines) had to maintain their commitment to require TEDs on all commercial shrimp trawl vessels by 1 May 1994, and be able to demonstrate the use of TEDs on a significant number of shrimp trawl vessels by 1 May 1993. (7) To receive certification in 1994 and in subsequent years, affected nations were required to use TEDs on all their shrimp trawl vessels, subject to a limited number of exemptions. (8) The 1993 Guidelines eliminated the second option for certification which was contained in the 1991 Guidelines, i.e., the commitment to engage in a scientific programme to reduce the mortality of sea turtles in shrimp trawling.

In December of 1995, the U.S. Court of International Trade ("CIT") found that the 1991 and 1993 Guidelines were contrary to law by limiting the geographic scope of the application of Section 609 to shrimp harvested in the wider Caribbean/western Atlantic region and directed the Department of State "to prohibit no later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of commerce..."(9)

In April 1996, the U.S. Department of State published revised guidelines ("1996 Guidelines") to comply with the CIT order of December 1995. (10) The new guidelines extended Section 609 to shrimp harvested in ALL foreign nations. The Department of State further determined that, as of 1 May 1996, all shipments of shrimp and shrimp products into the United States were to be accompanied by a declaration ("Shrimp Exporter's Declaration Form") attesting that the shrimp or shrimp product in question was harvested "either under conditions that do not adversely affect sea turtles..or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609".

The 1996 Guidelines define "shrimp or shrimp products harvested in conditions that do not affect sea turtles" to include: "(a) Shrimp harvested in an aquaculture facility....; (b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States; (c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear, that in accordance with the US programme..would not require TEDs; (d) Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur..."

The 1996 Guidelines further determine the criteria for certifying a harvesting nation whose particular fishing environment "does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting" (Section 609 (b) (2) (c)) as follows: "(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to

its jurisdiction, (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g. any nation that harvests shrimp exclusively by artisanal means; (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur".

The 1996 Guidelines also provide that "other certifications" can be granted by May 1, 1996 and annually thereafter, to other harvesting nations "only if the government of that nation has provided documentary evidence of the adoption of a regulatory programme governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average take rate of incidental taking of sea turtles by United States vessels in the course of such harvesting." For purposes of these "other certifications", a regulatory programme shall include, *inter alla*, "a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States...." Moreover, the average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the US program..." (Emphasis added.)

According to the 1996 Guidelines, "other considerations" may include: "other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitats, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles."

In October 1996, the CIT ruled that the embargo on shrimp and shrimp products enacted by Section 609 applied to "all shrimp and shrimp products harvested in the wild by citizens or vessels of nations which have not been certified." The Court found that the 1996 Guidelines were contrary to Section 609 when allowing, with a Shrimp Exporter's Declaration form, imports of shrimp from non-certified countries, if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles. The CIT later clarified that shrimp harvested by manual methods, which did not harm sea turtles, could continue to be imported even from countries which had not been certified under Section 609. The CIT also refused to postpone the worldwide enforcement of Section 609. (11)

The Case Before the WTO Panel

In accordance with WTO rules, the governments of Pakistan, Malaysia, India, and Thailand expressed their concerns to the WTO regarding the U.S. imposed embargo of shrimp imports. After pursuing informal consultations unsuccessfully, the complaining parties requested that a WTO Dispute Panel be convened and for the Panel to find that Section 609 of US Public Law 101-162 ("Section 609") and its implementing measures:

- (a) were contrary to Articles XI: 1 and XIII: 1 of GATT 1994;
- (b) were not covered by the exceptions under Article XX(b) and (g) of GATT 1994;
- (c) nullified or impaired benefits accruing to India, Malaysia, Pakistan, and Thailand within the meaning of Article XXIII: 1 (a) of GATT 1994.

India, Pakistan, and Thailand additionally requested the Panel to find that Section 609 was contrary to Article I: 1 of GATT 1994.

Malaysia, Pakistan, and Thailand requested the panel to recommend that the United States take all necessary steps to bring Section 609 and its implementing measures into conformity with its obligations under the GATT.

The United States requested the Panel to find that Section 609 and its implementing measures fell within the scope of Article XX, paragraphs (b) and (g) of GATT 1994.

Malaysia's Submission

Malaysia submitted to the WTO Panel that none of the Malaysian fisherman used TEDs. A significant amount of wild harvested shrimps were caught using traditional methods such as hand retrieval nets which would not in anyway cause incidental catches of turtles. In Sabah and Sarawak in particular, shrimps were caught in locations that were far from turtle nesting grounds. Sabah and Sarawak had turtle protection laws, and fishing trawlers were not allowed to operate within designated areas where turtles mated and nested.

In addition, Malaysia had a comprehensive legal framework on the conservation and management of marine turtles which were under the jurisdiction of 13 individual states. The states' legislation on turtle protection had been enacted in 1932 and prohibited, *inter alla*, the capture, killing, injuring, possession or sale of turtles, collection of eggs, disturbing turtles during laying eggs, and provided for the establishment of turtle sanctuaries.

Subsidiary legislation had also been enacted, such as the Customs (Prohibition of Export/Import) Orders of 1988, enforced specifically to ban the exports and imports of turtle eggs to and from all countries. At the federal level, the Fisheries Act of 1985 prohibited the capture of marine turtles by any type of fishing methods. Enforcement of the existing legislation within 2 nautical miles of marine parks would provide protection to nesting turtles in the area. An Order made under the

Act in 1990 prohibited the use of driftnet with mesh sizes exceeding 25.4 cm in order to reduce turtle mortality.

Olive ridly, leatherback, hawksbill and green turtle were the four species of sea turtles found in Malaysia; the last three of them were at issue in this dispute. Malaysia had always been actively engaged in turtle conservation programmes aiming at reducing mortalities both on nesting beaches and at sea.

(More factual information will be provided to those representing the nation of Malaysia)

Malaysia considered that its commitment to sea turtle protection and conservation was evident by the actions taken both domestically and internationally in order to protect these endangered species from extinction. Conservation efforts were better achieved through bilateral or multilateral agreements rather than resorting to trade sanctions under the WTO.

Pakistan's Submission

Pakistan submitted that it shared the United States' concerns over the plight of sea turtles. However, the U.S. requirement that TEDs be installed on Pakistan's commercial fishing vessels not only violated US obligations under the GATT, but was completely unnecessary given Pakistan's long history of protecting endangered species, including sea turtles. However, the US requirement that TEDs be installed on Pakistan's commercial fishing vessels not only violated US obligations under the GATT, but was completely unnecessary given Pakistan's long history of protecting endangered species, including sea turtles. Pakistan stated that its culture embraced a traditional belief that it was sinful to kill sea turtles. In 1950, Pakistan passed legislation to protect sea turtles by enacting the Imports and Exports (Control) Act (amended on 13 August 1996), which made it illegal to export protected species, including sea turtles and sea turtle by-products from Pakistan. In addition to laws protecting sea turtles, various public and private organizations in Pakistan were engaged in sea turtle protection programmes. Since 1979, Pakistan's Sindh Wildlife Department was engaged in sea turtle conservation programmes in conjunction with the World Wildlife Fund (WWF) and the World Conservation Union (IUCN). The main objective of the programme was to protect sea turtles from extinction. In this regard, the programme established enclosures on beaches to protect sea turtles and their eggs from predators and poachers. The Sindh Wildlife Department also engaged in turtle conservation training programmes designed to teach the public about the importance of protecting sea turtles. This programme proved to be extremely effective in preserving and protecting sea turtles. It is estimated that between October 1979 and December 1995, more than 1.5 million sea turtle eggs were protected and thousands of hatchlings were released safely to the sea. The government of Pakistan was also instrumental in ensuring that sea turtle protection laws were enforced.

(Further facts will be provided to those representing the Pakistani government in the simulation.)

Pakistan considered that the protection of sea turtles was a challenging task tackled by a large number of countries in a variety of ways. Pakistan did not accept the U.S. assertion that the use of TEDs was the only way to prevent the extinction of sea turtles and considered the U.S. action to be an unacceptable interference in its policies within Pakistan's sovereign jurisdiction. Programmes such as those undertaken by Pakistan were described by Pakistan as essential in

furthering the goal of sea turtle protection. Pakistan argued that, since it had adequate measures in place to protect and preserve the endangered species of sea turtles, there was no need for the United States to impose its own agenda on third parties through the use of far-reaching, extra-territorial measures such as the one imposed by Section 609.

Pakistan further asserted that it was unaware of any efforts made by the United States to initiate negotiations and/or reach bilateral or multilateral agreements on the protection of sea turtles relevant to the issues at stake in the WTO proceeding.

The United States' Submission

The United States submitted that, as recently as the 19th century, sea turtles were very abundant, with some populations numbering well into the millions. Today, all species of sea turtles face the danger of extinction, primarily because of human activities. For example:

- In 1946, an estimated 40,000 female Kemp's ridley sea turtles nested on the beach at Rancho Nuevo, Mexico in a single day. By 1988, only an estimated 650 nested at the same site throughout the entire nesting season.
- The Southeast Asian and Indian Ocean regions have experienced particularly alarming declines in sea turtle populations, even with respect to the olive ridley sea turtles, which were the most abundant species. T
- In Malaysia, the Terengganu stock of nesting olive ridley turtles has shrunk from possibly thousands annually to approximately 20 each year. I
- In Thailand, the number of live riddle turtles from the Andean Sea that nested each year now numbers in the tens. (12)

The United States considered that the international community had responded to the imperiled global status of sea turtles. Since 1975, all species of sea turtles had appeared on Appendix I to the CITES. Similarly, all species except the fallback were listed in Appendices II & II to the CMS and in Appendix II of the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean region. Since the 1970s, all species of sea turtles that occurred in waters subject to US jurisdiction had been listed as either endangered or threatened under the US Endangered Species Act of 1973. (13)

The United States considered that the use of TEDs had become a recognized multilateral environmental standard, fulfilling twin commitments on the part of the international community to conserve endangered species, such as sea turtles, and to minimize their unintentional mortality in fishing operations. Under the terms of the CITES, trade in these species must accordingly be subject to "particularly strict regulation in order not to endanger their survival and must be authorized only in exceptional circumstances". (14) By itself, however, the U.S. asserted that the CITES prohibitions did little to protect the endangered species from incidental mortality in trawl nets, which for many years has constituted a far greater threat to sea turtles than international trade.

In 1993, the United States had joined Mexico in leading negotiations toward a new multilateral agreement for the Western Hemisphere devoted specifically to protecting sea turtles from extinction. This three-year negotiating effort concluded on 5 September 1996 with the adoption of the Inter-American Convention for the Protection and Conservation of Sea Turtles ("Inter-American Convention"7. This new treaty required parties to take a variety of measures to protect and conserve sea turtles and their habitats, and stipulated, in particular that "each Party shall require shrimp trawl vessels subject to its jurisdiction that operate within the Convention Area to use recommended TEDs that are properly installed and functional." (Annex III, paragraph 3 of the Convention). The countries in the Western Hemisphere understood that, because of the highly migratory nature of sea turtles, a Meaty that afforded protection to sea turtles in only one region of the world would not succeed unless countries in other regions adopted comparable measures. For this reason, Article XX of the Inter-American Convention encouraged its parties to negotiate complementary protocols to that treaty with states in other regions in order to promote the protection and conservation of sea turtles outside the Western Hemisphere.

(Supplementalfacts will be provided to the Us. team for the negotiations.)

The Decision of the WTO Panel and Current Status

As indicated, the WTO Panel issued its report (WT/DS58/R) dated 15 May 1998.

Conclusions

The WTO Panel, after considering the evidence and arguments of the parties, found largely in favor of the complainants on the grounds that the U.S. Section 609 requirements violated Article XI: 1 of the GATT 1994 and that the exceptions cited by the United States in Article XX were not applicable.

Accordingly, "the panel finds that most populations of sea turtles are considered to be endangered or threatened. In this respect, all marine turtles are included in Appendix I to the 1973 Convention on International Trade in Endangered Species (CITES) as species threatened with extinction.

The WTO Panel held with respect to Article XI: 1 of GATT 1994 "that all four complainants raise claims regarding the violation of Article XI GATT 1994. The parties submit that the scope of Article XI: 1, which provides for the general elimination of quantitative restrictions, is comprehensive and applies to all measures instituted or maintained by a Member 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. Measures prohibited by Article XI:1 include outright quotas and quantitative restrictions made effective through import or export licenses. The embargo applied by the United States on the basis of Section 609 constitutes a prohibition or restriction on the importation of shrimp or shrimp products from the complainants and is not in the nature of a 'duty tax' or other charges' within the meaning of Article XI: 1." [See Panel Report on the United States-Restrictions on Imports of Tuna, 3 September 1991, DS29/R, not adopted (hereafter "Tuna I"), and Panel Report on the United States-Restrictions on Imports of Tuna, 16 June 1994, DS29/R, not adopted (hereafter "Tuna II").]

"....We therefore find that Section 609 violates Article XI:1 of GATT 1994." (p 284 of Panel Report.)

(The panel found it unnecessary to rule on whether Articles XIII: 1 and Article I: 1 of GATT 1994 were violated because of its finding that Section 609 violates Article XI: 1.)

Under Article XX, subsections (b) and (g), the United States raised the defence that the measures adopted under Section 609 were permissible as general exceptions:

Article XX

General Exceptions

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

- (b) necessary to protect human, animal or plant life or health;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

The U.S. arguments that the application of international agreements on the preservation of sea turtles (CITES) and domestic laws of the United States (Endangered Species Act) and Section 609 should be interpreted to permit the enforcement of an embargo of certain shrimp and shrimp products pursuant to Article XX (b) and (g). The panel considered the preamble to the GATT 1994 which acknowledges the importance of building an international trading system that prioritizes environmental sustainability but also which seeks to promote a fair and open multilateral trading system. The panel held that "in reaching our conclusions, we based ourselves on the current status of the WTO rules and of international law. As far as the WTO Agreement is concerned, we considered that certain unilateral measures, insofar as they could jeopardize the multilateral trading system, could not be covered by Article XX. Our findings with respect to international norms confirm our reasoning with regarding the WTO Agreement and GATT. General international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence a negotiated solution is clearly to be preferred, both from a WTO and an international environmental law perspective. However, our findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted. Nevertheless, in the present case, even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied without any serious attempt to reach, beforehand, a negotiated solution."

"We therefore find that the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX."

"Article XX (b) and (g)

"In line with our approach described (cite) above, we do not find it necessary to examine whether the US measure is covered by the terms of Article XX(b) or (a)"

The panel report further held that the U.S. had not demonstrated a good faith commitment to initiate international negotiations (bilateral or multilateral) with the complaining parties prior to the imposition of the embargo pursuant to Section 609.

The WTO panel report concludes:

1. "In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.
2. The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement." T

(Panel Report at p 300.)

Current Status

For purposes of this simulation, assume that the United States government represented by the Office of the U.S.-Trade Representative (USTR, has filed an appeal of the decision for consideration by the Appellate Body of WTO. Pending a decision by the appellate body, the USTR has been directed by the President of the United States to explore, through bilateral and multilateral negotiations, all options to settle the case with the complaining parties in a manner that will protect broad international interests and which will succeed in preservation of the endangered sea turtle.

The European Union's Establishment of an Eco-Labeling

Provision for the Importation of Shrimp and Shrimp Products (hypothetical)

For purposes of this negotiation simulation, consider the following facts to be true: The European Council has approved the recommendation of the EU Commission to establish a voluntary eco-label for use by exporters of all shrimp and shrimp products imported for sale within any of the member states of the EU. The voluntary eco-label has been recommended by the EU Commission based on the strong lobbying efforts of both wholesale and retail shrimp distributors in EU member countries who want to provide their buyers with the choice of buying shrimp and shrimp products that have been harvested in a manner that is compatible with the preservation of endangered sea turtle species.

EU Eco-Label Section 1010:

"Any and all shrimp or shrimp products to be imported for sale by merchants in member states of the EU *may* bear an eco-label certification if the exporting nation certifies that the harvest of shrimp and shrimp products is completed in compliance with the terms of the label and the further requirements of this section."

"The text of the label shall read as follows:

"Shrimp or shrimp products contained in this shipment originating from _____ (country of origin) have been harvested with trawling nets equipped with Turtle Excluder Devices (TEDs) for the preservation of endangered sea turtle species";

Implementation provisions:

a) The EU Commission, in consultation with exporting nations, shall negotiate standards for the inspection and certification of shrimp trawling practices for purposes of compliance with this section;

b) This section is enacted to provide shrimp exporting nations with the opportunity to market their products by certifying that the fishing methods employed for the capture of wild shrimp are compatible with the preservation of all species of sea turtles identified as endangered species pursuant to the Convention on International Trade in Endangered Species (CITES).

c) Notification to all shrimp exporting nations and the pursuit of negotiation sessions shall commence immediately with the voluntary eco-label certification made available to complying exporters no later than January 1, 1999."

GENERAL NEGOTIATION INSTRUCTIONS

1. Each country or trading region representative is empowered by their government to engage in bilateral and multilateral negotiations to resolve outstanding disputes related to the import/export of shrimp and shrimp products;
2. Each country representative will receive a set of negotiation instructions which should be read before the commencement of a negotiation session
3. The sequence of negotiations will be:

- a) Individual country representatives read materials and develop a chart which identifies each country's interests, potential options for settlement, objective criteria to be employed, and your BATNA in the event that negotiations are unsuccessful;
- b) You will meet with your team members to further develop a joint negotiation strategy.
- c) Bilateral negotiations will begin between Pakistan and Malaysia and between the EU and the United States:
- d) Further bilateral sessions may be convened between Pakistan and the United States and Malaysia and the KU;
- e) Finally, a multi-lateral session will be convened with all parties participating.

4. Rules - Because of time constraints the following rules will apply:

- a) The parties will limit any caucus meetings to no more than 10 minutes;
- b) No party will be permitted to boycott or walk-out of a negotiation session
- c) Questions regarding facts or instructions should be directed to the instructor
- d) Each party should be assumed to have full authority from its government to pursue any and all options for the resolution of the dispute.

5. Goals:

In addition to developing your negotiating strategy, an important goal of the exercise is to develop a joint problem solving atmosphere. Each party seeks to promote good diplomatic relations with counterparts in the negotiations while protecting your nation's trade and commercial interests. While time constraints will prevent protracted negotiations, the parties should concentrate on the achievement of interim, procedural, and other agreements. Reduce to writing as many of your common agreements as possible.

6. Hints

The factual information contains many references to WTO/GATT regulations, the U.S. embargo, and facts related to the nature of sea turtles and shrimp trawling methods. The facts can be used to fashion options for the settlement of the dispute. Where insufficient factual information exists, you may negotiate practical and procedural recommendations to obtain the needed information.

The End Notes and attached reference documents may also prove useful in enhancing your understanding of the problem including further explanations of various shrimping techniques and the positions of various parties and interest groups.