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**Marine Sea Turtles and Shrimp Trawling: Interplay Between the U.S. Courts and the WTO Panels and Its Effect on the World Shrimp Industry**

By *Takako Morita*\*

**I. Introduction**

The United States is the world's largest consumer of shrimp and shrimp products.<sup>Ø</sup> However, not so many of us consumers realize the implication of our voluminous appetite on the marine ecosystem. The incidental mortality from shrimp trawling is one of the most significant threats to sea turtles today. Every year, thousands of sea turtles worldwide die in shrimp fishing nets.<sup>1</sup> In an effort to curb the death toll on these endangered species, the U.S. National Marine Fisheries Service (the "NMFS") promulgated regulations in 1987 that required all American shrimp trawlers to use Turtle Excluder Devices ("TEDs"). Subsequently, Congress enacted a statute (Public Law No. 101-162, section 609 ("Section 609")) prohibiting importation of shrimp and shrimp products from those countries whose methods of harvesting adversely affect sea turtles. This statute attempts to promote protection of sea turtles world-

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Ø. GLOBEFISH, *Shrimp Market Report - February 2004*, at <http://www.globefish.org/index.php?id=2060> (last visited Sept. 10, 2004).

1. Some estimate that as many as 200,000 to 300,000 turtles are killed as bycatch each year. ELIZABETH KEMF ET AL., WWF, MARINE TURTLES IN THE WILD 15 (2000), available at <http://www.panda.org/downloads/species/WWFturt2.pdf> (last visited Aug. 10, 2004). WWF, an acronym for World Wildlife Fund and World Wide Fund for Nature, is now used as the name of the worldwide organization. WWF, *Who We Are*, at [http://www.panda.org/about\\_wwf/who\\_we\\_are/index.cfm](http://www.panda.org/about_wwf/who_we_are/index.cfm) (last visited Aug. 10, 2004). Therefore, any of the various appellations of the organization are cited simply as WWF.

wide by ensuring that all shrimp sold in the U.S. market<sup>2</sup> are harvested in a turtle-friendly manner. The interpretation of this seemingly simple law has been at the center of debate in at least 10 U.S. federal court cases and four World Trade Organization (the “WTO”) panels.

Part II of this note provides background on how disputes on sea turtle protection and shrimp trade arose, and Part III analyzes significant domestic cases and the WTO panel decisions.

Part IV discusses recent developments since the WTO decision in the United States and Southeast Asia and suggestions for future approaches to bridging the gap between protection of sea turtles and economic activities of seafood production. The note ends with a conclusion in Part V.

## II. Factual and Legal Background

### A. Sea Turtles: Endangered Species

Seven species of sea turtles live and migrate in most parts of the world’s oceans, and their populations have been critically threatened by anthropogenic

causes. To analyze the implication of the unilateral measures taken by the U.S. government to protect these species, one must first understand the legal status and geographical distributions of each sea turtle species. All seven species of sea turtle are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) as being threatened with extinction.<sup>3</sup> The 158 member nations of the CITES are prohibited from trading these turtle species or their parts.<sup>4</sup> All species, except the Australian Flatback, are also listed in Appendices I and II of the Convention on Migratory Species of Wild Animals.<sup>5</sup>

The Kemp’s Ridley (*Lepidochelys kempii*) is the most endangered sea turtle of all seven species.<sup>6</sup> Scientists estimate that only 2,500 nesting females are alive today.<sup>7</sup> Unlike other sea turtle species, it has limited range and nests only along the coastline of the Gulf of Mexico.<sup>8</sup> This turtle is particularly vulnerable to shrimp trawling because it feeds primarily in the shrimping grounds.<sup>9</sup> It was first listed under the Endangered Species Act (the

2. Imported shrimp constitutes approximately 80 percent of the U.S. shrimp market. David Balton, Setting the Record Straight on Sea Turtles and Shrimp, Remarks to the Eleventh Annual Judicial Conference of the U.S. Court of International Trade on Social Justice Litigation: The CIT and WTO (Dec. 7, 1999), available at [http://www.state.gov/www/policy\\_remarks/1999/991207\\_balton\\_turtles.html](http://www.state.gov/www/policy_remarks/1999/991207_balton_turtles.html) (last visited Sept. 1, 2004).

3. WWF, *Marine Turtles*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/index.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/index.cfm) (last updated Jul. 16, 2004).

4. *Id.* Note that CITES controls trade in species and their body parts listed in the Appendices, but it does not regulate trade activities like the shrimping industry that affect the listed species.

5. WTO Dispute Settlement Reports on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, ¶ 2.3 (May 15, 1998), available at <http://docsonline.wto.org> (via search function) (last visited Aug. 10, 2004)[hereinafter WTO 1998a].

6. SEA TURTLE RESTORATION PROJECT, SEA TURTLE FACT SHEET: KEMP’S RIDLEY (2003), available at <http://www.seaturtles.org/pdf/Kemps.pdf> (last visited Aug. 10, 2004).

7. *Id.*

8. WWF, *Kemp’s Ridley Turtles: Introduction*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/kemps\\_ridley\\_turtle/index.cfm/](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/kemps_ridley_turtle/index.cfm/) (last updated Mar. 23, 2004).

9. KEMF ET AL., *supra* note 1, at 15.

“ESA”)<sup>10</sup> on December 2, 1970, and it falls under the International Union for Conservation of Nature (the “IUCN”) status category of critically endangered.

The Hawksbill turtle (*Eretmochelys imbricata*) is another critically endangered species on the IUCN Red List, and has been listed on the ESA as endangered since 1970.<sup>11</sup> The Hawksbill turtle lives in the Caribbean Sea and the Atlantic, Pacific, and Indian oceans, and its nesting grounds are found in more than 60 countries and territories in the tropics.<sup>12</sup>

The Leatherback turtle (*Demachelys coriacea*), the only sea turtle without a shell, has faced local extinction threat in some parts of the world. In particular, the Leatherback populations in the Pacific and the Indian oceans have precipitously declined over the past four decades. In a Malaysian nesting colony, for example, the Leatherback population fell from 3,000 females in 1968 to only two in 1993.<sup>13</sup> Similar loss in population has occurred in Indonesia, Sri Lanka, Thailand, Mexico, and Costa Rica.

According to WWF<sup>14</sup> studies, female Leatherbacks in the eastern Pacific regions dropped from 4,638 in 1996 to 1,690 in 2000, making the Pacific Leatherback population the world’s most endangered sea turtle population.<sup>15</sup> Due primarily to strong protection measures taken, Leatherbacks in South Africa, Trinidad and Tobago, Guyana, Suriname, and St. Croix have seen an increase in the nesting population. However, the world population has declined to the point that it was reclassified as critically endangered in 2000 by the IUCN.<sup>16</sup> In the United States, the Leatherback was listed as endangered under the ESA on June 2, 1970.<sup>17</sup>

The Green turtle (*Chelonia mydas*) has a broad geographical distribution and is found near 139 countries in tropical and subtropical waters.<sup>18</sup> The Green turtle’s important nesting and feeding grounds are found along the coasts of Africa, India, Southeast Asia, and Australia.<sup>19</sup> On July 28, 1978, it was listed on the ESA as endangered in Florida and the Pacific coast of Mexico and as threatened every-

10. 16 U.S.C. § 1531 (1994). Under the ESA and its implementing regulations, taking—including incidental take—of endangered and threatened species, such as sea turtles, is prohibited within the United States, and its territorial and high seas without prior authorization by the Secretary of Commerce or Interior.

11. SEA TURTLE RESTORATION PROJECT, SEA TURTLE FACT SHEET: HAWKSBILL (2003), available at <http://www.seaturtles.org/pdf/hawksbill.pdf> (last visited Aug. 10, 2004).

12. *Id.*

13. WWF, *Leatherback Turtles: Population*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/leatherback\\_turtle/population.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/leatherback_turtle/population.cfm) (last updated Mar. 23, 2004).

14. *See supra* note 1.

15. *Id.*

16. *Id.*

17. SEA TURTLE RESTORATION PROJECT, SEA TURTLE FACT SHEET: LEATHERBACK I (2003), available at <http://www.seaturtles.org/pdf/ACF82B.pdf> (last visited Aug. 10, 2004).

18. SEA TURTLE RESTORATION PROJECT, SEA TURTLE FACT SHEET: GREEN SEA TURTLE I (2003), available at <http://www.seaturtles.org/pdf/Green.pdf> (last visited Aug. 10, 2004) [hereinafter FACT SHEET: GREEN SEA TURTLE].

19. WWF, *Green Turtles: Distribution*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/green\\_turtle/distribution.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/green_turtle/distribution.cfm) (last updated Mar. 23, 2004).

where else.<sup>20</sup> The Green turtle falls under the IUCN category of endangered species, but its Mediterranean population is regarded as critically endangered.<sup>21</sup>

The Loggerhead turtle (*Caretta caretta*) was listed as threatened on June 2, 1970, under the ESA.<sup>22</sup> The Loggerhead is highly migratory and found in around 50 countries in subtropical and temperate regions.<sup>23</sup> Because Loggerhead meat is less in demand and its shell is less prized in the market compared to that of other sea turtles, it faces less threat from direct human harvest and consumption. However, the Loggerhead suffers considerably from fisheries by-catch. The WWF estimates that before TEDs were introduced approximately 50,000 Loggerheads drowned in shrimp nets in the Gulf of Mexico and the Atlantic Oceans.<sup>24</sup> Loggerheads are listed as endangered on the IUCN list.<sup>25</sup>

The Olive Ridley (*Lepidochelys olivacea*) is the most abundant of all the endangered sea turtle species. Unfortunately, however, its population has yet to recover from centuries of massive slaughter for its meat and leather by humans,<sup>26</sup> and thus it

is still listed as critically endangered on the IUCN list.<sup>27</sup> These sea turtles feed primarily on shrimp, jellyfish, crabs, and snails, so they face great threats from shrimp trawlers. Olive Ridelys are found mainly on the north coast of South America, on the coasts of West Africa, Australia, and Southeast Asia, and in the Indian Ocean.<sup>28</sup>

The Flatback turtle (*Natator depressus*) is a threatened species, and is found only around the northern half of Australia and southern parts of Indonesia and Papua New Guinea.<sup>29</sup> Neither Olive Ridley nor Flatback turtles are listed on the ESA because they are not found off the coast of the United States. Since the United States lacks jurisdiction, these two species are not covered under Section 609, the statute at issue in this Note.

## B. Shrimp Trawlers and Sea Turtles

All seven species of sea turtles have been adversely affected by human activities. Some of these threats include consumption of turtle meat and eggs, use of turtle shells for jewelry and trinkets, and destruction of nesting beaches. The most significant threat, however, comes from

20. FACT SHEET: GREEN SEA TURTLE, *supra* note 17, at 1.

21. WWF, *Green Turtles: Introduction*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/green\\_turtle/index.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/green_turtle/index.cfm) (last updated Mar. 23, 2004).

22. SEA TURTLE RESTORATION PROJECT, SEA TURTLE FACT SHEET: LOGGERHEAD (2003), *available at* <http://seaturtles.org/pdf/Logger.pdf> (last visited Aug. 10, 2004).

23. *See* WWF, *Loggerhead Turtles: Distribution*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/loggerhead\\_turtle/distribution.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/loggerhead_turtle/distribution.cfm) (last updated Mar. 23, 2004).

24. *Id.*

25. *Id.*

26. WWF, *Olive Ridley Turtles: Threats*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/olive\\_ridley\\_turtle/threats.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/olive_ridley_turtle/threats.cfm) (last updated Mar. 23, 2004).

27. *Id.*

28. WWF, *Olive Ridley Turtles: Population & Distribution*, at [http://www.panda.org/about\\_wwf/what\\_we\\_do/species/what\\_we\\_do/flagship\\_species/marine\\_turtles/olive\\_ridley\\_turtle/population\\_distribution.cfm](http://www.panda.org/about_wwf/what_we_do/species/what_we_do/flagship_species/marine_turtles/olive_ridley_turtle/population_distribution.cfm) (last updated Mar. 23, 2004).

29. KEMF ET AL., *supra* note 1, at 12.

incidental capture and drowning of sea turtles in shrimp nets.<sup>30</sup> By 1979, many countries participating at the World Conference on Sea Turtle Conservation had identified shrimp trawls as a major source of sea turtle mortality in their countries.<sup>31</sup> Shrimp trawling occurs in tropical and subtropical coastal waters where sea turtles are often found.<sup>32</sup> Sea turtles are air-breathing reptiles, so those turtles caught in submerged trawl nets often drown before shrimpers pull the nets out of the water. In 1981, to reduce turtle mortality from shrimp trawling, the NMFS invented a specially designed net with a grid of metal bars with an escape door, called TEDs. These devices allow large marine creatures, like turtles and sharks, to escape from trawl nets through an opening, while keeping shrimp in the net.<sup>33</sup> According to the Turtle Island, an estimated 100,000 turtles had been captured annually worldwide before several

countries adopted the use of TEDs.<sup>34</sup> Every year since the mid-1980s, the NMFS has tested new and existing TED designs and has shown that TEDs can reduce turtle mortality from shrimping by 97 percent and finfish and other by-catch by 50 percent to 60 percent with minimal loss of shrimp.<sup>35</sup> TEDs also save fuel and lower costs of fishing operations by reducing net drags.<sup>36</sup> The cost of installing TEDs ranges from \$50 to \$400 for each shrimp net.<sup>37</sup> As of February 2002, the NMFS, together with the State Department, had helped 40 shrimp supplying nations<sup>38</sup> to develop comparable TED programs.<sup>39</sup>

### C. Section 609

The NMFS' efforts during the early 1980s to distribute and encourage shrimp fishers to voluntarily adopt the use of TEDs could not achieve the intended result.<sup>40</sup> On June 29, 1987, pursuant to the ESA, the Department of Commerce

30. WTO 1998a, *supra* note 5, ¶ 2.5. The panel cited a study conducted by the National Academy of Sciences in the Gulf of Mexico and the Atlantic Ocean to conclude that incidental capture and drowning by shrimp trawlers constituted the most significant cause of sea turtle mortality.

31. Deborah Crouse, *Guest Editorial: The WTO Shrimp/Turtle Case*, MARINE TURTLE NEWSLETTER, Jan. 1999, at 1, available at <http://www.seaturtle.org/mtn/PDF/MTN83.pdf> (last visited Sept. 1, 2004).

32. Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 762 (2001).

33. Nat'l Marine Fisheries Service, *Turtle Excluder Devices*, at [http://www.nmfs.noaa.gov/prot\\_res/PR3/Turtles/TEDS.html](http://www.nmfs.noaa.gov/prot_res/PR3/Turtles/TEDS.html) (last visited Aug. 10, 2004).

34. SEA TURTLE RESTORATION PROJECT, QUESTIONS & ANSWERS (Apr. 2002), available at <http://www.seaturtles.org/pdf/Q&A.pdf> (last visited Aug. 10, 2004).

35. Center for Int'l Env't'l L., et al.'s Amicus Brief to the Appellate Body on United States—Import Prohibition of Certain Shrimp and Shrimp Products at

7, WTO Case No. 58 and 61 (1998), available at <http://ciel.org/Publications/shrimpturtlebrief.pdf> (last visited Sept. 1, 2004) [hereinafter Amicus Brief].

36. *Id.* at 9.

37. The Trade and Environment Database, *TED Case Studies: Asia - US Turtle Dispute*, § 2 at <http://www.american.edu/TED/shrimp3.htm> (last visited Aug. 17, 2004).

38. These include the two WTO complainants, India and Thailand.

39. Gaines, *supra* note 31, at 764-65. The U.S. legislation and implementing regulations emphasized the use of TEDs because other measures to protect sea turtles, such as protection of nesting beaches or bans on the harvest of sea turtle eggs and shells, had proven ineffective in protecting juvenile and adult sea turtles. The United States explained before the WTO panel in 1998 that of the then existing available measures to protect sea turtles, only the use of TEDs could effectively protect large juvenile and adult turtles. WTO 1998a, *supra* note 5, ¶ 3.19.

40. 52 Fed. Reg. 24,244 (June 29, 1987).

promulgated regulations requiring all large U.S. shrimp trawlers operating in areas where there is a likelihood of incidentally capturing sea turtles to use TEDs, and requiring smaller trawlers to either use TEDs or reduce tow time of the trawl net.<sup>41</sup> These regulations received mixed responses. On the one hand, U.S. shrimp industry representatives were concerned about the unfair advantages given to shrimp trawlers participating in the lucrative U.S. shrimp market that are from exporting nations that do not require the use of TEDs.<sup>42</sup> On the other hand, scientists and environmentalists warned that given the highly migratory characteristic of sea turtles, the U.S. measures by themselves would be insufficient to effectively protect sea turtle populations world-

wide.<sup>43</sup> Consequently, the shrimp industry and environmentalists formed a coalition to support the unilateral import prohibition proposed in Section 609, which was passed on November 21, 1989 by Congress as a rider to the Department of Commerce annual appropriations bill. Section 609 requires all wild shrimp and shrimp products imported into the United States be harvested by trawlers with TEDs or similar methods of achieving comparable level of sea turtle protection.<sup>44</sup> Therefore, to avoid a trade embargo, shrimp harvesting nations needed to either be certified by the Department of State or show that their shrimp-fishing environment does not pose a threat to sea turtles. Section 609 also directed the Secretary of State to initiate negotiations

41. *Id.*; see also 50 C.F.R. §§ 223.206, 223.207 (2001). These regulations protect five species of sea turtles living in the area of concern: Loggerhead, Kemp's Ridley, Green, Leatherback, and Hawksbill.

42. See Crouse, *supra* note 30.

43. In addition, if U.S. shrimpers have to compete with foreign shrimpers whose governments do not require TEDs, there is a great incentive or temptation not to use TEDs on the part of the U.S. shrimpers to remain competitive in the shrimp market.

44. Section 609 is also known as the Turtle-Shrimp Law, and was codified as a note (Conservation of Sea Turtles; Importation of Shrimp) to 16 U.S.C. § 1537, a section in the ESA addressing international cooperation. Relevant provisions of Section 609 include:

(a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987 — . . . .

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering

into bilateral and multilateral treaties with such countries to protect such species of sea turtles; . . .

(5) . . . . provide to the Congress by not later than one year after the date of enactment of this section — (A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles; (B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and (C) a full report on —

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) In general. — The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except [those shrimp or products that are certified by the President].

(2) Certification procedure. The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress no later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a reg-

with other nations for bilateral or multi-lateral agreements for the protection of sea turtles.<sup>45</sup> These regulations became effective on May 1, 1990. As will be discussed below, because implementation of Section 609 has effects far beyond the United States territorial waters, the provision has been the subject of dispute since its enactment.

### III. Interpretation of Section 609: Domestic and International Battles

#### A. The State Department's Efforts to Implement Section 609 and the Court of International Trade Decisions

In 1991, the State Department issued guidelines interpreting Section 609 as applying only to shrimp shipments from the Wider Caribbean and Western Atlantic region, and requiring shrimp exporting nations in this region<sup>46</sup> to phase in the appropriate regulatory programs by 1994 to avoid an embargo on shrimp and shrimp products (the "1991 Guidelines").<sup>47</sup> In February 1992, the Earth Island Institute ("Earth Island")

along with a coalition of environmental and animal rights groups filed a lawsuit in the Northern District of California challenging the 1991 Guidelines as having an application that is too restricted in scope. Both the district court and the Ninth Circuit dismissed the claim because they lacked subject-matter jurisdiction to address this issue.<sup>48</sup>

In 1993, the State Department revised the 1991 Guidelines, but the scope of Section 609 application remained restricted to the 14 countries in the wider Caribbean and western Atlantic region.<sup>49</sup> Some of the significant revisions in the 1993 Guidelines include a requirement to use TEDs on all shrimp trawl vessels to receive certification and the elimination of the formerly existing option for obtaining a certification from the State Department by showing commitment to preventing sea turtle by-catch and developing an alternative program to TEDs.<sup>50</sup> Earth Island refiled a suit in the Court of International Trade (the "CIT"), challenging the limited scope and asking

ulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting;

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

The President subsequently delegated to the Secretary of State the authority to make certification pursuant to this section. 56 Fed. Reg. 357 (Jan. 4, 1991).

45. 16 U.S.C. § 1537(b) (2000).

46. These countries include Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil. See

Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines, 56 Fed. Reg. 1051 (Jan. 10, 1991).

47. *Id.* The State Department also decided that Section 609 does not apply to aquaculture-raised shrimp since the harvesting of such shrimp does not adversely affect sea turtles. The 1996 revised guidelines further expanded the Section 609 exemption to include imports of shrimp that are harvested in waters where sea turtles do not exist. 61 Fed. Reg. 17,342 (Apr. 19, 1996).

48. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993) [hereinafter *Earth Island Inst.* I].

49. Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015 (Feb. 18, 1993) [hereinafter 1993 Guidelines].

50. *Id.*

the court to interpret Section 609 to apply worldwide.<sup>51</sup> The CIT held that the State Department was “not properly enforcing . . . Section 609(b) by restricting its mandate to the Gulf of Mexico-Caribbean Sea-Western Atlantic Ocean”<sup>52</sup> because there were no geographical restrictions set in the text of Section 609. The court also ordered the State Department to prohibit by May 1, 1996,<sup>53</sup> all importation of shrimp and shrimp products<sup>54</sup> that were harvested in the wild in a way that adversely affected the sea turtles protected by the regulations.<sup>55</sup> The United States petitioned for a one-year extension to allow newly affected foreign nations adequate time to develop sea turtle protection programs; however, the CIT denied this request.<sup>56</sup> As a result, in February 1996, the Clinton Administration warned 49 of 70 shrimp exporting partners that they may be subject to embargo if they failed to satisfy the Section 609 require-

ments. The State Department complied with the court order and on April 30, 1996, certified 36 shrimp exporting nations as either having the necessary system that required the use of TEDs or harvesting shrimp in a manner that did not adversely affect sea turtles.<sup>57</sup> Thus all other nations not certified by the State Department were prohibited from exporting wild-caught shrimp to the United States effective May 1, 1996.<sup>58</sup>

In 1996, the State Department, in response to the CIT decision, also revised the guidelines implementing Section 609(b).<sup>59</sup> The 1996 Guidelines required all shipments of shrimp and shrimp products into the United States, regardless of country of origin, to either be accompanied by a declaration<sup>60</sup> that the shrimp was harvested under conditions not adverse to sea turtles<sup>61</sup> or be harvested in waters subject to the jurisdiction of a

51. *Earth Island Inst. v. Christopher*, 19 Ct. Int'l Trade 1461 (1995) [hereinafter *Earth Island Inst. II*].

52. *Id.* at 1485.

53. At the time of the decision, the National Fisheries Institute, a U.S. trade organization, estimated that the embargo would ban import of \$200 million to \$500 million worth of shrimp annually. Sea Turtle Restoration Project, WTO: *The Story of the WTO Versus the Sea Turtles*, at <http://www.seaturtles.org/progBackground.cfm?campaignBackgroundID=14> (last visited Sept. 1, 2004).

54. This extension of Section 609's scope is significant because most shrimp production takes place in the Pacific region. See Helga Josupeit, GLOBEFISH, An Overview on the World Shrimp Market (Sept. 2001) (unpublished PowerPoint presentation on file with *West-Northwest*, formerly available at <http://www.globefish.org>).

55. *Earth Island Inst. II*, 19 Ct. Int'l Trade at 1486.

56. *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 460 (1996) [hereinafter *Earth Island Inst. III*].

57. Shrimp Import Certifications Pursuant to Section 609 of Public Law 101-162, 62 Fed. Reg. 4,826 (Jan. 31, 1997).

58. *Id.*

59. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (Apr. 19, 1996) [hereinafter 1996 Guidelines].

60. DSP-121 forms, which are now being replaced by the DS-2031 forms.

61. The 1996 Guidelines define “shrimp or shrimp products harvested in conditions that does not affect sea turtles” as: a) shrimp harvested in an aquaculture facility; b) shrimp harvested by commercial shrimp trawl vessels using TEDs with comparable effectiveness to the TEDs 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 . . . would not require TEDs”; and d) shrimp harvested in areas where sea turtles do not occur. 1996 Guidelines, *supra* note 59.

nation that is already certified under Section 609.<sup>62</sup> The 1996 Guidelines are significant in at least two aspects: (1) they extended the scope of Section 609 from regionwide to worldwide, and (2) they permitted, for the first time, importation of shrimp from waters of uncertified nations so long as the exporter presented a declaration for each shipment. Earth Island challenged this new interpretation in the CIT, arguing that this shipment-by-shipment certification approach discouraged countries from implementing programs requiring the use of TEDs.<sup>63</sup> The CIT agreed with the environmental group and found that a Section 609(b)(1) embargo should be applied on a nation-by-nation basis, rather than a shipment-by-ship-

ment basis.<sup>64</sup> Shortly before the CIT issued its first ruling, however, Earth Island attempted to withdraw its motion to enforce Section 609.<sup>65</sup> The court denied its motion to withdraw, and ultimately held in favor of the plaintiffs. Later the same year in *Earth Island Institute v. Christopher*,<sup>66</sup> the CIT held that the State Department could not allow importation of shrimp or shrimp products harvested by vessels of nations that were not certified in accordance with Section 609. The United States appealed from these two 1996 CIT orders and in 1998, the Federal Circuit vacated both orders.<sup>67</sup> In August 1998, the State Department reinstated its position<sup>68</sup> to permit the importation of shrimp, even from uncertified nations as

62. Certified nations include (1) any harvesting nation where no relevant species of sea turtles occur in waters subject to its jurisdiction, (2) any harvesting nation that harvests shrimp by means that do not adversely affect sea turtles, and (3) any nation whose trawling operations take place only in waters subject to its jurisdiction where sea turtles are not found. The 1996 Guidelines also required that the State Department certify harvesting nations annually upon showing by the government of evidence of (a) a regulatory program that is comparable to that of the United States and (b) an average take rate of incidental taking that is comparable to the average take rate by U.S. vessels in such shrimp harvesting. *Id.*

63. *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 1221 (1996) [hereinafter *Earth Island Inst. IV*]. A shipment-by-shipment certification is problematic because in areas with heavy shrimping activities, presence of even a few trawlers without TEDs can drown significant numbers of turtles, undermining the efforts by those shrimpers who do use TEDs. This approach also makes it "virtually impossible to verify the reliability of certificates issued in many nations where public officials are poorly paid and the pressure to certify for export to the US market is intense." *See supra* text accompanying note 31.

64. *Id.* at 1229-30. The court first reasoned that the language of Section 609(b)(1) should be read

in conjunction with other parts of Section 609—because Section 609(a) directed the Secretary of State to engage in negotiations with foreign *nations* and Section 609(b)(2) required the President to determine the comparability of foreign *nations'* existing conservation programs, the court concluded that the prohibition should also be determined on a nation-by-nation basis. The court also stated that since Section 609 is codified as part of the ESA, it should be read in *pari materia* with the ESA and every effort should be put into halting and reversing the "trends towards species extinction, whatever the costs." *Id.* at 1231.

65. *Id.* Earth Island, lacking confidence to win based on then existing evidence, attempted to withdraw in order to preserve its right to gather further evidence and to challenge the 1996 Guidelines in a separate action.

66. *Earth Island Institute v. Christopher*, 20 Ct. Int'l Trade 1389, 1394 (1996) [hereinafter *Earth Island Institute V*].

67. *Earth Island Institute v. Albright*, 147 F.3d 1352, 1358 (Fed. Cir. 1998).

68. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094 (Aug. 28, 1998) [hereinafter 1998 Guidelines]; *see infra* text accompanying note 111.

long as they were harvested with TEDs, and allow for importation on a shipment-by-shipment basis.<sup>69</sup>

### **B. The State Department's and the NMFS' Efforts to Carry Out Their Mandate Under Section 609**

While the interpretation of Section 609 was disputed in the judicial system, the State Department and the NMFS attempted to carry out their mandate under Section 609 by launching an intensive training and transfer of TEDs and towing techniques to the wider Caribbean and western Atlantic region in 1991.<sup>70</sup> Within three years, every affected nation in this region had in place a necessary legal scheme<sup>71</sup> and all shrimp trawlers were required to use TEDs. The State Department certified every nation in the wider Caribbean and western Atlantic region, allowing them to continue to export shrimp to the United States without facing the threat of an embargo.<sup>72</sup>

The State Department also made an effort to engage in negotiations to develop multilateral agreements to protect and conserve sea turtles as required by

Section 609(a). In 1993, the United States initiated negotiations with Mexico to broaden the efforts to protect sea turtles throughout the Western Hemisphere.<sup>73</sup> On December 1, 1996, this effort culminated in the establishment of the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "IAC"), in which 23 countries participated in the treaty negotiations.<sup>74</sup> The IAC is the only international treaty existing thus far<sup>75</sup> dedicated exclusively to the protection of sea turtles. It was intended to fulfill all of Section 609's requirements, and thus participation in the treaty and its ratification meant an automatic qualification for Section 609 certification by the State Department.<sup>76</sup>

### **C. Conflicts over the Application of Section 609 in WTO**

#### **1. 1998 WTO Dispute Panel Decision**

On October 8, 1996, while the 1996 CIT interpretation of Section 609<sup>77</sup> was pending on appeal in the Federal Circuit, a group of newly affected nations that were prohibited from exporting certain shrimp and shrimp products to the United

69. The shipment-by-shipment approach had not been reinstated when the shrimp embargo issue was argued before the May 1998 WTO dispute panel or the October 1998 appellate body. WTO Dispute Settlement Reports on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, ¶ 5 (Oct. 12, 1998), available at <http://docsonline.wto.org/> (via search function) (last visited Aug. 10, 2004) [hereinafter WTO 1998b].

70. Gaines, *supra* note 32, at 766.

71. These countries all require the use of TEDs country-wide.

72. Gaines, *supra* note 32, at 766.

73. Sea Turtle Restoration Project, *Inter-American Convention for the Protection and Conservation of Sea Turtles*,

available at <http://www.seaturtle.org/iac/intro.shtml> (posted Aug. 27, 2003; updated May 6, 2003).

74. *Id.*

75. For more recent development on IAC, see *infra* text accompanying note 166.

76. Sali Jayne Bache, *A View of the Inter American Convention for the Protection and Conservation of Sea Turtles from Down Under*, in PROCEEDINGS OF THE TWENTIETH ANNUAL SYMPOSIUM ON SEA TURTLE BIOLOGY AND CONSERVATION 121-22 (Andrea Mosier, Allen Foley, & Beth Brost, compilers, 2002). Ironically, the successful negotiations and establishment of the treaty are some of the causes of dispute at the WTO panel in 1998.

77. *Earth Island Inst. V.*, 20 Ct. Int'l Trade at 1389, *supra* note 65; see also *supra* text accompanying notes 67-70.

States under Section 609—India, Malaysia, Pakistan, and Thailand<sup>78</sup>—requested consultation pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”) and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).<sup>79</sup> After unsuccessful consultation, these four countries requested the Dispute Settlement Body (the “DSB”) to establish a panel (the “Panel”) to examine, under Article 6 of the DSU and Article XXIII:2 of GATT 1994, the U.S. laws and regulations that impose embargo on certain shrimp and shrimp products.<sup>80</sup> On April 10, 1997, the Panel was convened.<sup>81</sup>

India, Malaysia, Pakistan, and Thailand asked the Panel to find that Section 609 and its implementing guidelines (1) were contrary to Articles, XI: 1<sup>82</sup> and XIII:1<sup>83</sup> of GATT 1994, (2) do not fall

under the exceptions under Article XX(b) and (g) of GATT 1994,<sup>84</sup> (3) impaired benefits accruing to them within the meaning of Article XIII:1(a) of GATT 1994,<sup>85</sup> and (4) were contrary to Article I:1<sup>86</sup> of GATT 1994. Specifically, India asked the Panel to recommend that the United States remove its embargo, while Malaysia, Pakistan, and Thailand asked the Panel to recommend that the United States modify Section 609 and its guidelines so that the United States complies with its obligations under GATT 1994.<sup>87</sup> The United States, on the other hand, asked the Panel to find that U.S. laws and guidelines fell within the exceptions set forth in Article XX(b) and (g).<sup>88</sup> On April 6, 1998, the Panel issued its final findings that the wording of Section 609 and its interpretation by the CIT constituted an impermissible “prohibition or restriction” under Article XI:1,<sup>89</sup> and that because the statute and its regulations were “unjustifi-

78. Thailand, Malaysia, and India fall within the top six shrimp catching nations in the world. Thailand is also the world’s major shrimp exporter, producing approximately 250,000 metric tons in 2000, with India following closely behind. These three countries, however, were not the only affected countries—for example, United States continued to reject shrimp and its products from Indonesia in 1999 because it still failed to meet the required standards. See *Indonesia Shrimp Exports Drop 11 percent in 1998*, THE JAKARTA POST., Mar. 11, 1999.

79. WTO 1998a, *supra* note 5, ¶ 1.1.

80. *Id.* ¶ 1.2. By the time the Panel heard the case, 43 shrimp harvesting nations had been certified by the State Department. One of these nations was Thailand, which became certified on November 8, 1996. See 61 Fed. Reg. 59,482 (Nov. 22, 1996). Thailand was the biggest shrimp exporter to the United States from 1996 to 1999. Despite its status as a certified nation, Thailand continued to remain as a party to the WTO dispute, arguing that the U.S. law violated Thailand’s sovereign rights to determine ways of harvesting

shrimp in its own waters. Crouse, *supra* note 31.

81. WTO 1998a, *supra* note 5, ¶ 1.5.

82. Article IX deals with the General Elimination of Quantitative Restrictions.

83. Article XIII is on Non-discriminatory Administration of Quantitative Restrictions.

84. Article XX allows trade restrictions if they are (b) measures necessary to protect animal life or health, or (g) relate to the “conservation of exhaustible natural resources.”

85. WTO 1998a, *supra* note 5, ¶ 3.1.

86. Article I:1 of GATT 1994 discusses the “most-favoured-nation” principle. This fourth point was made by India, Pakistan and Thailand only.

87. WTO 1998a, *supra* note 5, ¶ 3.2.

88. *Id.* ¶ 3.3.

89. *Id.* ¶ 7.17. The Panel did not address the parties’ arguments that Section 609 violated Articles I:1 and XIII:1 because it already found that Section 609 violated Article XI:1. *Id.* ¶ 7.23.

able discrimination,” they fell outside the scope of measures permitted under the Chapeau of Article XX.<sup>90</sup> The DSB adopted the Panel’s report on May 15, 1998.<sup>91</sup>

## 2. 1998 WTO Appellate Body Decision

On July 13, 1998, the United States notified the WTO of its decision to appeal from the Panel’s decision pursuant to paragraph 4 of Article 16 of the DSU.<sup>92</sup> The two main arguments of the United States were that (1) the Panel erred in finding that it could not accept unrequested submissions from nongovernmental organizations and (2) the Panel erroneously held that Section 609 fell outside the scope of Article XX by misinterpreting the term “unjustifiable discrimination.”<sup>93</sup> The Appellate Body reversed the Panel’s findings on many key points. First, it reversed the Panel’s finding that accepting unsolicited information from nongovernmental sources is incompatible with the provisions of the DSU.<sup>94</sup> Second, the Appellate Body reversed the Panel’s finding that the U.S. measures under Section 609 and its implementing regula-

tions do not fall within the scope of measures permitted under the Chapeau of Article XX.<sup>95</sup> To reach this conclusion, the Appellate Body applied a two-tiered analysis: first determine whether the trade measures adopted by a particular member nation can be provisionally justified under the specific exceptions outlined in paragraphs (a) through (j) of Article XX, then assess whether such trade measures meet the requirements of the Article XX Chapeau.<sup>96</sup>

Under this analysis, Section 609 was “relating to the conservation of exhaustible natural resources” for the purposes of an Article XX(g) exception.<sup>97</sup> Despite its finding that Section 609 could meet the Article XX(g) exception requirement, the Appellate Body ultimately held that U.S. law and regulations failed under the second prong of the two-tiered analysis. Under this part of the analysis, the Appellate Body considered whether the measure adopted by the United States constituted (1) an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or

90. *Id.* ¶ 7.62.

91. For a more detailed discussion of the Panel’s decision, see Renata Benedini, *Complying with the WTO Shrimp-Turtle Decision*, in *RECONCILING ENVIRONMENT AND TRADE* 413, 421-24 (Edith Brown Weiss & John H. Jackson eds., 2001).

92. WTO 1998b, *supra* note 68, ¶ 8

93. *Id.* ¶¶ 10-19.

94. *Id.* ¶ 110. This finding is significant because before this decision, only member nations as a state had standing to bring a case and participate in a dispute.

95. *Id.* ¶¶ 122-123.

96. *Id.* ¶ 118 (citing WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline,

WT/DS2/AB/R, ¶ 4.1 (Apr. 29, 1996)).

97. The Appellate Body first held that living resources and species are just as finite as mineral and other non-living resources, and thus may fall within the Article XX(g) exception. *Id.* ¶ 128. Second, it held that five species of sea turtles covered by Section 609 are “exhaustible” because they are all listed in Appendix I of the CITES. *Id.* ¶ 132. Third, the Appellate Body noted that both Section 609(b)(1) and (b)(2) are narrowly focused and directly relate to the goal of conserving sea turtles. *Id.* ¶¶ 137-42. Fourth, it held that Section 609 is an even-handed measure imposing similar requirements and penalties on the U.S. shrimp trawlers as those on foreign shrimp trawlers. *Id.* ¶ 144. Because the Appellate Body found that Section 609 was within the terms of Article XX(g), it did not decide whether it also fell within Article XX(b). *Id.* ¶ 146

(2) a disguised restriction on international trade.<sup>98</sup> First, although the language of Section 609 itself does not mandate other WTO members to adopt specific policies and enforcement practices, the 1996 Guidelines do use mandatory language (“certification *shall be* made”) and specify “the only way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B).”<sup>99</sup> Therefore, the implied purpose of Section 609 was to “establish a rigid and unbending standard” for the United States to determine grant or denial of certification, without considering the measures and practices that other countries may have already adopted to protect sea turtles.<sup>100</sup> Second, the Appellate Body found that discrimination occurred because the United States failed to do two things: (1) engage in multilateral agreements with any of the complainants before imposing the import prohibition,<sup>101</sup> even though it had diligently negotiated with some other members and had entered into the IAC,<sup>102</sup> and (2) give the same length of “phase-in” period to all

shrimp exporters to come into compliance with the Section 609 requirements. Under the 1991 and 1993 Guidelines, the 14 countries in the wider Caribbean and western Atlantic region<sup>103</sup> had a phase-in period of three years during which the shrimp industry could adjust to the new TEDs requirements. All the other members of the WTO, however, had only four months to adjust to the new changes made by the CIT court order in 1995.<sup>104</sup> Third, the Appellate Body highlighted the fact that the United States had made “observable . . . differences in the levels of effort” to transfer TED technology to other countries. As discussed earlier,<sup>105</sup> considerably more effort was made to implement TEDs in shrimp vessels in the wider Caribbean and western Atlantic region than in other exporting countries.<sup>106</sup> Fourth, the Appellate Body expressed skepticism and criticized the lack of transparency under Section 609 because there seemed to be no way of guaranteeing that the statute or its implementing regulations were applied in a fair and just man-

98. *Id.* ¶ 150.

99. *Id.* ¶¶ 161-62; *see supra* note 59 for the 1996 Guidelines (emphasis added).

100. *Id.* ¶ 163. The Appellate Body emphasized that although it may be acceptable for the U.S. government to impose uniform strict requirements on the domestic shrimping industry, it is not acceptable in international trade relations for one WTO member to use an economic embargo and prohibitions to require other members to adopt the same policy to achieve its policy goal without properly considering the varying factors found in those other member countries. The Appellate Body advocated a shipment-by-shipment approach, which examines how a given shipment of shrimp is harvested, instead of a nation-by-nation approach, which requires all shrimp trawling vessels in a particular country to use TEDs to qualify for certification. *Id.* ¶ 164.

101. *Id.* ¶ 166. David Balton, the director of the

Office of Marine Conservation in the State Department, however, stated that the United States had proposed several times since 1996 to the governments in the Indian Ocean region that they enter into negotiations to protect sea turtles in that region, but did not received positive responses from any of these governments. David Balton, Remarks to the Eleventh Annual Judicial Conference of the U.S. Court of International Trade on Social Justice Litigation: The CIT and WTO (Dec. 7, 1999), *available at* [http://www.state.gov/www/policy\\_remarks/1999/991207\\_balton\\_turtles.html](http://www.state.gov/www/policy_remarks/1999/991207_balton_turtles.html).

102. WTO 1998b, *supra* note 69, ¶ 171; *see supra* text accompanying note 74.

103. *See supra* text accompanying note 46.

104. WTO 1998b, *supra* note 69, ¶ 173.

105. *See supra* discussion on page 14 and note 70.

106. WTO 1998b, *supra* note 69, ¶ 175.

ner by the appropriate governmental agencies.<sup>107</sup> Therefore, even though Section 609 could fit under the Article XX(g) exception, its application amounted not only to unjustifiable discrimination, but also arbitrary discrimination “between countries where the same conditions prevail[ed], contrary to the requirements of the Chapeau of Article XX.”<sup>108</sup> The Appellate Body recommended that United States revise the parts of Section 609 that it found to be inconsistent with the Chapeau requirements in order for the United States to conform to its obligation under GATT 1994.<sup>109</sup> The DSB adopted the Appellate Body report on November 6, 1998.<sup>110</sup>

#### D. Actions in the United States After the 1998 WTO Decisions

In August 1998, the State Department revised its Section 609 guidelines to reinstate its policy to allow importation of shrimp harvested with TEDs from uncertified nations.<sup>111</sup> On November 25, 1998, the United States notified the DSB that it

intended to implement the recommendations and rulings of the DSB.

On April, 2, 1999, Earth Island reinitiated a challenge against the State Department’s guidelines in the CIT.<sup>112</sup> The court preliminarily found that the “part of the 1998 Revised Guidelines which constituted the decision to permit importation of TED-caught shrimp from uncertified nations . . . was not in accordance with section 609.”<sup>113</sup> The court, however withheld its judgment until it received the United States’ annual report to Congress on the enforcement of the 1998 Guidelines and its proposal to revise its guidelines.

On July 8, 1999, the State Department revised its 1996 and 1998 Guidelines.<sup>114</sup> To correct the “rigidity” and “inflexibility” of the 1996 Guidelines, the 1999 Guidelines added under section B(d) a provision that allows the State Department to consider such factors as demonstrated differences in foreign shrimping conditions<sup>115</sup> and to deter-

107. *Id.* ¶ 181.

108. *Id.* ¶ 184.

109. *Id.* ¶ 188.

110. WTO Dispute Panel Report on United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/RW, ¶ 1.1 (June 15, 2001) available at <http://docsonline.wto.org> (via search function) (last visited Sept. 1, 2004). [hereinafter WTO 2001a].

111. 1998 Guidelines, *supra* note 68.

112. *Earth Island Inst. v. Daley*, 48 F. Supp.2d 1064 (1999).

113. *Id.* at 1081.

114. WTO Dispute Settlement Proceeding Regarding Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 65 Fed. Reg. 69,118 (Nov. 15, 2000); *see also* Revised Guidelines for the

Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999) [hereinafter 1999 Guidelines].

On January 21, 1999, the United States and WTO complainants agreed that a reasonable period to implement the DSB rulings would be 13 months, ending in December 1999. *Id.* at 36,951. In January 2000, the United States informed the DSB that it had met the 13-month requirement and implemented the recommendations and rulings of the DSB. WTO Dispute Settlement Proceeding Regarding Section 609, 65 Fed. Reg. at 69,119.

115. Due to changes made in the 1999 Guidelines, today shrimp shipments from China, Pakistan, Thailand, and India may be imported into the United States, even though they are not yet certified in accordance with Section 609 by the State Department, because there is sufficient proof that

mine, with the consultation of the NMFS, whether shrimp harvested in “*any other manner or under any other circumstances* [not already listed in subsections (a)-(c)], does not pose a threat<sup>116</sup> of the incidental taking of sea turtles.”<sup>117</sup> Under this analysis, shrimp products may be imported into the United States even if shrimp trawlers use methods not explicitly defined in the statute, as long as they do not pose threats to the turtles.

In response to the WTO finding that Section 609 lacks transparency in its certification process, the State Department made several procedural changes such as notifying certification seekers on a timely basis of all pending and final certification decisions, providing certification seekers a meaningful opportunity to be heard, and presenting any additional information relevant to the pending certification cases. Those nations denied certification would also receive a full explanation of the reasons for the denial.<sup>118</sup> In addition, the 1999 Guidelines reinstated the State

these shrimp were caught manually or by other methods, such as shrimp farming, that do not adversely affect sea turtles. 16 U.S.C. § 1537, note 2 (2000).

116. Today, to obtain approval by the NMFS, TEDs design must be at least 97 percent effective in excluding sea turtles during experimental TED testing session. 50 C.F.R. § 223.207(e) (2001).

117. Determination by the Department of State Regarding Shrimp Imports From the Northern Prawn Fishery of Australia, 65 Fed. Reg. 55,673, 55,673 (Sept. 14, 2000) (emphasis added). Other subsections under section (B) remained relatively unchanged. See note 61 for the 1996 Guidelines.

118. 65 Fed. Reg. at 55,673.

119. This shipment-by-shipment certification policy was reinstated in 1998 after the Federal Circuit vacated the CIT’s earlier interpretation of Section 609. See 1998 Guidelines, *supra* note 68.

120. The 1999 Guidelines were challenged by Turtle Island Restoration Network (“Turtle Island”),

Department’s policy of certifying on a shipment-by-shipment basis regardless of the flag state of the shrimp boat,<sup>119</sup> and required regular examinations of procedures that governments of uncertified nations have put in place to verify the accuracy of the DSP-121 declaration forms.<sup>120</sup>

The United States has also made efforts to negotiate with countries outside the wider Caribbean and western Atlantic region and to provide technical assistance to noncertified nations outside the region. For example, following the issuance of the 1999 Guidelines, the United States made an offer of technical training in the design, development, installation, and operation of TEDs to any government that requested it on a first-come, first-served basis.<sup>121</sup> As of January 17, 2000, the Thai and Pakistani governments had requested technical assistance for reassessing the operations of their shrimp fleets for possible certification and for developing a comprehensive TEDs

a spin off group of Earth Island. The CIT concluded on July 19, 2000, “without reservation that the [environmental groups] prevailed in their argument: that the Department’s policy was inconsistent with the terms of the statute.” The court, however, once again declined to issue injunctive relief to the environmental group, because it deemed that the evidence was insufficient to show that the policy actually harmed sea turtles. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005 (2000) [hereinafter *Turtle Island Restoration Network I*].

121. Status Report by the United States: Addendum, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/15/Add.4, at 2 (Jan. 17, 2000), available at <http://docsonline.wto.org> (via search function) (last visited Sept. 1, 2004) [hereinafter Jan. 2000 Status Report]. These status reports of progress on implementation of recommendations are required pursuant to Article 21.6 of the DSU.

program in Thailand and Pakistan.<sup>122</sup> The United States has invited a group of specialists from the Thai government to the National Marine Fisheries Laboratory in Mississippi for training in the use and maintenance of TEDs.<sup>123</sup>

In October 1998, the State Department renewed its proposal<sup>124</sup> to enter into a negotiation to protect sea turtles in the Indian Ocean region by approaching high-level representatives of the four WTO complainants, and other governments in the region.<sup>125</sup> The U.S. delegates also participated in the Second Association of Southeast Asian Nations ("ASEAN") Symposium and Workshop on Sea Turtle Conservation and Biology, held in Sabah, Malaysia on July 15-17, 1999.<sup>126</sup> The participants adopted the Sabah Declaration, which noted that six of the seven species of sea turtles occur in the waters of the Indian Ocean and Indo-Pacific, and that long-term survival and recovery of these species require cooperation among nations in this region through existing bilateral and multilateral instruments, such as the Turtle Islands Heritage Protection Area (the "TIHPA"),<sup>127</sup> the ASEAN Memorandum of Understanding

("MOU"), the Convention on the Conservation of Migratory Species of Wild Animals, and the South Pacific Regional Environment Programme. The Sabah Declaration also recommended that the ASEAN member governments and other governments throughout the region, as well as any interested nongovernmental organizations, support efforts to negotiate and implement a wider regional agreement for the conservation and management of marine turtle populations and their habitats in the Indian Ocean and Indo-Pacific region.<sup>128</sup>

From October 19-22, 1999, the United States also participated in a workshop on sea turtle conservation hosted by the government of Australia.<sup>129</sup> The participants of this symposium passed a resolution agreeing to hold a further consultation and negotiation in the first half of 2000, aiming at establishing a nonbinding instrument called the "Indian Ocean and South-East Asia Regional Agreement on Conservation and Management of Marine Turtles and Their Habitats."<sup>130</sup> Among several elements, the resolution proposed an instrument that recognizes "widely differing national and sub-regional circumstances, and flexibility to provide for a

122. *See Id.*

123. *Id.*

124. *See supra* text accompanying note 101.

125. WTO Dispute Settlement Proceeding Regarding Section 609, 65 Fed. Reg. at 69,119.

126. Status Report by the United States: Addendum, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/15/Add.1, at 2 (Sept. 8, 2000), *available at* <http://docsonline.wto.org> (via search function) (last visited Sept. 1, 2004) [hereinafter Sept. 1999 Status Report].

127. This is a product of the ASEAN Regional Symposium on Marine Turtle Conservation, partly funded by the WWF-Malaysia. This transboundary

protected area was proposed in 1996 for the purpose of protecting turtle populations in the area. KEMF ET AL., *supra* note 1, at 23, 30; *see infra* text accompanying note 185 for update on the TIHPA.

128. Sept. 1999 Status Report, *supra* note 126, at 3-4. For additional information on more recent developments, see Section IV below.

129. Status Report by the United States: Addendum, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/15/Add.3, at 1 (Nov. 9, 1999), *available at* <http://docsonline.wto.org> (via search function) (last visited Sept. 1, 2004) [hereinafter Nov. 1999 Status Report].

130. *Id.*

range of national and sub-regional approaches to marine turtle conservation,” and that encourages an exchange of expertise and technologies among nations.<sup>131</sup>

The follow-up conference on conservation of sea turtles took place in Kuantan, Malaysia from July 11 to 14, 2000.<sup>132</sup> The 24 participating countries, including the United States and Malaysia, adopted the text of the ASEAN MOU on the Conservation and Management of Marine Turtles of the Indian Ocean and Southeast Asia.<sup>133</sup> Although the ASEAN MOU is not a legally binding instrument, the parties have agreed to negotiate a conservation and management plan, which would be annexed to the ASEAN MOU.<sup>134</sup>

### E. More WTO Disputes Over Implementation of Section 609

On October 12, 2000, Malaysia once again requested the DSB, pursuant to Article 21.5 of the DSU, to establish a panel arguing that the United States' failure to lift an importation ban on Malaysia

violated the November 6, 1998, Appellate Body's recommendations and rulings.<sup>135</sup> Because of the various efforts the United States had put into implementing the recommendations of the Appellate Body, the arbitration panel found in favor of the United States. First, it held that under the first prong of the two-tiered analysis used in the 1998 Appellate Body decision,<sup>136</sup> the implementing measure of Section 609 provisionally complied with the requirements of Article XX(g).<sup>137</sup> Second, the panel found that the United States had made “serious, good faith efforts” to enter into negotiations with the countries in the Indian Ocean and Southeast Asia regions<sup>138</sup> and to address the Appellate Body's concerns regarding the insufficient flexibility in the 1996 Guidelines.<sup>139</sup> The panel concluded that “Section 609 . . . as implemented by the Revised Guidelines of 8 July 1999[<sup>140</sup>] and as applied so far by the U.S. authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings, . . . in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.”<sup>141</sup>

131. *Id.* at 5.

132. WTO 2001a, *supra* note 109, ¶ 5.81.

133. Also known as the Indian Ocean Agreement.

134. WTO 2001a, *supra* note 110, ¶ 5.81. For a more recent development on the ASEAN MOU, see *infra* note 171.

135. *Id.* ¶¶ 1.4, 3.1.

136. See *supra* text accompanying note 96.

137. WTO 2001a, *supra* note 110, ¶ 5.42.

138. *Id.* ¶¶ 5.86-87.

139. *Id.* ¶ 5.104.

140. The panel assumed that the meaning of Section 609 was not changed by the decision of the CIT in *Turtle Restoration Network v. Mallett*, see 110 F. Supp. 2d 1005, *supra* note 120.

141. WTO 2001a, *supra* note 110, ¶ 6.1(b). After the 1998 rulings, turtles became an icon for conservation efforts and the antiglobalization movement. However, unlike the 1998 rulings of the Panel and the Appellate Body, the new 2001 WTO ruling attracted almost no media coverage. Elizabeth R. DeSombre and J. Samuel Barkin suggested that the discrepancy in the media attention occurred because “those campaigning against the WTO's record on trade and environment were loathe to admit that the organization could come up with a positive ruling in what had otherwise appeared to be a string of failures for environmental interests within the realm of free trade.” Elizabeth R. DeSombre & J. Samuel Barkin, *Turtles and Trade: The WTO's Acceptance of Environmental Trade Restrictions*, GLOBAL ENVIRONMENTAL POLITICS, Feb. 2002, at 1, 12.

Malaysia had also argued before the panel that the unilateral imposition of U.S. sea turtle conservation policy on Malaysia violated its sovereign right to promulgate its own environmental and conservation policies.<sup>142</sup> The panel recognized this concern<sup>143</sup> but ultimately referred to the Appellate Body's findings that "while a WTO may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed *comparable* to its own."<sup>144</sup> Thus the panel concluded that if Malaysia wanted to export shrimp to the United States, it would be subject to the requirements imposed by the United States. Although these requirements may distort Malaysia's environmental policy priorities, they would be acceptable because the revised guidelines require only a *comparable* program.<sup>145</sup> The panel, in the end, urged the United States and Malaysia to cooperate with each other in order to reach an agreement, which would protect and conserve sea turtles.<sup>146</sup> It issued its report to the

parties on May 16, 2001, and the DSB adopted the report on June 15, 2001.<sup>147</sup>

On July 23, 2001, Malaysia filed a notification with the DSB of its intent to appeal from the panel's decision.<sup>148</sup> Malaysia argued two main points: (1) in relying on the reasoning of the 1998 Appellate Body, the Panel failed to correctly assess the U.S. measure under the relevant provisions of GATT 1994; and (2) the panel erred in interpreting the Appellate Body's dicta as substantive alternative courses of conduct, fulfillment of which would automatically make the measures not "arbitrary or unjustifiable discrimination."<sup>149</sup> The Appellate Body rejected Malaysia's challenges and upheld the findings of the panel. The Appellate Body concluded that the "[U.S.] measure is now applied in a manner that meets the requirements of Article XX of the GATT 1994" and thus made no further recommendation to the DSB.<sup>150</sup>

#### IV. After All Said and Done, Where Do We Stand Today?

Section 609 and its implementing regulations have been at the center of disputes during the past decade both in domestic and global contexts. This sec-

142. WTO 2001a, *supra* note 110, ¶ 5.102.

143. The panel cited to Principle 12 of the Rio Declaration on Environment and Development: "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on international consensus." *See id.* ¶ 5.103.

144. *Id.* (emphasis added).

145. *Id.*

146. *Id.* ¶ 7.2.

147. WTO 2001a, *supra* note 110, ¶ 1.8.

148. WTO Report of the Appellate Body on United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, ¶ 1 (Oct. 22, 2001), available at <http://docsonline.wto.org> (via search function) (last visited Sept. 1, 2004) [hereinafter WTO 2001b].

149. *Id.* ¶ 15.

150. *Id.* ¶ 154. The DSB adopted the Appellate Body report on November 21, 2001. For more detailed analysis of the panel's decision, see Gaines, *supra* note 32.

tion will analyze the aftermath of the most recent WTO decision and developments in the turtle conservation efforts in the U.S., Caribbean, original WTO complainant nations, and Japan.

### A. What Do WTO Decisions Mean Today?

The shrimp-turtle case brought before the WTO arbitration panels deserves some in-depth analysis. According to the WTO panels, although multilateral agreements and rules are generally preferred,<sup>151</sup> unilateral environmental trade measures imposed by one WTO member may be acceptable under Article XX, as long as there are continuous and serious good faith efforts to reach an agreement with all of that member's trading countries before imposing such measures. The right to impose unilateral measures has several limitations, however. They must be applied to all trading partners equally, especially with respect to the phase-in periods and technological transfers. The member imposing restrictions cannot require other members to implement the same policies and systems; instead, it must consider the conditions of each exporting country to determine whether existing conservation schemes in that country can achieve the same objective as the member country. Following a similar logic, a member may not impose a blanket import prohibition on an exporting nation, because the shipment-by-shipment approach is more narrowly tailored to achieving the objective of protecting sea turtles. In addition, if a mem-

ber does decide to prohibit importation on a certain exporting country, it must provide adequate due process procedures before its decision and an explanation for its decision.<sup>152</sup> The unilateral measures to protect environmental interests have various restrictions; however, this case indicates that even in the trade-driven context of the WTO, one member nation can have significant influence on the conservation policies of other member nations to achieve environmental goals. Although a unilateral move by one nation is generally disfavored, the shrimp-turtle case demonstrates how a threat of unilateral sanctions may motivate some hesitant governments, which would otherwise not come to the table, to come forward and engage in negotiations with other countries to achieve a common goal.

### B. Where Do We Stand Today in the United States?

The disputes over the interpretation of Section 609 continued in U.S. courts throughout the period during which the same issue was disputed before the WTO panels. In 1999, Turtle Island appealed from the CIT's denial of an injunction to immediately halt shipment-by-shipment certification.<sup>153</sup> The Federal Circuit disagreed with the CIT's rationale and found that "there is nothing inherently insensible about applying the negotiation and certification provisions [of Sections 609(a) and (b)(2)] to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other."<sup>154</sup>

151. A third set of participants, including Australia and countries in the European Union also stressed its preference for the multilateral agreement over the unilateral action by one WTO member. WTO 2001b, *supra* note 148, ¶¶ 48, 54.

152. For more detailed discussion, see Tracy P.

Varghese, *The WTO's Shrimp-Turtle Decisions: The Extraterritorial Enforcement of U.S. Environmental Policy Via Unilateral Trade Embargoes*, 8 ENVTL. LAW. 421, 447-55 (Feb. 2002).

153. 48 F. Supp.2d at 1081.

154. Turtle Island Restoration Network v.

The legislative history indicated that Congress, “with remarkable unanimity, was focused on protecting the domestic shrimp industry, not the sea turtle, when it enacted Section 609,” and therefore was concerned with only those foreign trawlers that participated in the U.S. market.<sup>155</sup> Because Congress omitted from Section 609 a provision on explicit nation-by-nation embargoes, even though it had previously included such a provision in other similar statutes, such an omission indicated Congress’ lack of intent to impose this kind of nation-by-nation embargo.<sup>156</sup> Accordingly, the court held that congressional intent<sup>157</sup> was clear and that the State Department’s shipment-by-shipment approach set up in the 1999 Guidelines carried out that intent.<sup>158</sup>

A powerful dissent by Circuit Judge Newman argued that the majority incorrectly interpreted Section 609. First, the statute was enacted in the midst of a widespread recognition of a drastic decline in sea turtle populations worldwide due mainly to incidental capture and drowning in shrimp trawl nets.<sup>159</sup> Judge Newman analyzed the legislative history like the majority of the court, but he concluded that the purpose of Section 609 was not only to ensure domestic fishers’ competitiveness in the U.S. market, but

also to protect sea turtles in their global habitat.<sup>160</sup> Second, although the State Department relied on the 1998 WTO Panel ruling to seek endorsement of its newest 1999 Guidelines, Judge Newman reminded the majority that it is for Congress to decide whether to make such changes in the statute, and not for the State Department or the court to step in and rewrite the statute for the legislators.

In August 2002, the petition for rehearing en banc was denied by the Federal Circuit.<sup>161</sup> Circuit judges Gajarsa and Newman disagreed and argued that an en banc hearing should have been granted because the majority had adopted an unreasonable statutory interpretation and that the State Department had issued inconsistent interpretations of the statute during the previous six years.<sup>162</sup> Turtle Island formally petitioned the U.S. Supreme Court to hear the case in November 2002, arguing that “[w]hile lower courts consistently—and appropriately—found that the Executive Branch must defer to Congress in enforcing such laws, the State Department preferred to follow a course of appeasing foreign fishing interests and trading partners and, ultimately, of reversing its own interpretation of a domestic statute in order to capitulate to a panel decision of the

Evans, 284 F.3d 1282, 1293 (Fed. Cir. 2002) [hereinafter *Turtle Island Restoration Network II*].

155. Id. at 1294-1295.

156. Id. at 1296.

157. Whether legislative intent can correctly be inferred from legislative history is the subject of a heated debate. For example, Justice Scalia in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 617 (1991), stated that committee reports are not a “genuine indicator of congressional intent” because they may not represent the intent of Congress as a

whole and most members of the House or Senate do not read the reports before voting.

158. *Turtle Island Restoration Network II*, 284 F.3d at 1297.

159. Id. at 1299.

160. Id. at 1300.

161. *Turtle Island Restoration Network v. Evans*, 299 F.3d 1373, 1374 (Fed. Cir. 2002) [hereinafter *Turtle Island Restoration Network III*].

162. Id.

WTO.”<sup>163</sup> Although the most recent judgment by the Federal Circuit undercuts efforts made by the environmental groups over the past few decades, their ceaseless challenges have helped clarify the meaning of Section 609 and triggered a global ideological paradigm shift toward protecting sea turtle populations and conserving their habitats worldwide.

Next, a quick discussion of the effectiveness of enforcement in the United States must be made. According to Turtle Island, American shrimpers often purposely disable their TEDs in the false belief that these devices hurt their profits.<sup>164</sup> The environmental group also criticizes the federal government for its lack of monitoring and enforcement of turtle-shrimp law. Because no monitoring system is set by regulation, there is no guarantee that sea turtles were not killed or harmed while harvesting shrimp.<sup>165</sup> A lack of enforcement is evidenced by the continuing high death toll of sea turtles in the United States. In 1999 and 2000, NOAA's Protected Resources Enforcement Team found that as many as 30 percent of

shrimp vessels boarded in Texas alone violated TED laws.<sup>166</sup> To claim success of the objectives of Section 609, its regulations must be effectively enforced in the near future.

### C. Updates on the Turtle Conservation Measures and IAC in the Western Hemisphere

In May 2001, the IAC finally became enforceable in participating countries including the United States, Venezuela, Costa Rica, Nicaragua, Brazil, Peru, Ecuador, Mexico, Uruguay, Belize, the Netherlands, and Honduras.<sup>167</sup> The objective of this treaty is to “promote the protection, conservation and recovery of sea turtle populations and of the habitats on which they depend, based on the best available scientific evidence, taking into account the environmental, socioeconomic and cultural characteristics of the Parties.”<sup>168</sup> The treaty, in Annex III, also requires the use of TEDs in all shrimp vessels operating in areas where sea turtles are likely to be found. This is a promising treaty as it is not only founded on the con-

163. Press Release, Sea Turtle Restoration Project, Environmentalists Petition U.S. Supreme Court to Hear the Case of the Sea Turtles (Jun. 11, 2002), at [http://www.seaturtles.org/press\\_release2.cfm?pressID=149](http://www.seaturtles.org/press_release2.cfm?pressID=149) (last visited Sept. 1, 2004); *cert. denied*, Turtle Island Restoration Network v. Evans, No. 02-700, 2003 U.S. LEXIS 2731, at \*1 (U.S. Apr. 7, 2003).

164. Sea Turtle Restoration Project, *Why Isn't Federal Law Alone Saving the Sea Turtles?*, at <http://web.archive.org/web/20030428112029/64.84.44.17/seaturtles/site/progBackground.cfm?campaignBackgroundID=32> (archived on Apr. 28, 2003, on file with West-Northwest) [hereinafter *Federal Law Not Saving Sea Turtles*].

165. SEA TURTLE RESTORATION PROJECT, CERTIFIED TURTLE-SAFE SHRIMP FACT SHEET, available at <http://www.seaturtles.org/pdf/ACF752.pdf> (last visited Sept. 1, 2004) [hereinafter TURTLE-SAFE

SHRIMP]. A lack of monitoring and enforcement of the TEDs requirement is also problematic in Asia as the evidence shows that shrimp that were not caught with TEDs are often stamped as turtle safe and shipped into the United States under that guise. Natalie M. Henry, *Sea Turtles: WTO Rules in Favor of U.S. Ban on Certain Shrimp Imports*, GREENWIRE, June 21, 2001.

166. *Federal Law Not Saving Sea Turtles*, *supra* note 164.

167. Earthjustice, *Sea Turtles: A Global Traveler on the Brink*, at <http://www.earthjustice.org/regional/international/index.html?show=Sea+Turtles> (last visited Sept. 1, 2004).

168. Inter-American Convention for the Protection and Conservation of Sea Turtles, art. II, available at <http://www.seaturtle.org/iac/english.pdf> (last visited Sept. 1, 2004).

cept of other international accords such as the United Nations Convention on the Law of the Sea, Agenda 21, and the United Nations Conference on the Environment and Development, but it also complies with international instruments, such as CITES and the WTO. At the 12th Conference of Parties to CITES, Ecuador proposed cooperation and synergy between the IAC and CITES to protect sea turtles.<sup>169</sup> The CITES Secretariat adopted this resolution, directing members to increase synergy and corroboration between various regional and international agreements and the IAC to further strengthen existing management mechanisms for the protection of Hawksbill sea turtles in the wider Caribbean region.<sup>170</sup> Although the IAC lacks mechanisms for enforcement or ways to penalize violations of its terms, with the strengthened corroboration with other international agreements and instruments, this treaty will surely be a milestone in the path toward protecting endangered turtles in the Western Hemisphere.

#### **D. A Close-Up Look at Actions in the Pacific**

To better understand the impact of the imposition of unilateral prohibition by the United States, one must learn about the recent developments in the affected countries. In June 2001, 21 countries and

169. Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Twelfth Regular Meeting; Tentative U.S. Negotiating Positions for Agenda Items and Species Proposals Submitted by Foreign Governments and the CITES Secretariat, 67 Fed. Reg. 66,464, 66,470 (Oct. 31, 2002).

170. CITES, Decisions of the Conference of the Parties to CITES in Effect After the 12th Meeting, Nos. 12.44-46 and Annex 3 (Nov. 3-15, 2002), available at <http://www.cites.org/eng/decis/E12-Dec.pdf>

38 states of the Indian Ocean and Southeast Asia regions participated in the negotiations for the MOU on the Indian Ocean Agreement.<sup>171</sup> At the conclusion of the conference, eight of these countries and states<sup>172</sup> signed the agreement.<sup>173</sup> It is a non-legally binding instrument and it consists of six objectives: (1) to identify and document threats to sea turtles and their habitat, (2) to protect their habitat, (3) to improve understanding of these species through research and information exchange, (4) to increase public awareness of threats to turtles and their habitats, (5) to increase cooperation at each level, and (6) to promote implementation of the ASEAN MOU.<sup>174</sup> It also specifically calls for the use of TEDs in shrimp vessels. It is expected that some other participants of the negotiation such as Malaysia, India, South Africa, Saudi Arabia, and the United Arab Emirates will sign the agreement as well.<sup>175</sup> Much remains to be resolved; however, this is certainly a beginning of cooperative efforts to protect and conserve turtle populations and their habitat in the Indian Ocean and Southeast Asia regions.

#### **1. Developments in Malaysia**

Next, we will analyze the ecological and economic profile of Malaysia, a complainant in all of the four WTO disputes over shrimp and shrimp products.

(last visited Sept. 1, 2004).

171. See *supra* text accompanying note 134.

172. These eight countries include the United States, Australia, Tanzania, the Philippines, Sri Lanka, Myanmar, Iran, and Comoros.

173. Natalie M. Henry, *Sea Turtles: Countries Sign Indian Ocean Conservation Agreement*, GREENWIRE, June 29, 2001.

174. *Id.*

175. *Id.*

Malaysia has several laws for protection and conservation of sea turtle populations and their habitats, such as the Wild Life Protection Ordinance of 1998. This Wild Life Protection Ordinance is similar to the ESA and prohibits a person from hunting, killing, capturing, selling, offering for sale, importing, exporting, or possessing “any totally protected animals or any recognizable parts or derivative thereof, or any nest thereof.” Unfortunately, these laws have contributed little to halt the precipitous decline in nesting populations of sea turtles in Malaysia. The WWF-Malaysia estimates that the nesting population of Leatherbacks has fallen by 99 percent<sup>176</sup> since the 1950s and Green turtles by more than 65 percent since the 1960s.<sup>177</sup> Consistent with this lack of enthusiasm for the protection of sea turtles, the Malaysian media portrayed the 2001 WTO rulings as “another victory for powerful developed nations to practise [sic] double standards and selective protectionism, in the name of conservation and the environment.”<sup>178</sup> The article continued its criticisms of U.S. environmental policy by citing to the Bush Administration’s failure to ratify the Kyoto Protocol on greenhouse gas emissions and to meet its obligations under Agenda 21 of the Rio Summit on Environment and

Development stating, “under the new administration of President George W. Bush, the U.S. is even reversing some previous save-the-environment initiatives.”<sup>179</sup>

As the report submitted to the WTO’s original Panel in 1998 indicates, Malaysia’s economy suffered significantly because of the export ban. Due largely to the implementation of Section 609,<sup>180</sup> exports fell 54 percent from US \$9.1 million in 1995 to US \$4.86 million in 1996 and further declined to US \$1.47 million in 1997.<sup>181</sup> Malaysia also needed to find alternative export markets in Europe, Hong Kong, Australia, Japan,<sup>182</sup> and China to compensate for the lost volume of wild shrimp that would have been exported to the United States, had there not been an import prohibition.<sup>183</sup> Upset with this economic impact, an author for the *Business Times (Malaysia)* argued that “[d]enying the country a legitimate source of income is only going to make it that much tougher, regardless of its willingness, to protect the environment.”<sup>184</sup>

Despite its defiance in the trade arena, the Malaysian government participated in several international negotiations. One such notable effort resulted in the establishment of the TIHPA<sup>185</sup> in

176. WWF-Malaysia, *Leatherback Turtle*, at <http://www.wwfmalaysia.org/madaerah/turtles/leatherback.htm> (last visited Sept. 1, 2004).

177. WWF-Malaysia, *Green Turtle*, at <http://www.wwfmalaysia.org/madaerah/turtles/green.htm> (last visited Sept. 1, 2004).

178. *Turning Turtle the Environment*, BUS. TIMES (Malay.), Oct. 25, 2001, Trends Section, at 6.

179. *Id.*

180. WTO 2001a, *supra* note 110, ¶ 3.28.

181. *Id.*; Adeline Ong, *US Embargo on Shrimp Not Consistent with WTO Provisions*, BUS. TIMES (Malay.), Oct. 22,

1998, Nation Section, at 2. In 1997, Malaysia’s export consisted of only aquacultured shrimp. Ong, at 2.

182. However, this effort was hurt by the fact that in Japan, the imports of shrimp had declined from 1995 to 1998 due mainly to an increase in the price of frozen shrimp in producing countries. JAPAN EXTERNAL TRADE ORGANIZATION (JETRO), *SHRIMP AND CRAB, MARKETING GUIDEBOOK FOR MAJOR IMPORTED PRODUCTS I* (2003), available at [http://www.jetro.go.jp/ec/e/market/mgb/data\\_e/1/14.pdf](http://www.jetro.go.jp/ec/e/market/mgb/data_e/1/14.pdf) [hereinafter JETRO].

183. See Ong, *supra* note 181.

184. *Turning Turtle the Environment*, *supra* note 178.

185. See *supra* text accompanying note 127.

2001, the first and only transfrontier protected area for the conservation of turtles, which covers a group of nine islands shared by the Philippines and Malaysia.<sup>186</sup> In addition, Malaysia has completely halted its exports of wild-caught shrimp, and has decided to expand its aquaculture shrimp production from the current amount of 130,000 tons to 600,000 tons by 2010 so that it can become a net exporter again.<sup>187</sup>

Since 1996, the Malaysian government has launched many research projects in Sarawak, Malaysia. Some of these projects include an in situ and hatchery subproject, satellite tracking subproject, and radio or ultrasonic subproject.<sup>188</sup> The most interesting project introduced thus far is the reef ball project. As many as 500 reef balls have been disseminated around the sea turtle nesting areas in Sarawak, and because each of these reef balls has a sharp textured surface that is capable of ripping trawler nets, trawlers have effectively avoided these areas entirely upon receiving a public notice of the reef ball-disseminated areas.<sup>189</sup> A continuing effort to develop local meth-

ods of protecting sea turtles must be made to save the remaining sea turtles found in Malaysia.

## 2. India and Its Current Situation

India, another complainant in the original WTO cases in 1998, is frequented by five turtle species and has the world's largest Olive Ridley nesting grounds. Under statutes such as the 1972 Wildlife Protection Act<sup>190</sup> and 1982 Orissa Marine Fisheries Regulation Act,<sup>191</sup> sea turtles should be provided with protection near their nesting habitats. Moreover, there have been court orders requiring the use of TEDs in shrimp nets. For example, in 1994, WWF-India filed a petition in the Orissa High Court seeking, on behalf of the Bhitarkanika Sanctuary, court orders to protect sea turtles in the vicinity of the sanctuary.<sup>192</sup> On May 14, 1998, the Orissa High Court held that no fishing trawlers may enter the coast of the sanctuary and required all trawlers operating in the vicinity to use TEDs.<sup>193</sup> In addition, the high court ordered that the state government set up a high level committee for the specific purpose of protecting, conserving, and researching sea turtles.<sup>194</sup>

186. Lilybeth G. Ison, *Feature: Help Marine Turtles Survive*, MALAY. GEN. NEWS, June 27, 2001.

187. Eirmalasare Bani, *Malaysia Swims Against Tide Over US Shrimp Import Ban*, BUS. TIMES (Malay.), Oct. 25, 2001, Nation Section, at 2.

188. For more detail on each of these projects, see Oswald Braken Tisen & James Bali, *Current Status of Marine Turtle Conservation Programmes in Sarawak, Malaysia*, in PROCEEDINGS OF THE TWENTIETH ANNUAL SYMPOSIUM ON SEA TURTLE BIOLOGY AND CONSERVATION 12-13 (Andrea Mosier, Allen Foley, & Beth Brost, compilers, 2002).

189. *Id.*

190. The act requires that all sea turtles be protected from capture, destruction, or trade.

191. The act prohibits fishing using mechanized trawlers within five kilometers of the coastline. This requirement, however, is not enforced because there is no patrolling along the coastline in India. Ruben Banerjee, *Olive Ridelys: Saving the Turtle*, INDIA TODAY, Dec. 23, 2002, at 57.

192. The plaintiffs sought to restrain the state of Orissa from constructing any further infrastructure within the sanctuary, provide necessary personnel to protect mangrove forest and endangered species found within and around the sanctuary, and appoint a committee to prepare an Environmental Impact Assessment in and around the Sanctuary. KEMF ET AL., *supra* note 1, at 24.

193. *Id.* at 24-25.

194. *Id.*

Despite the passage of statutes and the issuance of court orders, the decline in nesting populations of sea turtles continues in India due partly to a lack of enforcement. For example, in December 1997, the government made the use of TEDs mandatory for all fishing trawlers; however, not even a single license has been revoked for nonuse of TEDs since the rule's implementation.<sup>195</sup> In 1999, the West Bengal Forest Department reported 13,000 Olive Rيدleys<sup>196</sup> killed in Orissa by fishing trawlers and mechanized shrimp nets.<sup>197</sup> More recently, in 2000, another 17,000 Olive Rيدleys were found dead and in 2001, over 14,000 additional turtles were recorded dead along the Orissa coast.<sup>198</sup>

However, the government of India has taken some steps to ameliorate the situation. An example of earlier efforts by the government to establish regional cooperation includes the Northern Indian Ocean Sea Turtle Workshop, which took place in January 1997.<sup>199</sup> At the end of the workshop, the participants, including turtle experts, government representatives, and nongovernmental organizations

from 10 countries, drafted a comprehensive strategy for the long-term protection of sea turtles in the Northern Indian Ocean.

In December 2002, the Central Institute of Fisheries Technology created an indigenous model of TEDs, addressing the needs of both sea turtles and commercial trawling operations.<sup>200</sup> Thus far, the adoption of these TEDs has posed no immediate threat to the seafood export industry in India. Because these TEDs are locally manufactured and their introduction to the market was accompanied by a press conference attended by various groups, such as fishing vessel operators, fishing net manufacturers, financial institutions, NGOs, and representatives of the fishery research institutes, the adoption of these TEDs by the fishing industry may turn out to be quite successful.<sup>201</sup> In addition to the development of indigenous TEDs, the government has also placed more emphasis on cultured shrimp. In 2000, cultured shrimp consisted of 76 percent of total shrimp exports, while the export of the same product accounted only for 57 percent in 1990.<sup>202</sup>

195. Banerjee, *supra* note 191.

196. Some studies indicate that as many as 80 percent of the turtles that drown in shrimp nets do not wash ashore; therefore, it is possible that as many as 50,000 turtles died in 1999 off the coast of Orissa alone. See PETER FUGAZZOTTO & CHITTA BEHERA, SEA TURTLE RESTORATION PROTECT AND PROJECT SWARAJYA, DEAD TURTLES: GOOD FOR THE GLOBAL ECONOMY? A SHOCKING CASE STUDY OF HOW THE WTO HAS PERPETUATED THE ANNUAL MASSACRE OF 13,000 SEA TURTLES BY INDIA'S SHRIMP TRAWLERS 4 (1999), available at <http://www.sea-turtles.org/pdf/ACFBA.pdf> (last visited Sept. 1, 2004).

197. KEMF ET AL., *supra* note 1, at 25.

198. Banerjee, *supra* note 191.

199. P. Mohanty-Hejmadi, *Trade Restrictions over Turtles*, THE INDEPENDENT, Sept. 2, 1998.

200. *Turtle Excluder Device to Be Transferred to Field*, THE HINDU, Dec. 12, 2002.

201. India, along with its co-complainant Thailand, is back to being one of the main exporters of shrimp and shrimp products in the U.S. market. See US Market, INFOFISH TRADE NEWS, Mar. 18, 2002, available at [http://www.infofish.org/publications/ITN\\_sample\\_copy.pdf](http://www.infofish.org/publications/ITN_sample_copy.pdf) (last visited Sept. 5, 2004) (on file with West-Northwest).

202. *Highlight - Surprising Recovery of the Shrimp Market*, GLOBEFISH HIGHLIGHTS, Dec. 15, 2001, at 3, (at p.19 of PDF) available at <http://www.infofish.org/>

### 3. Japan, the World's Largest Per Capita Consumer of Shrimp Products

Japan has the highest per capita shrimp consumption<sup>203</sup> in the world and is the second largest importer of shrimp and shrimp products, surpassed only by the United States.<sup>204</sup> Japan imports considerable amounts of shrimp and shrimp products<sup>205</sup> from Southeast and South Asia, including Indonesia (21.9 percent), India (19.3 percent), Thailand (8 percent), Malaysia (2 percent), and Sri Lanka (0.4 percent).<sup>206</sup> Therefore, an analysis of the Japanese shrimp market and its existing legal scheme is crucial to understanding the global picture of the shrimp market and its affect on sea turtles. Shrimp importation is subject to numerous laws including Food Sanitation Law, JAS Law,<sup>207</sup> Measurement Law,<sup>208</sup> Containers and Packaging Recycling Law,<sup>209</sup> and Law for Promotion of Effective Utilization of Resources,<sup>210</sup> and yet there is no law comparable to that of Section 609 that

prohibits the importation of shrimp not caught using TEDs. In fact, Kenji Kagawa of the Department of Fisheries in Japan was critical of the United States' unilateral action and stated:

Unilateral action by one country against another in trade is never justified, no matter how good the cause. Many nations negotiated in good faith for many years to establish the World Trade Organization as an arbiter of fair trade measures. The use of TEDs and other conservation measures should be the subject of multilateral agreements and should not be imposed by unilateral fiat.<sup>211</sup>

With little consumer awareness and no system of eco-labeling with respect to seafood, consumers do not know where or how seafood came to their plate even though it is served at almost every meal.<sup>212</sup>

publications/GH sample copy.pdf (last visited Sept. 5, 2004) (on file with West-Northwest).

203. Earth Summit Watch, *Shrimp Sentinel Online: Shrimp Facts*, at [http://www.earthsummitwatch.org/shrimp/shrimp\\_facts/ffconsum.html](http://www.earthsummitwatch.org/shrimp/shrimp_facts/ffconsum.html) (last updated Sept. 2001, as indicated on home page: [www.earthsummitwatch.org](http://www.earthsummitwatch.org)). The Japanese consume an average of 300,000 tons of shrimp and lobsters annually. JETRO *supra* note 182, at 10.

204. Earth Summit Watch, *Shrimp Sentinel Online: National Reports-Japan*, at [http://www.earthsummitwatch.org/shrimp/national\\_reports/crjapa1.html](http://www.earthsummitwatch.org/shrimp/national_reports/crjapa1.html) (last updated Sept. 2001, as indicated on home page: [www.earthsummitwatch.org](http://www.earthsummitwatch.org)) [hereinafter *National Reports-Japan*].

205. Ninety percent of shrimp and shrimp products in Japanese markets is imported. *Id.* at 5.

206. See *Shrimp Imports into Japan in January 2002-Japanese Market*, INFOFISH TRADE NEWS, Mar. 18, 2002 (at p. 17 of PDF).

207. JAS Law requires quality labeling for fresh fishery products sold to consumers—the label should contain information about the name of product, the country of origin, a description of “cultivated” if applicable, and a description of “thawed” if applicable; for processed crab or shrimp products, more information, such as the net content, the preservation method, the importer’s name and the address, and a list of ingredients is required. JETRO, *supra* note 182, at 8.

208. Measurement Law requires an accurate showing of content volume. *Id.*

209. *Id.* at 7.

210. Under this law, whenever paper or plastic is used as a packaging material for wrapping shrimp or its products, there must be a label indicating the use of such material. *Id.* at 8.

211. *National Reports-Japan*, *supra* note 204.

212. Amanda Suutari, “Factory” Fishing Threatens Marine Stocks, THE JAPAN TIMES, July 18, 2002. This

Japan has, however, helped improve conservation efforts in the Southeast Asia region by providing funding for research projects. For example, starting in 1998, it funded the three-year regional research program conducted by the Southeast Asia Fisheries Development Center and the Marine Fishery Resources Development and Management Department on sea turtle conservation management.<sup>213</sup> These projects include determining the living sea turtle population in the region and tagging sea turtles to study their migration, growth, mortality, and reproduction in the region.<sup>214</sup>

### E. Some Viable Options and Alternatives in the Future

TEDs are scientifically and internationally recognized as an effective tool in protecting sea turtles. However, TEDs cannot be the only and exclusive means of achieving this goal, because despite a widespread use of TEDs, sea turtle mortality continues to increase. Todd Steiner and Teri Shore of Turtle Island, at the NOAA's annual symposium on sea turtle

statement needs qualification however. Nongovernmental organizations and consumer cooperatives recently created a trading company called Alter Trade Japan, which imports Eco Shrimp that was harvested from shrimp farms under its traditional extensive aquaculture system. Eco Shrimp is priced 10 to 15 percent higher than regular shrimp, but the product is popular among those who are concerned about food safety. See Chiyono Sugiyama, *Appetite for Shrimp Is Hurting Earth's Health*, THE DAILY YOMIURI (Tokyo), Dec. 13, 1997, at 10.

213. Syed Abdullah Syed Abdul Kadir, *Conservation and Management of Sea Turtles in the Southeast Asian Region*, in PROCEEDINGS OF THE TWENTIETH ANNUAL SYMPOSIUM ON SEA TURTLE BIOLOGY AND CONSERVATION 18 (Andrea Mosier, Allen Foley, & Beth Brost, compilers, 2002).

214. *Id.*

conservation, proposed a global network of protected swimways as a new approach.<sup>215</sup> The protected swimways are essentially linked Marine Protected Areas ("MPAs") already in existence throughout the world<sup>216</sup> and are designed to accommodate the highly migratory characteristics of sea turtles. Turtle Island is currently working to create an Internet-based communication network for interested parties to identify appropriate locations and create such sea turtle swimways.<sup>217</sup>

Another possible option for the global effort to protect sea turtles is eco-labeling.<sup>218</sup> The eco-labeling scheme exists in many different industries such as timber, banana plantation, and dairy, and thus it may prove to be quite successful in the shrimp industry as well. In 1996, Turtle Island initiated a Certified Turtle-Safe seal campaign. Under this program, labels were given to those fishers who signed an agreement with Turtle Island, stipulating that they would use TEDs properly and allow monitoring by the program observers.<sup>219</sup> This was the first and the

215. Teri Shore & Todd Steiner, *Going Beyond TEDs: Protected Swimways for Sea Turtles*, in PROCEEDINGS OF THE TWENTIETH ANNUAL SYMPOSIUM ON SEA TURTLE BIOLOGY AND CONSERVATION 80 (Andrea Mosier, Allen Foley, & Beth Brost, compilers, 2002). Today, only less than 0.5 percent of the 4.4 million square miles of submerged lands within U.S. jurisdiction are protected by the government. *Id.* at 81.

216. There are hundreds of MPAs in the world, and they may also be referred to as marine reserves, marine sanctuaries, or ecological reserves. *Id.* at 80.

217. For more detail, visit <http://www.seaturtles.org>.

218. Eco-labeling, in theory, internalizes externalities of production because in order to obtain labels, products must meet certain environmental standards, which in turn are reflected in the price of end products.

219. TURTLE-SAFE SHRIMP, *supra* note 165.

only certification for seafood in the United States. By May 1999, over three million pounds of Certified Turtle-Safe Shrimp was available, and a total of 125 shrimping boats had participated in this program.<sup>220</sup> Unfortunately, due to a lack of resources, the Turtle-Safe Certification program was suspended on January 1, 2001.<sup>221</sup>

Some exporting countries, such as Malaysia and India resist any efforts to initiate eco-labeling on a global scale, however. Agriculture Minister Datuk Amar Dr Sulaiman Daud of Malaysia stated that “different groups implementing eco-labeling could come up with different standards which would create havoc in the fish trade.”<sup>222</sup> This concern is also shared by Dr. K. P.P. Nambiar, the director of INFOFISH, an intergovernmental organization of the fishery industry of the Asia-Pacific region.<sup>223</sup> He stated that exporting countries needed to cooperate with each other to bring different eco-labeling initiatives together to achieve a successful and efficient global eco-labeling program.<sup>224</sup> Although short lasting, Turtle Island’s Turtle-Safe Certification program demonstrated that a successfully implemented program could provide environmentally conscious consumers a way to choose their food.

220. Sea Turtle Restoration Project, *What Is the Turtle-Safe Certification Program?* (on file with West-Northwest; web-page that is no longer available on web-site).

221. *Id.*

222. *Sustainable Fisheries via Code of Conduct*, NEW STRAITS TIMES (Malay.), Mar. 17, 1999, National Section, at 6.

223. *India: Marine Exports Suffer Setback*, BUS. LINE (THE HINDU), Aug. 5, 1998, available at 1998 WL 12718693.

224. *Id.*

In November 2002, the NMFS issued a temporary authorization to allow limited tow times by U.S. shrimp vessels for a maximum of 30 days as an alternative to the use of TEDs in waters off Louisiana, Alabama,<sup>225</sup> and Mississippi.<sup>226</sup> This alternative is allowed only in an emergency situation in which the NOAA Assistant Administrator for Fisheries “determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable.”<sup>227</sup> In the absence of such emergency conditions, CIEL and other environmental groups argued that reduced tow time fails to adequately prevent the death of large juvenile and adult turtles because such restrictions are practically unenforceable and only a fraction of shrimpers actually follow them.<sup>228</sup>

## V. Conclusion

Over the past decades, numerous lawsuits and disputes over the protection of sea turtles and promotion of free trade arose both in domestic and international fora. Undoubtedly, a continuing long-term commitment to regional cooperation must be made on the part of every nation involved. The battles over the interpretation and implications of Section 609, the

225. Sea Turtle Conservation; Shrimp Trawling Requirements (Louisiana & Alabama), 67 Fed. Reg. 67,793, 67,793 (Nov. 7, 2002).

226. Sea Turtle Conservation; Shrimp Trawling Requirements (Mississippi), 67 Fed. Reg. 67,795, 67,795-6 (Nov. 7, 2002).

227. Shrimp Trawling Requirements (Louisiana & Alabama), 67 Fed. Reg. at 67,694.

228. Amicus Brief, *supra* note 34, at 10.

shrimp-turtle law, have shown the intricate interplay between domestic and international law. The repeated challenges to the Section 609 implementing regulations in U.S. courts brought about WTO cases in which foreign countries criticized the soundness of U.S. policy. The WTO decisions, in turn, very much influenced the most recent decision by the U.S. Federal Circuit, in which the court resorted to an unreasonable construction of Section 609 to remain consistent with the WTO ruling and appease U.S. trading partners. The shrimp-turtle cases also demonstrated the possibilities and limitations of unilateral action by a WTO member nation to achieve environmental goals. Today, necessary legal schemes are set up in many countries around the globe because of Section 609; thus the next step is to effectively enforce these instruments. Because the United States initiated this move, the Administration in power should carry out its responsibility and show the world that the United States does still care about the environment and that it is possible to save some of the most endangered species around the world if nations cooperate with each other.

### CHRONOLOGY

- 1987 - U.S. NMFS promulgates regulations pursuant to the ESA.
- 1989 - U.S. Congress enacts Public Law No. 101-162, section 609.
- 1992 - *Earth Island Inst. v. Baker*, 1992 WL 565222 (N.D. Cal. Aug. 06, 1992).
- 1993 - *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993).
- 1995 - *Earth Island Inst. v. Christopher*, 19 Ct. Int'l Trade 812 (1995).
- *Earth Island Inst. v. Christopher*, 19 Ct. Int'l Trade 1262 (1995).
  - *Earth Island Inst. v. Christopher*, 19 Ct. Int'l Trade 1461 (1995).—
- 1996 - *Earth Island Inst. v. Christopher*, 86 F.3d 1178 (Fed. Cir. 1996).
- *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 460 (1996).
  - *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 1221 (1996).
  - *Earth Island Inst. v. Christopher*, 20 Ct. Int'l Trade 1389 (1996).
  - WTO Complainants (India, Thailand, Pakistan, and Malaysia) first go to the WTO.
- 1998 - *Earth Island Inst v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998).
- WTO Panel Decision.
  - WTO Appellate Body Decision.
- 1999 - *Earth Island Inst. v. Daley*, 48 F. Supp.2d 1064 (1999).
- 2000 - *Turtle Island Restoration Network, et al. v. Mallett*, 110 F. Supp. 2d 1005 (2000).
- 2001 - WTO Review Panel Decision.
- WTO Appellate Body Decision.
- 2002 - *Turtle Island Restoration Network, et al. v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002).
- *Turtle Island Restoration Network, et al. v. Evans*, 299 F.3d 1373 (Fed Cir. 2002).
  - Turtle Island Restoration Network files petition for certiorari to the U.S. Supreme Court.
- 2003- *Turtle Island Restoration Network v. Evans*, No. 02-700, 2003 U.S. LEXIS 2731, at \*1 (U.S. April 7, 2003).