(5) Precisely why did the Appellate Body find that the US actions in *Shrimp* constituted unjustifiable or arbitrary discrimination? In respect of each of these reasons, what would the US have to do to bring its measure into conformity with its WTO obligations? Consider how the Appellate Body dealt with these issues:

UNITED STATES—IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS (RECOURSE TO ARTICLE 21.5 BY MALAYSIA)

WT/DS58/AB/RW.
Appellate Body Report adopted November 21, 2001.

[Malaysia brought an Article 21.5 action claiming that the United States had failed to bring Section 609 into conformity with its WTO obligations within the agreed-upon reasonable period of time for implementation. Thus, the compliance panel focused on the actions taken by the United States subsequent to the original *Shrimp* decision. The panel described the US implementing measures as (i) the adoption of the 1999 Guidelines and (ii) US efforts to negotiate an agreement on the conservation of sea turtles with the Governments of the Indian Ocean region and to provide technical assistance on the use of TEDs.

According to the 1999 Guidelines,[2] Section 609 does not apply to shrimp or products of shrimp harvested under specified conditions in which harvesting does not adversely affect sea turtles. These conditions include shrimp harvested in aquaculture; shrimp harvested by trawlers using TEDs comparable in effectiveness to those required in the United States; shrimp harvested exclusively by artisanal means; and shrimp harvested in any other manner that the State Department determines does not pose a threat of the incidental taking of sea turtles.

Under the 1999 Guidelines, importation of shrimp into the US must be accompanied by a declaration attesting that the shrimp at issue were harvested (i) under the conditions defined above or (ii) in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609.

The 1999 Guidelines provide for certification on the basis that the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles (e.g., the relevant species of sea turtles are not found in its waters; shrimp are harvested exclusively by means that do not pose a threat to sea turtles, e.g., artisanal means; shrimp trawling takes place exclusively in waters in which sea turtles do not occur). The Guidelines also provide for certification on the basis that a government has adopted and credibly enforced a TEDs program. Moreover, they also allow for the possibility that a country may be certified on the basis of having a regulatory programme not involving the use of TEDs if it demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea

2. 64 Fed. Reg. 36949 (1999).

turtles in the course of shrimp trawl fishing without the use of TEDs. In making the latter determination, the State Department is required to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and in the country in question. In either case, there is also a requirement that the rate of incidental taking of sea turtles must be comparable to the US rate.

The Revised Guidelines also revise the procedures under which the certification process operates. They also indicate that they may be revised in the future to take into consideration additional information on the interaction between sea turtles and shrimp fisheries, changes in the US program and in light of the results of pending litigation in US courts.

The Article 21.5 panel found that the US had made adequate efforts to negotiate an agreement with South East Asia nations. It also concluded that the US had satisfactorily dealt with the other aspects of the unjustifiable discrimination found by the Appellate Body, which it noted were agreed by the parties to be: (i) the insufficient flexibility of the 1996 Guidelines, in particular the absence of consideration of the different conditions that may exist in the exporting nations; (ii) the prohibition of importation of shrimp caught in uncertified countries, even when that shrimp had been caught using TEDs; (iii) the length of the "phase-in" period; and (iv) the differences in the level of efforts made by the United States to transfer successfully TED technology to exporting countries. Similarly, it found that the US had corrected the problems of arbitrary discrimination found by the Appellate Body through the adoption of new procedures.

On appeal Malaysia's arguments concerned (i) the nature and extent of the duty of the United States to pursue international cooperation in protecting and conserving endangered sea turtles and (ii) the flexibility of the Revised Guidelines.]

The Nature and the Extent of the Duty of the United States to Pursue International Cooperation in the Protection and Conservation of Sea Turtles

119. * * * In *United States—Shrimp*, we stated that the measure at issue there resulted in "unjustifiable discrimination", in part because, as applied, the United States treated WTO Members differently. The United States had adopted a cooperative approach with WTO Members from the Caribbean/Western Atlantic region, with whom it had concluded a multilateral agreement on the protection and conservation of sea turtles, namely the Inter-American Convention. Yet the United States had not, we found, pursued the negotiation of such a multilateral agreement with other exporting Members, including Malaysia and the other complaining WTO Members in that case.

* * *

122. We concluded in *United States—Shrimp* that, to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries "similar opportunities to negotiate" an interna-

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122. We concluded in *United States—Shrimp* that, to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries "similar opportunities to negotiate" an interna-

tional agreement. Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. The negotiations need not be identical. Indeed, no two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.

123. Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

124. As we stated in *United States—Shrimp*, "the protection and conservation of highly migratory species of sea turtles ... demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations". Further, the "need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations". For example, Principle 12 of the Rio Declaration on Environment and Development states, in part, that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus". Clearly, and "as far as possible", a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT

1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.

* * *

130. * * * The Panel compared the efforts of the United States to negotiate the Inter-American Convention with one group of exporting WTO Members with the efforts made by the United States to negotiate a similar agreement with another group of exporting WTO Members. The Panel rightly used the Inter-American Convention as a factual reference in this exercise of comparison. It was all the more relevant to do so given that the Inter-American Convention was the only international agreement that the Panel could have used in such a comparison. As we read the Panel Report, it is clear to us that the Panel attached a relative value to the Inter-American Convention in making this comparison, but did not view the Inter-American Convention in any way as an absolute standard. Thus, we disagree with Malaysia's submission that the Panel raised the Inter-American Convention to the rank of a "legal standard". The mere use by the Panel of the Inter-American Convention *as a basis for a comparison* did not transform the Inter-American Convention into a "legal standard". Furthermore, although the Panel could have chosen a more appropriate word than "benchmark" to express its views, Malaysia is mistaken in equating the mere use of the word "benchmark", as it was used by the Panel, with the establishment of a legal standard.

131. The Panel noted that while "factual circumstances may influence the duration of the process or the end result, ... any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention." Such a comparison is a central element of the exercise to determine whether there is "unjustifiable discrimination". The Panel then analyzed the negotiation process in the Indian Ocean and South-East Asia region to determine whether the efforts made by the United States in those negotiations were serious, good faith efforts comparable to those made in relation with the Inter-American Convention. In conducting this analysis, the Panel referred to the following elements:

— A document communicated on 14 October 1998 by the United States Department of State to a number of countries of the Indian Ocean and the South-East Asia region. This document contained possible elements of a regional convention on sea turtles in this region.

— The contribution of the United States to a symposium held in Sabah on 15-17 July 1999. The Sabah Symposium led to the adoption of a Declaration calling for the negotiation and implementation of a regional agreement throughout the Indian Ocean and South-East Asia region.

— The Perth Conference in October 1999, where participating governments, including the United States, committed themselves to developing an international agreement on sea turtles for the Indian Ocean and South-East Asia region.

— The contribution of the United States to the Kuantan round of negotiations, 11-14 July 2000. This first round of negotiations towards the conclusion of a regional agreement resulted in the adoption of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the "South-East Asian MOU"). The Final Act of the Kuantan meeting provided that before the South-East Asian MOU can be finalized, a Conservation and Management Plan must be negotiated and annexed to the South-East Asian MOU. At the time of the Panel proceedings, the Conservation and Management Plan was still being drafted.

132. On this basis and, in particular, on the basis of the "contribution of the United States to the steps that led to the Kuantan meeting and its contribution to the Kuantan meeting itself", the Panel concluded that the United States had made serious, good faith efforts that met the "standard set by the Inter-American Convention." In the view of the Panel, whether or not the South-East Asian MOU is a legally binding document does not affect this comparative assessment because differences in "factual circumstances have to be kept in mind". Furthermore, the Panel did not consider as decisive the fact that the final agreement in the Indian Ocean and South-East Asia region, unlike the Inter-American Convention, had not been concluded at the time of the Panel proceedings. According to the Panel, "at least until the Conservation and Management Plan to be attached to the MOU is completed, the United States efforts should be judged on the basis of its active participation and its financial support to the negotiations, as well as on the basis of its previous efforts since 1998, having regard to the likelihood of a conclusion of the negotiations in the course of 2001."

133. We note that the Panel stated that "any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention." In our view, in assessing the serious, good faith efforts made by the United States, the Panel did not err in using the Inter-American Convention as an *example*. In our view, also, the Panel was correct in proceeding then to an analysis broadly in line with this principle and, ultimately, was correct as well in concluding that the efforts made by the United States in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those that led to the conclusion of the Inter-American Convention. We find no fault with this analysis.

134. In sum, Malaysia is incorrect in its contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX requires the *conclusion* of an international agreement on the

protection and conservation of sea turtles. Therefore, we uphold the Panel's finding that, in view of the serious, good faith efforts made by the United States to negotiate an international agreement, "Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination, as identified by the Appellate Body in its Report".

The Flexibility of the Revised Guidelines

* * *

136. Malaysia disagrees with the Panel that a measure can meet the requirements of the chapeau of Article XX if it is flexible enough, both in design and application, to permit certification of an exporting country with a sea turtle protection and conservation programme "comparable" to that of the United States. According to Malaysia, even if the measure at issue allows certification of countries having regulatory programs "comparable" to that of the United States, and even if the measure is applied in such a manner, it results in "arbitrary or unjustifiable discrimination" because it conditions access to the United States market on compliance with policies and standards "unilaterally" prescribed by the United States. * * *

* * *

140. In *United States—Shrimp*, we concluded that the measure at issue there did not meet the requirements of the chapeau of Article XX relating to "arbitrary or unjustifiable discrimination" because, through the application of the measure, the exporting members were faced with "a single, rigid and unbending requirement" to adopt *essentially the same* policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the United States. In contrast, in this dispute, the Panel found that this new measure is more flexible than the original measure and has been applied more flexibly than was the original measure. In the light of the evidence brought by the United States, the Panel satisfied itself that this new measure, in design and application, does not condition access to the United States market on the adoption by an exporting Member of a regulatory programme aimed at the protection and the conservation of sea turtles that is *essentially the same* as that of the United States.

141. As the Panel's analysis suggests, an approach based on whether a measure requires "essentially the same" regulatory programme of an exporting Member as that adopted by the importing Member applying the measure is a useful tool in identifying measures that result in "arbitrary or unjustifiable discrimination" and, thus, do *not* meet the requirements of the chapeau of Article XX. However, this approach is not sufficient for purposes of judging whether a measure does meet the requirements of the chapeau of Article XX. * * *

* * *

143. Given that the original measure in that dispute required "essentially the same" practices and procedures as those required in the United States, we found it necessary in that appeal to rule only that Article XX did not allow such inflexibility. Given the Panel's findings with respect to the flexibility of the new measure in this dispute, we find it necessary in this appeal to add to what we ruled in our original Report. The question raised by Malaysia in this appeal is whether the Panel erred in inferring from our previous Report, and thereby finding, that the chapeau of Article XX permits a measure which requires only "comparable effectiveness".

144. In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination". We, therefore, agree with the conclusion of the Panel on "comparable effectiveness".

* * *

146. We note that the Revised Guidelines contain provisions that permit the United States authorities to take into account the specific conditions of Malaysian shrimp production, and of the Malaysian sea turtle conservation programme, should Malaysia decide to apply for certification. The Revised Guidelines explicitly state that "[if] the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification." Likewise, the Revised Guidelines provide that the "Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations as well as information available from other sources."

147. Further, the Revised Guidelines provide that the import prohibitions that can be imposed under Section 609 do not apply to shrimp or products of shrimp "harvested in any other manner or under any other circumstances that the Department of State may determine, following consultations with the [United States National Marine Fisheries Services], does not pose a threat of the incidental taking of sea turtles." * * * Additionally, Section II.B(c)(iii) states that "[i]n making certifica-

tion determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programmes to protect nesting beaches and other habitat, prohibitions on the direct take of sea turtles, national enforcement and compliance programmes, and participation in any international agreement for the protection and conservation of sea turtles." * * *

148. These provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification. As Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation.

149. We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member, including, of course, Malaysia. Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* Member.

150. We are, therefore, not persuaded by Malaysia's argument that the measure at issue is not flexible enough because the Revised Guidelines do not explicitly address the specific conditions prevailing in Malaysia.

151. Malaysia argues, finally, that the Panel should have scrutinized the decision of the CIT in the *Turtle Island* case and assessed, in the light of that decision, the likelihood and consequences of the Revised Guidelines being modified in the future. According to Malaysia, the Panel should have come to the conclusion that the Revised Guidelines are not flexible enough because the CIT ruled that the part of the Revised Guidelines allowing TED-caught shrimp from non-certified harvesting countries to be imported into the United States is contrary to Section 609. As we have already ruled, we are of the view that, when examining the United States measures, the Panel took into account the status of municipal law at the time, and reached the correct conclusion. The CIT decision in the *Turtle Island* case has not modified the legal effect or the application of the Revised Guidelines; hence, we are not persuaded by this argument of Malaysia. [Eds. Note: The CIT decision was reversed on appeal.]

153. For all these reasons, we uphold the finding of the Panel, in paragraph 6.1 of the Panel Report, that "Section 609 of Public Law 101–162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied".