

AMICUS BRIEF TO THE APPELLATE BODY
ON UNITED STATES – IMPORT PROHIBITION
Of Certain Shrimp and Shrimp Products

Center for International Environmental Law (CIEL)
Center for Marine Conservation (CMC)
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Illustrations: Valeska Maria Populoh

Available from: CIEL - Center for International Environmental Law
1367 Connecticut Ave, N.W., Suite 300
Washington, D.C. 20036-1860, USA
Email: info@ciel.org Web: <http://www.ciel.org>

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1 INTRODUCTION

The world is losing 27,000 species a year, 74 a day, three an hour, a rate of extinction at least a thousand times the natural rate.¹ All seven sea turtle species are threatened with extinction; a fact widely acknowledged by the international community.² A primary cause of their decline is shrimping, even though there is now environmentally sound, cost-effective fishing gear that can save them from extinction, while still allowing shrimping to continue unimpeded.

The balance between the use of natural resources and sustainable development is addressed by the WTO Member States in the Preamble to the 1994 Agreement Establishing the World Trade Organization [WTO Agreement].³ It proclaims the parties' commitment to the "optimal use of the world's resources in accordance with

the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so."⁴ The current dispute involves the environmental exceptions, Article XX of the General Agreement on Tariffs and Trade [GATT], as embodied in the WTO Agreement, and specifically whether the exceptions protect measures requiring the use of the only fishing gear that adequately protects turtles at life stages critical to the survival of the species.

The aim of this *amicus* brief is to help clarify the factual record and help clarify and apply the principles of international law and WTO jurisprudence to the dispute, striking an appropriate balance between trade liberalization and species protection. In so doing, the brief refers both to the legal principles of sustainable development and their relevance to an appropriate interpretation of Article XX. Because Article XX forms a key nexus between trade and environmental policy, it is essential that it be given a broad interpretation, to provide clear guidance to the future development of policy in accordance with the objective of sustainable development. This is necessary both for environmental protection and for the development of coherent WTO jurisprudence.

¹ Edward O. Wilson, *The Diversity of Life* 280 (1992) cited in ROBERT HOUSMAN et al., *THE USE OF TRADE MEASURES IN SELECT MULTILATERAL ENVIRONMENTAL AGREEMENTS* 5 UNEP (1995).

² They are listed as endangered on Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8247 [hereinafter CITES]. They have been placed on Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, Aug. 29, 1979, 19 I.L.M. 15 [hereinafter Bonn Convention]. And they are listed as critically endangered, endangered or vulnerable on the IUCN, 1996 IUCN Red List of Threatened Animals 21, 63 (Jonathan Baillie & Brian Groombridge, eds. 1996) [hereinafter IUCN Red List].

³ Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement] 131 I.L.M. 1125 (1994).

This *amicus* brief concludes that the disputed sea turtle conservation measures are within the scope of Article XX protection and thus consistent with the rules of the GATT.

2 STATEMENT OF THE FACTS

2.1 The United States developed TEDs and implemented Section 609 to curb the impact of U.S. shrimp consumption on sea turtles, a distinctive and ecologically valuable species driven to the brink of extinction by mechanized shrimp trawling. Sea turtles have survived in the marine ecosystem for more than 100 million years, migrating thousands of miles between continents and through high seas and the Exclusive Economic Zones (EEZs) of many countries. They are a shared global resource and every country has a right and responsibility to ensure their survival. The international community has recognized that sea turtles are now on the brink of extinction and has committed itself to preserving the species. Shrimp trawling is a major cause of sea turtle mortality and, as the world's second largest consumer of shrimp, the United States bears a special responsibility for the fate of sea turtles. To ensure that its consumption did not further

deplete the sea turtle populations, the United States developed turtle excluder devices (TEDs) and required their use by warm-water, mechanized shrimpers, first domestically and then by any trawler serving the United States' market.

2.1.1 Turtles are an essential component of global biodiversity. No sea turtle can be said to belong exclusively to a single country because sea turtles are a part of the world's shared biodiversity and they serve important roles in the ecosystems they inhabit throughout the globe. Sea turtle activities enhance nutrient cycling in sea grass beds, increasing the grasses' protein content and making the beds more productive for other species.⁵ Sea turtles have remarkably wide-ranging migratory habits and nesting practices that are highly distinctive. Some sea turtles that occur along the coast of the continental United States nest in Mexico, while many sea turtles that hatch from nests in Florida spend years in the eastern Atlantic and even the Mediterranean as juveniles before returning to Florida as adults.⁶ DNA analysis demonstrates that some leatherback sea turtles in American Samoa are from Malaysian or Indonesian

⁴ *Id.*

⁵ JEREMY B.C. JACKSON, REEFS SINCE COLUMBUS, CORAL REEFS (1997 to be published).

⁶ U.S. Department of Commerce, *Recovery Plan for U.S. Population of Loggerhead Turtle Caretta Caretta* 5 (1993).

stock.⁷ Loggerhead turtles that feed off the U.S. Pacific coast nest in Japan and Australia and the range of green turtles found in the U.S. Pacific Island territories most likely reaches into the South China Sea.⁸

2.1.2 Sea turtle populations have declined dramatically and all species are threatened with extinction, a fact identified by multilateral bodies as a pressing problem.

Sea turtle species are in danger of extinction. In 1947, an estimated 40,000 female Kemp's ridley sea turtles nested on the beach at Rancho Nuevo, Mexico in a single day. By 1988, the number had dropped to an estimated 650 turtles during the entire nesting season.⁹ A 1982 study estimated that more than half of the world's population of Pacific leatherbacks nested on Mexican beaches.¹⁰ A more recent study concluded that this population has been declining at a rate of 23 percent per year for the last

twelve years, with fewer than 1,000 animals in the 1995-96 nesting season.¹¹

The population of hawksbill turtles has shrunk 80 percent or more in the last three generations.¹²

The decline of sea turtles is evident in Southern Asia. The number of leatherback sea turtle nesting in Terengganu, Malaysia, for example, has plummeted 95 percent since 1956.¹³ The number of eggs laid by green, olive ridley and hawksbill turtles have declined more than 50 percent, and maybe as much as 85 percent since the late 1950s.¹⁴ The Terengganu stock of nesting olive ridley turtles has shrunk from possibly thousands annually to approximately 20 each year.¹⁵ In Thailand, the number of olive ridley turtles from the Andaman Sea that nest each year is now

⁷ B.W. Bowen, *Tracking Marine Turtles with Genetic Markers*, 45 *BioScience* 528 (1995).

⁸ P.H. Dutton et al., *Genetic Stock ID of Turtles Caught in the Pacific Longline Fishery*, presented at the Seventeenth Annual Symposium of Sea Turtle Biology and Conservation (1997).

⁹ NATIONAL RESEARCH COUNCIL, *DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION* 26 (National Academy Press, 1990) [hereinafter National Research Council Study].

¹⁰ P. Pritchard, *Nesting of the Leatherback Turtle Dermochelys coriacea in Pacific Mexico, with a New Estimate of the World Population Status*, 4 *Copeia* 741 (1982) as cited in Laura M. Sarti et al., *Estimation of the Nesting Population Size of the Leatherback Sea Turtle*

Dermochelys coriacea in the Mexican Pacific, (1996) (NMFS internal document).

¹¹ Laura M. Sarti et al., *Decline of the World's Largest Nesting Assemblage of Leatherback Turtles*, 74 *MARINE TURTLE NEWSLETTER* 2 (1996); SARTI, *supra* note 10.

¹² IUCN Red List, *supra* note 2, at 63.

¹³ Colin J. Limpus, *Current Declines in Southeast Asian Turtle Populations in Proceedings of the Thirteenth Annual Symposium of Sea Turtle Biology and Conservation*, 89 (1993).

¹⁴ Jeanne A. Mortimer, *Marine Turtle Conservation in Malaysia in Proceedings of the Tenth Annual Symposium of Sea Turtle Biology and Conservation*, 21 (1990).

¹⁵ COLIN J. LIMPUS, *GLOBAL OVERVIEW OF THE STATUS OF MARINE TURTLES: A 1995 VIEWPOINT*, IN *BIOLOGY & CONSERVATION OF SEA TURTLES*, 605-610 (Karen A. Bjorndal ed.; rev. ed. 1995).

numbered in the tens.¹⁶ Other species have also declined dramatically.¹⁷

The international community and every nation party to this dispute recognizes the dangerous decline in sea turtle populations. All five species of sea turtles¹⁸ at issue in this dispute are listed as endangered in Appendix I of the Convention on International Trade in Endangered Species (CITES).¹⁹ They are also listed as critically endangered, endangered or vulnerable on the IUCN (World Conservation Union) Red List²⁰ and have been identified as requiring protection under the Bonn Convention on the Conservation of Migratory Species of Wild Animals.²¹ Many individual countries, including the United States, have officially recognized the endangered status of sea turtles and

applied special protection to the species.²² Finally, countries in the western hemisphere have negotiated a multilateral treaty to preserve sea turtles.²³

2.1.3 Shrimp trawling is a major cause of turtle deaths. The drowning of sea turtles in shrimp trawl nets is one of the greatest anthropomorphic causes of sea turtle deaths.²⁴ In the United States it “kill[s] more sea turtles than all other human activities combined.”²⁵ This causal link between shrimp trawling and sea turtle deaths was identified as a global threat as early as the 1970s.²⁶ The 1982 Sea Turtle Conservation Strategy identified bycatch as a “major threat to many sea turtle populations [that] *must* be eliminated or

¹⁶ *Id.* at 606.

¹⁷ C.S. Kar & Satish Bhaskar, *Status of Sea Turtles in the Eastern Indian Ocean* in *BIOLOGY AND CONSERVATION OF SEA TURTLES*, 365 (Karen A. Bjorndal ed., 1982). Some other examples of other precipitous declines of sea turtle populations include a 50-80 percent decline in nesting loggerhead females at eastern Australian rookeries since the mid-1970s and a significant decline in green turtle populations in Indonesia and French Polynesia. Colin J. Limpus & Darryl Reimer, *The Loggerhead Sea Turtle, Caretta*, in *Queensland: A Population in Decline*, in Proceedings of the Australian Marine Turtle Conservation Workshop, Queensland Department of Environment & Heritage and the Australian Nature Conservation Agency, 39-60 (R. James ed., 1994); COLIN J. LIMPUS, *supra* note 15, at 605-609.

¹⁸ The five species are the Loggerhead, Hawksbill, Green, Kemp’s ridley and Leatherback.

¹⁹ CITES, *supra* note 2.

²⁰ IUCN Red List, *supra* note 2.

²¹ Bonn Convention, *supra* note 2.

²² Of the seven sea turtle species recognized, six are listed as endangered or threatened under the U.S. Endangered Species Act and the seventh is a candidate, 56 Fed. Reg. 26797-26798 (1991).

²³ The Inter-American Convention for the Protection and Conservation of Sea Turtles (copy on file with *Amicus*) [hereinafter Inter-American Convention].

²⁴ Other human-caused threats to sea turtles include direct hunting, which has been reduced considerably under CITES over the last 25 years, and losses of nesting beaches and foraging habitats. KAREN L. ECKERT, ANTHROPOGENIC THREATS TO SEA TURTLES, in *BIOLOGY AND CONSERVATION OF SEA TURTLES*, 611 (Karen A. Bjorndal ed.; rev. ed. 1995).

²⁵ National Research Council Study, *supra* note 9, at 76, 145. At the request of the U.S. Congress, the National Academy of Sciences looked at the status of sea turtle populations and the causes of their declines in U.S. waters. The Academy concluded that without TEDs other conservation measures would be ineffective. *Id.* See also, Deborah T. Crouse et al., *A Stage-based Population Model for Loggerhead Sea Turtles & Implications for Conservation*, 68 Ecology 1412, 1421 (1987).

²⁶ Hilburn O. Hillestad et al., *Worldwide Incidental Capture of Sea Turtles*, in *BIOLOGY AND CONSERVATION OF SEA TURTLES* 489-491 (Karen A. Bjorndal ed., 1982).

reduced to very low levels."²⁷ More recently, in 1995 the Marine Turtle Specialist Group of the IUCN (World Conservation Union) identified reduction of mortality due to fishing trawls as a priority action item.²⁸ Meanwhile, fisheries to feed growing human populations have increased dramatically and the incidental killing of sea turtles in fishing gear has increased concurrently.²⁹

2.1.4 Shrimp trawling kills sea turtles at a life stage critical to the maintenance and recovery of sea turtles populations.

TEDs provide the best available means to protect large juvenile and adult sea turtles, which are critical to species survival. The protection of large juvenile and adult sea turtles is essential because they contribute most significantly to population growth, according to a scientific review of the mortality and conservation status of sea turtles in the northwest Atlantic by the National Academy of Sciences.³⁰ For example, the reproductive value of one adult female loggerhead that nests in the United States was estimated to be 584

times more valuable than that of a hatchling turtle because of the extremely high mortality rate of young turtles over the many years to maturity.³¹ Because large juveniles and adults are also the group most often killed in shrimp trawls, the National Academy of Sciences report recommended "mandatory use of TEDs at most places at most times of the year."³²

2.1.5 The U.S. consumption of shrimp is a major cause of turtle deaths

throughout the world. The United States is one of the two largest consumers of shrimp products in the world,³³ and its shrimp consumption is a major cause of turtle deaths. Given the causal connection between shrimping and turtle mortality, the United States' ability to reduce the impact of its shrimp consumption on sea turtles is critical to protecting endangered sea turtle populations. The use of TEDs in shrimp trawls that serve the large U.S. market represents the most environmentally sound and effective method available to the United States to protect these endangered

²⁷ *Sea Turtle Conservation Strategy*, in *BIOLOGY AND CONSERVATION OF SEA TURTLES* 568 (Karen A. Bjorndal ed., 1982) (emphasis added).

²⁸ Marine Turtle Specialist Group, IUCN, *A Global Strategy for the Conservation of Marine Turtles*, 8 (1995).

²⁹ Eckert, *supra* note 24, at 611. *See also* COLIN J. LIMPUS, *supra* note 15, at 605-610.

³⁰ National Research Council Study, *supra* note 9, at 13, 147. *See also* Deborah T. Crouse et al., *supra* note 25, at 1412.

³¹ National Research Council Study, *supra* note 9, at 71. "Increasing survivorship of older juvenile and young adult sea turtles is the most effective means of increasing populations sizes." *Id.* at 72.

³² *Id.*

³³ Robert Greene, *Ruling on Turtles Curbs Imports of Shrimp*, Associated Press, October 16, 1996.

species while allowing human shrimping activity to continue relatively unimpeded.³⁴

2.1.6 The United States developed TEDs and required their use to ensure that U.S. shrimp consumption did not continue to jeopardize sea turtles. The

sea turtle conservation measures in Section 609 are designed to prevent the extinction of sea turtle species by prohibiting the availability in the United States of shrimp or shrimp products harvested by methods known to drown sea turtles.³⁵ The objective of Section 609 is to protect threatened and endangered sea turtles throughout their known migratory ranges.³⁶ In 1987, it was estimated that 42,909 loggerheads, 2,994 Kemp's, and 925 green turtles were captured in shrimp nets; more than 10,000 of those turtles drowned.³⁷ This estimate was later found to be too low, possibly by a factor of four, by the National Academy of Sciences.³⁸ That

same year the U.S. National Marine Fisheries Service (NMFS) promulgated regulations under the U.S. Endangered Species Act to require the use of TEDs in certain U.S. waters at certain times of the year.³⁹

In 1994, the United States imported 128,199 metric tons of shrimp, valued at \$2,667,738,621 (U.S.).⁴⁰ It was in recognition of the fact that, without regulation, U.S. consumption would continue to contribute directly to the rapid decline of turtle populations, that the U.S. government enacted the sea turtle conservation measures. By requiring the use of TEDs on all shrimp trawls operating in U.S. waters that interact with sea turtles, and by requiring countries importing shrimp into the United States to require TEDs on all shrimp trawlers that interact with sea turtles, the United States seeks to ensure that its shrimp consumption will stop harming sea turtle populations.

The focus of Section 609's drafters was "on equitable conservation requirements within the range of those species that were the subject of the aggressive U.S. domestic

³⁴ See *infra* Part 2.1.

³⁵ 62 Fed. Reg. 13934 (1997).

³⁶ See Report of the Secretary of State to the Congress of the United States on the Status of Efforts for the Conservation & Protection of Sea Turtles Pursuant to Pub. L. No. 101-162 § 609, *The Departments of Commerce, Justice, and State: The Judiciary and Related Agencies Appropriations Act, 1990*, at 4 [hereinafter Report on Sea Turtles] (stating understanding of the Administration that Section 609 was limited to an effort by Congress to extend protection given to threatened and endangered sea turtles protected by U.S. regulations).

³⁷ Tyrrell A. Henwood & Warren E. Stuntz, *Analysis of Sea Turtle Captures and Mortalities During Commercial Shrimp Trawling*, 85 Fishery Bulletin 813, 815 (1987).

³⁸ National Research Council Study, *supra* note 9.

³⁹ 50 C.F.R. § § 217, 222 & 227. The regulations were implemented initially in 1989. Final regulations were promulgated in 1992. See MICHAEL WEBER ET AL., *DELAY AND DENIAL: A POLITICAL HISTORY OF SEA TURTLES & SHRIMP FISHING* (1995).

⁴⁰ National Marine Fisheries Service (Internal Document on file with *Amicus*).

conservation program.”⁴¹ In fact, the sea turtle conservation measures apply only to those five species of sea turtles that inhabit U.S. waters.⁴² The narrow tailoring of the law demonstrates that Section 609 was not intended to create market disruptions nor provide protection to the domestic U.S. industry.⁴³

The import provisions of the sea turtle conservation measures complete the protection of sea turtles from U.S. demand for shrimp products by including protection from demand fed by imports. These provisions allow imports of shrimp into the United States only if the exporting nation establishes either that its sea turtle conservation programs are comparable to the U.S. program, with comparable incidental take rates (actual instances of sea turtle drowning), or that the fishing environment of the exporting nation does not pose a threat to sea turtles. The measures thus apply the essence of U.S. domestic measures to imports of shrimp and shrimp products. Without the import provisions, the U.S. conservation measures would be ineffective, as sea turtles found in U.S. waters swim across vast stretches

⁴¹ See Letter from Senators Johnston, Breaux, Shelby, Heflin, Lott, Levin, Cochran and Hollings to Secretary of State James A. Baker III, May 10, 1991 (discussing regulatory process for implementing Public Law 101-162).

⁴² 61 Fed. Reg. 17342 (1996).

⁴³ See Report on Sea Turtles, *supra* note 36, at 4.

of ocean and through waters under the jurisdiction of many other countries.

2.2 TEDs are scientifically and internationally recognized as essential to the survival of endangered sea turtles; other measures are ineffective without this technology. TEDs are essential to the adequate protection of sea turtles. Without the use of TEDs in certain commercial shrimping nets, there is little hope for the recovery of most populations of threatened and endangered sea turtle species.⁴⁴

2.2.1 TEDs are effective, inexpensive and easy to use. TEDs are inexpensive, easy to install and they do not result in excessive shrimp loss.⁴⁵ They also are extremely effective: TEDs developed by the National Marine Fisheries Service (NMFS) exclude 97 percent of the sea turtles entrained while retaining most shrimp, increasing trawling efficiency, and reducing finfish bycatch by 50-60 percent.⁴⁶ Some hard grid TEDs show no significant shrimp loss when compared to

⁴⁴ See National Research Council, *supra* note 9; Crouse et al., *supra* note 25.

⁴⁵ In fact, TEDs can be made inexpensively from local material. The TEDs workshops given by the United States government and described later in the brief include segments on making TEDs. See Maurice Renaud et al., *Loss of Shrimp by Turtle Excluder Devices (TEDs) in Coastal Waters of the United States, North Carolina to Texas: March 1988 - August 1990*, 91 Fisheries Bulletin 133 (1993); 61 Fed. Reg. 18102, 18111 (1996).

⁴⁶ Charley W. Taylor et al., *Construction and Installation Instructions for the Trawling Efficiency Device*, 1 NMFS-SEFC-71 (1985).

trawls without TEDs.⁴⁷ This allows for the unimpeded, if not improved, harvesting of shrimp. Clearly, for the tremendous conservation benefits conveyed, TEDs impose little economic burden. In fact, TEDs are ultimately beneficial to both the commercial fishing industry and the environment.

Preliminary evidence indicates that the U.S. TED regulations are resulting in significant benefits to sea turtle populations. Although they are still severely depleted and critically endangered, scientists are seeing an increase in the Kemp's ridley population from a combination of factors, including the use of TEDs in shrimp trawls.⁴⁸ A 1994 study verifies that loggerhead nesting in South Carolina, after declining five percent per year through the 1980's, appear to have stabilized after 1987 (TEDs were first required in South Carolina in 1988, under state regulations).⁴⁹ A 1995 analysis of 14 years of loggerhead stranding data (dead turtles washing up on beaches) in South Carolina determined that TEDs

reduced strandings in shrimp trawls by about 44 percent compared to shrimp trawling without TEDs.⁵⁰

More recently a Turtle Expert Working Group, appointed by the National Marine Fisheries Service, found that, after declining substantially over two decades, the northern U.S. nesting population of loggerheads may have stabilized while the south Florida population appears to be increasing.⁵¹ Present state-of-the-art scientific modeling also supports the critical role of TEDs in sea turtle recovery, concluding, for example, that, "population model predictions suggest that the outlook for loggerhead population recovery is good ... if reductions in stage-specific mortality rates are at all similar to the observed reductions in strandings due to TEDs."⁵²

⁴⁷ Renaud, *supra* note 45.

⁴⁸ Turtle Expert Working Group, Kemp's Ridley Sea Turtle (*Lepidochelys kempii*) Status Report 10 (1996 Draft).

⁴⁹ Sally R. Hopkins-Murphy & Thomas M. Murphy, *Status of the Loggerhead Nesting Population in South Carolina: A Five Year Update*, in Proceedings of the Fourteenth Annual Symposium on Sea Turtle Biology and Conservation, 62-64, NOAA Technical Memorandum NMFS-SEFSC-351 (Karen Bjorndal et al., eds., 1994).

⁵⁰ LARRY B. CROWDER ET AL., EFFECTS OF TURTLE EXCLUDER DEVICES (TEDS) ON LOGGERHEAD SEA TURTLE STRANDINGS WITH IMPLICATIONS FOR CONSERVATION, COPEIA 773-779 (1995)

⁵¹ Report of the Turtle Expert Working Group (TEWG) to Rolland Schmitt, Director of the National Marine Fisheries Service, July 2, 1996, at 71.

⁵² See Crowder., *supra* note 50, at 773. For additional research demonstrating the positive impact of TED use and Section 609 measures, see Report of the Marine Turtle Expert Working Group, *Status of the Loggerhead Turtle Population (Caretta) in the Western North Atlantic*, 13-14 (1996) (Adult loggerheads of the South Florida Subpopulation (the largest loggerhead nesting assemblage in the Atlantic and one of the two largest in the world) have shown significant increases in recent years, indicating that the population is recovering); Report of the Marine Turtle Expert Working Group, *Kemp's Ridley Sea (Lepidochelys Kempii) Turtle Status Report*, 3-4 (1996) (detailing recent population increases at Rancho Nuevo).

In addition to protecting highly endangered sea turtles, TEDs have other significant fishing benefits. The TED developed by the National Marine Fisheries Service reduced finfish bycatch by 50 percent and recent tests by Georgia and South Carolina Sea Grant technicians have shown significant reductions in finfish bycatch in nets outfitted with TEDs of other designs.⁵³ TEDs also save fuel and lower costs by reducing net drag.⁵⁴

The scientific support showing the positive impact that TEDs are having in the Western Hemisphere is irrefutable. The sea turtle conservation measures serve a clear conservation purpose. The United States adopted TEDs technology to protect sea turtles, and the sea turtle conservation measures are succeeding.

2.2.2 Other conservation measures are ineffective in protecting sea turtle populations because they do not save large juvenile and adult sea turtles.

Conservation measures other than TEDs, such as the protection of nesting sites and “headstarting,” only protect eggs and

hatchlings.⁵⁵ These alternative measures cannot protect turtle populations adequately because the protection of eggs and hatchlings alone does not translate into significant increases in population size.⁵⁶ Even if these measures achieved a 100 percent hatchling survival rate during the first year, models have shown that they are unlikely to have a significant effect on population due to high mortality rates before hatchling turtles reach breeding age.⁵⁷

To maintain current population levels, “headstarted” turtles would have to survive at least as well as wild turtles after they are released.⁵⁸ In fact, their captive upbringing may make hatchlings less prepared for life in the wild. Headstarted turtles are raised in buckets, fed food pellets and have limited opportunities to swim, making it difficult for the hatchlings to recognize or capture their natural food, much less learn migrating skills.⁵⁹ Only two nestings of

⁵³ See Weber, *supra* note 39, at 20.

⁵⁴ J. E. Easeley, *A Preliminary Estimate of the Payoff to Investing in a Turtle Excluder Device for Shrimp Trawls*, Final Report Prepared for the Monitor International and the Center for Environmental Education (1982) (now the Center for Marine Conservation).

⁵⁵ “Headstarting” is a technique where the sea turtle eggs are taken from the wild and incubated and the hatchlings raised in captivity, usually for about one year.

⁵⁶ Selina S. Heppell et al., *Models to Evaluate Headstarting as Management Tool for Long-lived Turtles*, 6 *Ecological Applications* 556, 563 (1996).

⁵⁷ *Id.*

⁵⁸ National Oceanic & Atmospheric Administration, Review of the Kemp’s Ridley Sea Turtle Headstart Program (NOAA Technical Memorandum NMFS-OPR-3), 3 (August 1994); Jeanne A. Mortimer, *Headstarting as a Management Tool*, in *BIOLOGY & CONSERVATION OF SEA TURTLES*, 614 (Karen A. Bjorndal ed., 1995).

⁵⁹ Erich K. Stabenau et al., *Swimming Performance of Captive-Reared Kemp’s Ridley Sea Turtles Lepidochelys*

“headstarted” turtles have been documented in the world to date,⁶⁰ and those two turtle nestings came after more than 22,000 Kemp’s ridleys were released.⁶¹ Meanwhile a number of headstarting programs around the world have been discontinued.⁶²

Even if the “headstarted” turtles were to survive as well as wild turtles, “headstarting” cannot be certain to compensate for losses in later stages of life when the population is already declining.⁶³ Due to the slow maturation of turtles, the ultimate success of “headstarting” -- an increase in nesting turtles -- cannot be measured for as much as 50 years depending on the species.⁶⁴ Deferring

implementation of TEDs while waiting several decades for such confirmation presents a very high risk of causing the extinction of some sea turtle populations. Finally, “headstarting” is not cost effective -- costs per turtle have been estimated to be between \$175 to \$400, a cost largely wasted if the turtles are released into waters only to be drowned by shrimp trawlers without TEDs.⁶⁵

Other proposed strategies -- including tow-time regulations and time and area closures -- are not as effective as TEDs because they do not adequately prevent the death of large juveniles and adult turtles.

Restricting tow-times, which is the length of time the trawl net is submerged, is virtually unenforceable. Tests of compliance with tow-time restrictions in the United States show that only a fraction of shrimpers adhere to the restrictions.⁶⁶

kempi (Garman), 161 J. Exp. Mar. Biol. Ecol. 213-4 (1992). Kemp’s ridley turtles forage in the wild on crabs. If the turtles are unable to swim quickly, due to underdeveloped muscles caused by their confinement in buckets, they will not be able to capture the crabs. Additionally, the turtles may not even recognize the crab as food since they have never been exposed to live crabs before.

⁶⁰ Donna J. Shaver, *Head-Started Kemp’s Ridley Turtles Nest in Texas*, Marine Turtle Newsletter, July 1996 at 5.

⁶¹ Charles W. Caillouet, Jr. et al., *Distinguishing Captive-Reared from Wild Kemp’s Ridleys*, Marine Turtle Newsletter, April 1997 at 3.

⁶² See MARYDELE DONNELLY, SEA TURTLE MARICULTURE: A REVIEW OF RELEVANT INFORMATION FOR CONSERVATION & COMMERCE 29 (1994). In 1991, the Micronesian Mariculture Demonstration Center in Palau discontinued its “headstarting” program because it determined that “headstarting” did not prove to be a successful management technique for restocking sea turtle populations. In addition, two other long running and well funded programs in the United States were also discontinued.

⁶³ Heppell, *supra* note 56, at 556.

⁶⁴ The estimated age at reproductive maturity for the five species of turtles concerned are: Kemp’s ridley, 10-15 years; Leatherback, 10-16 years; Hawksbill, at least 31

years; Loggerhead, 25-35 years; and Green, 20-50 years. U.S. Fish & Wildlife Service and National Marine Fisheries Service, Recovery Plan for the Kemp’s Ridley Sea Turtle, 2 (1992); Karen L. Eckert & James I. Richardson, General Biology, in BIOLOGY & STATUS OF THE HAWKSBILL IN THE CARIBBEAN, 3 (IUCN, 1997); U.S. Fish & Wildlife Service and National Marine Fisheries Service, Recovery Plan for the Hawksbill Turtle, 5 (1993); U.S. Fish & Wildlife Service and National Marine Fisheries Service, Recovery Plan for the Atlantic Green Turtle, 2 (1991); U.S. Fish & Wildlife Service and National Marine Fisheries Service, Recovery Plan for the Loggerhead, 3 (1991).

⁶⁵ Gary Taubes, *A Dubious Battle to Save the Kemp’s Ridley Sea Turtle*, 256 Science 614 (1992). For example, of the 519 “headstarted” Kemp’s ridley turtles that were released near Corpus Christi in 1986, at least 65 were caught in shrimp trawls or washed up injured or dead on the shore after being caught in the nets, many years before any could mature and reproduce.

⁶⁶ National Marine Fisheries Service and North Carolina Division of Marine Fisheries, *Summary of Tow Times in*

Either independent monitors must continuously watch each shrimp boat for the entire time the shrimper engages the trawl, or all shrimpers must engage and disengage their trawls in a given area at the same time.⁶⁷ Additionally, recent research on Kemp's ridley turtles has shown that significant blood gas chemistry changes occur within five minutes of forced submergence, which may eventually cause death.⁶⁸ This means that even the suggested tow-time of less than sixty minutes for shrimp trawls may still cause significant drownings of sea turtles. Finally, shortening tow-times sufficiently to protect sea turtles would adversely affect shrimpers, reducing their time spent actually trawling for shrimp and thus their profit margin.

Time and area closures are too limited to be effective. Closures only protect the large juvenile or adult turtles while they

are in the closed area or during the time when shrimping is banned, and not in other places or at other times. Research suggests that this type of conservation plan only delays mortality, but does not prevent it.⁶⁹ For shrimpers, area and time closure boundaries can be easily defined. Turtles, however, are highly migratory species and they do not stay in one area for extended periods of time.

The Complainants have instituted some of these alternative conservation measures, yet their turtle populations are declining. Sea turtle populations have declined in Thailand, with the loggerhead sea turtle thought to be extinct in Thai waters.⁷⁰ The main hazard identified as affecting the population of sea turtles in the Gulf of Thailand is the heavy fishing activity in the area, especially trawling, and the use of drift gill nets and long-line hooks.⁷¹ In India, near-shore mechanized fishing has also been determined to be the cause of a large number of sea turtle deaths.⁷² In

the Summer Flounder Trawl Fishery, November 1991-February 1992, 2 (1992) (When tow-time restrictions, as opposed to TEDs, were imposed on the Virginia and North Carolina flounder trawl fishery, which uses the same gear configurations as shrimp trawls, only 26 percent of the tows monitored by state or federal observers were within the time limit of 75 minutes.); WEBER, et al., *supra* note 39, at 20 (Of 473 vessels required to use mandatory tow-times in Louisiana in the summer of 1989, 274 violated the restriction).

⁶⁷ 57 Fed. Reg. 57348, 57350 (1992) (codified in 50 C.F.R. pts. 217 & 227) (final rule).

⁶⁸ Molly E. Lutcavage & Peter L. Lutz, *Voluntary Diving Metabolism & Ventilation in the Loggerhead Sea Turtle*, 147 J. Exp. Mar. Biol. Ecol. 287 (1991). See also Erich K. Stabenau et al., *Respiratory, Acid-Base and Ionic Status of Kemp's Ridley Sea Turtles (Lepidochelys Kempfi) Subjected to Trawling*, 99A Comp. Biochem. Physiol. 110 (1991).

⁶⁹ National Research Council Study, *supra* note 9; 57 Fed. Reg. 18449 (1992) (discussing the relationship between mortality of sea turtles and the opening of shrimp trawling season in North Carolina, South Carolina, Georgia and Florida).

⁷⁰ *Country Report for Thailand*, presented at the Northern Indian Ocean Sea Turtle Workshop and Strategic Planning Session on January 13-18, 1997 in Bhubaneswar, Orissa, India, at 1-3.

⁷¹ *Id.*, at 5.

⁷² *Country Report for India*, presented at the Northern Indian Ocean Sea Turtle Workshop and Strategic Planning Session on January 13-18, 1997 in Bhubaneswar, Orissa, India, at para. 3(iii).

1994, one study counted more than 5,000 dead olive ridley sea turtles off the coast of Orissa in a six month period,⁷³ attributing these deaths to accidental capture in trawl nets.⁷⁴ Another study conducted at Gahirmath, India determined that mechanized boats, including trawlers, drown turtles during the breeding season, posing a “serious threat” to these species.⁷⁵ Death in trawl nets is also a significant factor in the mortality of sea turtles in Malaysia.⁷⁶ One study found that “[The number of turtles caught by trawl and drift nets in 1985 and 1986] which include both juvenile and adult turtles, are alarmingly high when compared with the number of nestings recorded for each species, and it can be seen that fishing nets have the potential of quickly decimating the current populations of sea turtles.”⁷⁷ Sea turtle populations in Malaysia were found to be in serious decline in 1996.⁷⁸

⁷³ *Id.* (citing to a study by Pandav et al., conducted in 1994.)

⁷⁴ *Id.*

⁷⁵ P. Mohanty-Hejmadi, *Biology of the Olive Ridleys of Gahirmatha, Orissa, India*, in Proceedings of the Fourteenth Annual Symposium of Sea Turtle Biology and Conservation, 90 (1994).

⁷⁶ E.H. Chan et al., *The Incidental Capture of Sea Turtles in Fishing Gear in Terengganu, Malaysia*, 43 *Biological Conservation* 1 (1988).

⁷⁷ *Id.*

⁷⁸ *Country Report for Malaysia*, presented at the Northern Indian Ocean Sea Turtle Workshop and Strategic Planning Session on January 13-18, 1997 in Bhubaneswar, Orissa, India, at 8.

2.3 Use of TEDs is now the global environmental standard for protecting sea turtles; the importance of using TEDs has been recognized by many countries and in multilateral agreements. Scientists and governments worldwide “recognize the TED as an important tool for the conservation and protection of threatened and endangered species of sea turtles.”⁷⁹ The use of TEDs, as required in the sea turtle conservation measures, is receiving rapid international acceptance. African and Asian countries have recently begun requiring their use. Thailand implemented a comprehensive TEDs program in 1996.

Perhaps most significantly, a multilateral treaty for the Western Hemisphere (the Inter-American Convention)⁸⁰ requires all commercial shrimp trawl vessels operating in the waters regulated by the Parties to use TEDs wherever there is a likelihood of interactions with sea turtles.⁸¹ This treaty is an important milestone in the global recognition of the effectiveness and importance of TEDs. The countries in the Western Hemisphere understood that, given sea turtles’ far-reaching migratory patterns, a regional treaty would not adequately protect the species unless

⁷⁹ See Report on Sea Turtles, *supra* note 36, at 5.

⁸⁰ The Inter-American Convention for the Protection and Conservation of Sea Turtles (copy on file with the *Amici*).

countries in other regions adopted comparable measures. Therefore, Article XX of the Inter-American Convention encourages its parties to negotiate complementary treaties with countries in other parts of the world.

Consistent with the Inter-American Convention, last autumn the United States proposed the negotiation of a similar international agreement for sea turtle protection to the governments of many Asian countries, including the four Complainants. The governments of India, Malaysia, Pakistan and Thailand declined.

Despite the Complainants reluctance, other countries of south Asia increasingly acknowledge the necessity of using TEDs to protect sea turtles. As mentioned above, Thailand now requires the use of TEDs. The *Conservation Strategy and Action Plan for the Western Indian Ocean*, prepared by the Marine Turtle Specialist Group, lists the promotion of TEDs in trawl fisheries as priority action for the conservation of marine turtles in the Western Indian Ocean.⁸¹ A similar plan, the *Conservation Strategy and Action Plan for the Northern Indian Ocean*, is being developed. Participants from India, Pakistan, Thailand, and Malaysia

⁸¹ Marine Turtle Newsletter, No.75 16 (1996).

⁸² IUCN, *A Marine Turtle Conservation Strategy and Action Plan for the Western Indian Ocean* 14 (1996).

cooperated in the development of the present draft of that plan,⁸³ which endorses the use of TEDs in that region.⁸⁴ In addition, the draft action plan calls for the development, promotion and passage of model TED legislation, and training workshops to facilitate TED technology transfer.⁸⁵

Clearly, the mandatory use of TEDs for warm-water mechanized shrimping is now an accepted environmental standard around the globe.

2.4 The United States has made a substantial effort to disseminate TEDs worldwide, demonstrating its commitment to protecting sea turtles and the lack of any protectionist motives.

That numerous foreign governments are interested in acquiring TED technology and developing national TED programs is further indication of the widespread recognition of the importance of TEDs. The U.S. Department of State and the National Marine Fisheries Service have worked to provide training in the use of TEDs, and to promote the transfer of TEDs technology. More than 50 workshops have been the centerpiece of an

⁸³ *Id.*

⁸⁴ IUCN, *A Marine Turtle Conservation Strategy and Action Plan for the Northern Indian Ocean* 11 (Draft 1997).

⁸⁵ *Id.*

initiative that has transferred TEDs technology to approximately 30 countries, including two of the complainants.⁸⁶

These efforts demonstrate both the seriousness of the U.S. government's intent to protect sea turtles and the reality that the sea turtle conservation measures were not designed to protect the U.S. domestic shrimping industry.

2.5 Section 609 is narrowly tailored, only imposing restrictions that match domestic requirements, that treat equally all countries whose trawling jeopardizes turtles, and that are necessary given the rapidly dwindling sea turtle population. The import provisions of the sea turtle conservation measures have been carefully crafted to ensure that shrimp caught in a manner not known to cause sea turtle mortalities may be sold in the United States. The Guidelines used by the Department of State to determine the comparability of foreign and U.S. programs automatically

allow the importation of four broad categories of shrimp:⁸⁷

- a) shrimp harvested in aquaculture facilities.
- b) shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, or by vessels using gear that do not require TEDs. This latter category includes:
 - vessels using certain special types of gear which do not pose a threat to sea turtles;
 - vessels whose nets are retrieved manually;⁸⁸ and
 - vessels shrimping in exceptional circumstances where, for example, the use of TEDs would be impracticable because of special environmental conditions.
- c) species of shrimp, such as pandalid species, harvested in areas where sea turtles do not occur. And finally,

⁸⁷ 61 Fed. Reg. 17342 (1996). *Amici* note that the U.S. measures seek to protect endangered sea turtles, but do not address the environmental threats posed by the harvesting of those categories of shrimp which are exempted from the import restrictions.

⁸⁸ This would cover the "significant amount of wild harvested shrimps . . . caught using traditional mechanisms (such as hand retrieval nets)" cited by the Malaysians at paragraph 8 of their submission. In addition, Pakistan has not been certified under this category because their operations resemble mechanized fishing. Pakistani shrimp trawl vessels engage large crews to allow for the retrieval of heavy nets. The vessels can leave the nets in the water for more than two hours, endangering captured sea turtles with drowning. See National Research Council Study, *supra* note 9, at 131-135.

⁸⁶ Participating nations include: Belize, Brazil, China, Colombia, Costa Rica, El Salvador, Ecuador, Guyana, Honduras, India, Indonesia, Kenya, Mexico, Nicaragua, Panama, Surinam, Thailand and Venezuela. A regional workshop was conducted in the Western Indian Ocean in early 1997 in recognition of the conservation value of TEDs. Eritrea, Mozambique, Madagascar and Tanzania attended the workshop and are interested in developing TED legislation despite the fact that they do not even export shrimp to the United States.

d) shrimp harvested by commercial shrimp trawl vessels in countries requiring the use of TEDs comparable in effectiveness to those required in the United States.

The breadth of these excluded categories demonstrate that the sea turtle conservation measures were designed to have the minimum impact on trade, and that they were narrowly tailored for the protection and conservation of endangered sea turtles. Given the migratory nature of sea turtles, the import aspects of Section 609 are essential if U.S. sea turtle conservation efforts are to be effective. Even if one narrows the focus to protecting sea turtles found in United States waters, addressing imports is necessary because the turtles also swim through waters under other countries' jurisdiction.⁸⁹

Since the 1980s, U.S. shrimping regulations sought to be as flexible and unrestrictive as possible, given the state of scientific knowledge, while still protecting sea turtles. Only when new scientific information proves their inadequacy have the regulations grown more stringent, and the application of Section 609 grown broader. The initial voluntary use of TEDs

⁸⁹ B.W. Bowen, *Tracking Marine Turtles with Genetic Markers*, 45 *BioScience* 528 (1995); P.H. Dutton et al., *Genetic Stock ID of Turtles Caught in the Pacific Longline Fishery*, Paper presented at the Seventeenth Annual Symposium of Sea Turtle Biology and Conservation (1997).

domestically and the option of allowing tow-time restrictions in lieu of TEDs were phased out after a scientific study in 1987 documented the continuing high levels of sea turtle capture in shrimp nets.

Similarly, in 1993 the United States eliminated the option of implementing conservation programs instead of requiring TEDs under Section 609 because it was becoming clear that such programs were ineffective. As mentioned earlier, Thailand and the other Complainants have sea turtle conservation programs, yet their sea turtle populations continue to decline.⁹⁰ Only the use of TEDs can satisfy the conservation goals of Section 609.

2.6 The Section 609 measures have not disrupted trade. The U.S. TEDs requirement has not adversely affected the importation of shrimp into the United States. The measures went into effect for the Complainants and other nations outside the Caribbean and Western Atlantic area on May 1, 1996.⁹¹ The amount of imported shrimp in the United States in 1996 was within one percent of the average annual level from 1993-1995 even though

⁹⁰ *Country Report for Thailand*, *supra* note 70, at 1-3; *Country Report for India*, *supra* note 72, at 1-3; P. Mohanty-Hejmadi, *supra* note 75, at 90; E.H. Chan et al., *supra* note 76, at 1.

⁹¹ The measures did not, however, affect importation of shrimp harvested in these nations and shipped to the United States before May 1, 1996, even if such shrimp did not actually reach the United States until after May 1, 1996.

the measures were in effect throughout the last two thirds of 1996. Furthermore, while protectionist trade measures would be expected cause prices to rise, the price of imported shrimp actually declined after the TEDs requirements went into effect, from \$9.52 (U.S.) per kilogram in 1995 to \$9.30 (U.S.) per kilogram in 1996.⁹²

3 LEGAL ARGUMENTS

Article XX exists to carve out certain areas of national policy that were not intended to be constrained by GATT disciplines. In deciding this controversy, the Appellate Body should recognize that Article XX preserves the right of countries, subject to specific but reasonable constraints, to take unilateral measures that encourage other countries to institute policies that alter their processes and production methods (PPMs) in order to meet their international environmental obligations. This case provides the Appellate Body with the opportunity to clearly define these reasonable constraints on the use of unilateral measures for environmental purposes.

The Appellate Body should acknowledge that the sea turtle conservation measures reflect and are consistent with international environmental law. To the extent that the

sea turtle conservation measures encourage the implementation of existing international environmental obligations, and are compatible with the objects and purposes of the WTO, the WTO ought to acknowledge that they qualify for Article XX protection and consequently are not subject to WTO disciplines. Even if, however, the Appellate Body finds that the application of the sea turtle conservation measures was unjustifiably discriminatory, the Appellate Body should limit its findings to specific flaws in the application.

3.1 The United States must establish a *prima facie* case of consistency with Article XX; it is then up to the Complainants to rebut a presumption that the measure is consistent with Article XX. The United States has the burden of proof under Article XX.⁹³ It must adduce evidence sufficient to establish a *prima facie* case of consistency with Article XX. A *prima facie* case is one that will prevail unless and until

⁹² See United States First Submission, para. 67.

⁹³ See Report of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*, reprinted at 35 I.L.M. 603 (1996) [hereinafter *Gasoline*] at 22 (stating “The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception”). See also Panel Report on *USA – Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 98. (discussing exceptions in Articles II:2(c) and VIII:1(a) of the GATT) as previous GATT practice of requiring a *prima facie* case to be established under a GATT exception.

contradicted and overcome by other evidence. As noted by the Appellate Body in *Shirts and Blouses*:

The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim of defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.⁹⁴

Similarly, the Appellate Body in *Hormones* stated that:

a *prima facie* is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.⁹⁵

Once the United States has established a *prima facie* case, the burden shifts to the Complainants to rebut the presumption that the U.S. measures are consistent with Article XX. If they fail to do so the

Appellate Body must, as a matter of law, rule in favor of the United States.

3.2 The standard of review applied by panels must maintain appropriate deference to national policy decisions.

When interpreting and applying the WTO Agreements, WTO dispute settlement bodies must apply a standard of review that maintains appropriate deference to national policy decisions to protect the environment. Absent a compelling reason, WTO panels should accept the factual determinations upon which national governments base their environmental measures.

The standard of review is established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and by the terms of Article XX. The basic standard of review to be applied is set out in Article 11 of the DSU. It requires panels to “undertake an objective assessment of the facts of the case.”⁹⁶ As noted by the Appellate Body in *Hormones*, this standard is neither a *de*

⁹⁴ See *United States – Measures Affecting Woven Wool Shirts and Blouses from India (U.S. – Shirts and Blouses)* (adopted 23 May 1997), WT/DS33/AB/R, at 14.

⁹⁵ *EC Measures Concerning Meat and Meat Products* [WT/D48/AB/R], [hereinafter *Hormones*], at 40 (para. 104). For an excellent discussion of burden of proof and WTO proceedings, see Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?*, in J.Int’l Econ. L. (1998). Shifting the burden has a number of benefits. First, it reflects an efficient and equitable allocation of the information costs of proof. Second, it enhances the ability of a panel to test the parties’ evidence. And third, it lessens the burden on panels to make decisions that will inevitably require balancing the respective benefits of trade and environmental protection, and competing notions of sovereignty.

⁹⁶ See Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex to art. 3(1), legal instruments – results of the Uruguay Round (1994), 33 I.L.M. 1125 [hereinafter DSU], at art. 11. For a concise discussion of the standard of review applicable to WTO proceedings, see Gabrielle Marceau, *The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization*, in PETERSMANN, INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, at 487, 512 (1997).

novo review, nor “total deference” to national decision.⁹⁷ It is a flexible standard that requires a panel to exercise significant deference where, for example, a dispute involves highly complex factual evidence, or issues of high policy as is the case with Article XX.⁹⁸

The standard of review under Article XX must also reflect the balance established between the jurisdictional competencies conceded by the Members to the WTO and the jurisdictional competencies retained by the members for themselves.⁹⁹ Under Article XX, the WTO Members have retained substantial jurisdictional competence to protect the environment. A deferential standard is confirmed by the language of the introductory paragraph to Article XX.¹⁰⁰ Like the National Security exception, it provides that “nothing in this Agreement shall be construed” to prevent adoption of measures. These words are recognition of the importance given to the

⁹⁷ *Hormones*, *supra* note 95, at 45 (para. 117).

⁹⁸ *United States – Impositions of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT doc. SCM/153, 1992. (panel rejected Norway’s claim that it review United States’ anti-dumping investigation stating that it “was not within the [panel’s] terms of reference”).

⁹⁹ *See, e.g., Hormones*, *supra* note 95, at 43.

¹⁰⁰ The introductory paragraph requires that discrimination in the application of a measure must not be “unjustifiable”. The ordinary meaning of this word requires panels to give significant deference to national measures taken under Article XX. A measure should not be overturned unless the discrimination is *incapable* of justification. The meaning of “unjustifiable” is discussed further at section 3.6 below.

General Exceptions by the WTO Members, and suggest a hierarchy requiring the other terms of the *General Agreement* to be construed in a way that preserves these areas of high policy.

Where, as here, the process of factual and scientific determination has been objective, balanced, and undertaken in good faith, the Panel should afford the member States substantial deference with respect to its factual and scientific determinations and the resulting legislative and administrative actions. The Panel should have given significant deference to the factual and scientific determinations of the United States that: first, sea turtles are in serious risk of extinction; second, shrimp trawl nets are a major cause of the mortality of adult and large juvenile sea turtles; third, adult and large juvenile sea turtles are critical to the survival of sea turtles; fourth, TEDs are necessary to protect the adult and large juvenile sea turtles populations; fifth, without the use of TEDs, other measures to protect sea turtles are insufficient; and finally, that TEDs are an environmentally safe and cost-effective means to protect sea turtles while allowing shrimping activity to continue virtually unimpeded.

WTO panels lack the expertise and resources to analyze complex scientific data or to conduct the kind of thorough and exhaustive fact-finding exercises that were

conducted in adopting the TED measures. A more appropriate and efficient use of a panel's resources is to examine the process a Member State uses to reach a factual determination that certain measures are required. If the process is proper, this Panel should accept such determinations, absent a compelling overriding purpose. Indeed, the legitimacy of the WTO dispute settlement process itself may well depend on granting appropriate deference to the Member States, with respect to carefully considered factual determinations.

3.3 The WTO Agreements must be interpreted in light of international law principles that support and define sustainable development. The WTO Agreements, and in particular Article XX, must be interpreted in light of international law principles that support and define sustainable development. First, sustainable development forms part of the context, object and purpose of the WTO Agreements. According to both the Vienna Convention on the Law of Treaties¹⁰¹ and this Appellate Body,¹⁰² the terms of a treaty must be interpreted in

their context and in light of the treaty's object and purpose. The goal of sustainable development is expressly incorporated into the Preamble of the WTO Agreement. It commits the parties to the "optimal use of the world's resources in accordance with the objectives of sustainable development seeking both to protect and preserve the environment and to enhance the means for doing so."¹⁰³ Thus, through the Preamble of the WTO Agreement, the international law principles that support and define sustainable development are an important guide to the interpretation to Article XX, as part of its context, object and purpose.¹⁰⁴

Second, international law principles of sustainable development comprise part of the "international law relations among the

accordance with customary rules of interpretation of public international law").

¹⁰³ WTO Agreement, *supra* note 3, at Preamble.

¹⁰⁴ There is now a substantial body of international law relating to sustainable development which includes: the Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]; Agenda 21, U.N. Conference on Environment and Development (UNCED), Annex II, U.N. Doc. A/CONF.151/26/Rev.1 (1992) [hereinafter Agenda 21], and numerous multilateral environmental agreements and principles of public international law, many of which have only recently gained the status of norms of customary international law. As noted by the International Court of Justice in the *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary-Slovakia), in the field of environmental protection "... new norms and standards have been developed set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight" See *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary-Slovakia), 1997 I.C.J. 25 (Sept. 25) paras. 140, 111-114.

¹⁰¹ May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention].

¹⁰² See *Gasoline*, *supra* note 93, at 17 (citing art. 3(1) of the DSU as "recognition that the General Agreement is not to be read in a clinical isolation from public international law"). See also DSU, *supra* note 96, at para. 3.2 (requiring the Panel to interpret GATT "in

parties” which forms another important guide to the interpretation of Article XX under the Vienna Convention.¹⁰⁵ Article XX must therefore be interpreted in light of relevant international law treaties and customary international law principles relating to the protection of endangered, migratory marine resources in the global commons that contribute to, and are a part of, the corpus of sustainable development law.¹⁰⁶

Finally, interpreting WTO Agreements in light of international sustainable development principles promotes the development of a coherent system of international law, which in turn, promotes respect for the international system in general. Moreover, it is consistent with the principles of interrelationship and integration of international law that “form the backbone of sustainable development.”¹⁰⁷

¹⁰⁵ Vienna Convention, *supra* note 101, art. 31(3)(c).

¹⁰⁶ International treaties between some of the WTO Members are binding between those parties that are signatories, except to the extent that they codify customary international law, in which case they can be applied to all WTO Members. *See*, Aaditya Mattoo and Petros Mavroidis, *Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT*, in PETERSMANN, INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 327, 332 (1997). *See generally* *The Konsprins Gustaf Adolf*, AD (1931-32) No 205; *Reparations Case*, 1949 I.C.J. Rep., at 174; *Fubini Claim* 1959 I.L.R. 29, at 34, 46.

¹⁰⁷ *See* Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Sept. 26-28 (1995), prepared for the Commission on Sustainable

3.4 The requirement of the use of TEDs is supported by international law principles of sustainable development.

The WTO Agreements must be interpreted in light of international law principles that support and define sustainable development. The environmental conservation measures at issue flow from and are consistent with numerous multilateral commitments and customary laws of sustainable development. These oblige States to protect migratory marine resources, to control unsustainable consumption, to prevent environmental harms beyond territorial boundaries, and to

Development, Fourth Session (April 18-May 3, 1996) [hereinafter CSD Expert Report on International Law], at 7 stating:

The concept of interrelationship and integration also has to do with procedures and with the composition of those bodies mandated to settle conflicts between different laws when the conflict is relevant to sustainable development. In considering specific cases, these bodies should . . . take into consideration rules of sustainable development.

Id. at 16. The Report also states that:

[i]nterrelationship and integration reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development, and could lead to the development of general rules of international law in which these separate fields retain their distinct characters but are subject to and interconnected approach. Integration is the underlying theme of the Rio Declaration and Agenda 21. Principles 3 and 4 of the Rio Declaration integrate not only the concepts of environment and development, but also the needs of generations both present and future. Principle 25 states that peace, development and environmental protection are independent and indivisible. The Principle of interrelationship and integration is addressed expressly in chapter 8 of Agenda 21.

See also Principle 4 of the Rio Declaration, *supra* note 104 (“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”); DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, INTERNATIONAL ENVIRONMENTAL

observe the precautionary principle. They strongly support measures to protect marine resources, especially endangered species. Because the sea turtle conservation measures are taken in furtherance of these multilateral obligations they are legitimate under the WTO.¹⁰⁸

3.4.1 International law requires the protection of endangered, migratory marine resources, including by means of reducing destructive bycatch with effective improvements in fishing gear.

All five species of sea turtles in this controversy are endangered. The 134 parties to the CITES agreements have recognized that these species of sea turtles are threatened with extinction and warrant the highest level of protection that agreement provides, including a complete prohibition on trade.¹⁰⁹ Moreover, as

LAW AND POLICY (Foundation Press 1998) [hereinafter Hunter, Salzman & Zaelke] at chap. 7.

¹⁰⁸ The measures do not solely target U.S. consumption of shrimp, but also secure U.S. interest in endangered sea turtle populations by encouraging countries to abide by international obligations to protect global marine resources.

¹⁰⁹ All species of sea turtles that are listed on CITES Appendix 1 have been placed on Appendices I and II of the Bonn Convention, and are listed as critically endangered or vulnerable on the IUCN Red List. CITES expressly allows parties to take stricter domestic measures regarding the conditions for trade in and the taking of threatened species in need of protection. Parties retain the right to adopt stricter “domestic measures restricting or prohibiting trade ... of species not included in Appendices I, II or III” (for example, shrimp); see CITES, art. XIV(1)(b). Further, in the past stricter domestic measures, in addition to those required by CITES, have been recommended by the CITES Standing Committee. See Chris Wold, *The Relationship Between*

discussed below, the protection of endangered marine resources like the sea turtles at issue, is required by numerous international environmental agreements and the customary norms reflected in these agreements.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), accepted as customary international law,¹¹⁰ requires states to protect living marine resources by, among other measures, taking into consideration effects on species other than target species to ensure that fishing is conducted in a manner designed to restore

the Trade Measures in CITES and the Provisions of GATT 5 (1994). The Committee has recommended prohibitions of trade with Thailand and has considered restrictions against Italy, China and Taiwan. *Id.* The use of trade measures is an accepted part of the international legal system for the protection of endangered species, and as such, should be considered when evaluating the rights and obligations of the parties.

¹¹⁰ United Nations Convention on the Law of the Sea, December 10, 1982, U.N. Doc. A/CONF.62/122 (1982) [hereinafter UNCLOS]; For discussion of customary international law and UNCLOS’s customary law status, See John N. Moore, “Customary International Law After the Convention,” in *THE DEVELOPING ORDER OF THE OCEANS* 133 (Robert B. Krueger & Stephan A. Riesenfeld eds., 1985), 41, 45-56; Louis B. Sohn, “Implications of the Law of the Sea Convention Regarding the Protection and Preservation of the Marine Environment, in *THE DEVELOPING ORDER OF THE OCEANS*, supra, at 106, as cited in David M. Dzidzornu, “Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis,” 8 *Colo. J. Int’l Envtl.L. & Pol’y* 283, 318, 321. See also Charlotte de Fountaubert, David R. Downes, Tundi S. Agardy, *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 *Geo. Int’l Envtl.L.Rev.* 753, 757 (Spr. 1998). See also, *North Sea Continental Shelf Case* 1969 I.C.J. Rep 3, para. 72. UNCLOS has been signed by 125 countries.

such associated populations above levels where they are seriously threatened.¹¹¹

These customary norms in UNCLOS are given specific expression in the FAO Code of Conduct for Responsible Fisheries (“FAO Code”).¹¹² By negotiating the Code, States have acknowledged the need to effectuate specific changes to their fisheries practices because of the failures in the past to adequately protect marine resources. The FAO Code asserts, in its “General Principles,” that “[m]anagement measures should not only ensure the conservation of target species but also of species belonging to the same ecosystem”¹¹³ Accordingly, the Code repeatedly promotes remedies to the environmental consequences of the use of fishing equipment and techniques that create significant bycatch and resulting discard of non-target species:

Selective and environmentally safe fishing gear and practices should be further developed and applied, to the extent practicable, in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems Where proper selective and environmentally safe fishing gear and practices exist, they should be recognized and accorded a priority in establishing conservation and management measure for fisheries. States and users of aquatic ecosystems should minimize waste, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species.¹¹⁴

Agenda 21 echoes the Code by calling on states to implement measures to protect biological diversity and the productivity of living marine resources under their jurisdictional and territorial control.¹¹⁵

Similarly, the Straddling Stocks Agreement (“SSA”),¹¹⁶ a further binding

¹¹¹ UNCLOS, *supra* note 110, art. 192 (requiring all nations “to protect and preserve the marine environment”), art. 194(5) (requiring all nations “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species”), and art. 61(4) (requiring states to determine allowable catches considering “the effects on species associated with . . . harvested species with a view to maintaining or restoring populations . . . above levels at which their reproduction may become seriously threatened”).

¹¹² Food and Agriculture Organization, Fisheries Department, Code of Conduct for Responsible Fisheries (Rome 1995). All but four WTO members are parties to the FAO Conference that developed the Code (Brunei Darussalam, Liechtenstein, Macau and Singapore).

¹¹³ *Id.* art. 6.2.

¹¹⁴ *Id.* art. 6.6. See also *id.* art. 7.2.2 (d) (fisheries management practices should provide that “biodiversity of aquatic habitats and ecosystems is conserved and endangered species are protected”), and *id.* at art. 7.2.2(g) (management practices should provide that “discards, . . . catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species are minimized, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques”).

¹¹⁵ Agenda 21, *supra* note 104, at chap. 17. See A.C. DE FONTAUBERT, D. DOWNES, ET AL., BIODIVERSITY IN THE SEAS: IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN MARINE AND COASTAL HABITATS 59 (1996) (noting that while Agenda 21 is not binding international law, its signatories made significant political commitments to the principles it embodies).

¹¹⁶ Agreement for Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation & Management of Straddling and Migratory Stocks, UN Doc. A/CONF.164/37, Sept. 8, 1995 [hereinafter Straddling Stocks Agreement]. *Amici* recognize that

elaboration of the customary obligations set forth in UNCLOS relating to straddling stocks, requires states to “minimize . . . catch of non-target species . . . , in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques.”¹¹⁷

The Convention on Biological Diversity (“CBD”),¹¹⁸ which was signed and ratified by the Complainants, affirms that conservation of threatened and endangered species is vital to protect the world’s biological diversity, an issue of collective international concern. As parties to the CBD, the Complainants must identify threatened species and alter their commercial and other activities so as to minimize their impacts on such species and promote their recovery. Specifically, the CBD requires parties to identify “processes

and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity”¹¹⁹ Parties must “regulate or manage the relevant processes and categories of activities” to limit adverse impacts, and must “[c]ooperate in providing financial and other support for in-situ conservation . . . particularly to developing countries.”¹²⁰ Finally, the CBD requires member countries to “[a]dopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.”¹²¹

The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of which both India and Pakistan are parties,¹²² also imposes affirmative obligations *vis a vis* threatened and endangered species. Three of the five species of sea turtles at issue in this dispute are identified as threatened under Appendices I and II of the Bonn

UNCLOS, the Straddling Stocks Agreement, and other multilateral environmental agreements generally favor a multilateral approach for implementing their measures. However, the multilateral environmental agreements do not preclude a State from moving forward on its own with measures that flow from and that are consistent with the multilateral measures. Indeed, this dialectic is often critical to full multilateral implementation. HUNTER, SALZMAN & ZAELKE, *supra* note 107, at chap.s 5, 9.

¹¹⁷ Straddling Stocks Agreement, *supra* note 116, art. 5. See also Agenda 21, *supra* note 104, para. 17.46 (articulating the duty to “promote the development and use of selective fishing gear and practices that minimize waste in the catch of target species and minimize the bycatch of non-target species”).

¹¹⁸ Convention on Biological Diversity, June 5, 1992, reprinted in 31 I.L.M. 818 (1992). All parties to this dispute have signed, and India, Malaysia and Pakistan

have each ratified, the Convention on Biological Diversity.

¹¹⁹ *Id.*, art. 7 (c)

¹²⁰ *Id.*, art. 8(l),(m)

¹²¹ *Id.*, art. 10(b).

¹²² The Bonn Convention, *supra* note 21, entered into force in India on 1 November 1983 and in Pakistan on 1 December 1987. Global coverage of the Convention on Migratory Species, UNEP Secretariat (1 February 1998).

Convention,¹²³ which prohibits the “taking”¹²⁴ of such species, unless this is done: in the interest of science; to enhance such species’ propagation or survival; to accommodate the needs of such species’ traditional subsistence users; or as required under extraordinary circumstances.¹²⁵ The Bonn Convention further requires parties to take specific measures to prevent, remove, compensate for, or minimize the adverse effects of activities or obstacles that could prevent the migration of the species.¹²⁶ The Convention further encourages parties to develop and conclude multilateral agreements for the benefit of migratory species whose conservation status is unfavorable – agreements which could, in this instance, require the use of TEDs by shrimp trawlers.

The U.S. sea turtle conservation measures flow from these international environmental law obligations by directly

¹²³ *Id.* at Appendix I. The three species so protected when occurring in Indian and Pakistani waters are the Hawksbill, Kemp’s Ridley and Leatherback sea turtles. In addition, the Olive Ridley sea turtle, though not covered by the U.S. measure at issue in this dispute, is listed as an Appendix I species in Indian territorial waters. Five species are recorded to nest in the region. See Jack Frazier, *Recommendation on Future Convention on Migratory Species Activities for Marine Turtle Conservation*, on file with Convention on Migratory Species Secretariat, paras. 25-28 (June 5, 1998). In fact, there is evidence that the turtle population has for the most part been decimated in this region. See *id.* para. 28.

¹²⁴ *Id.*, art. I.1(i), defines “taking” as “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.”

¹²⁵ *Id.*, art. III.5.

mitigating the serious harm to sea turtle populations caused by shrimp trawling. TEDs are scientifically recognized as the only effective means of protecting breeding age turtles from devastation by shrimp trawls. Thus, the measures allow for harvest of shrimp resources while avoiding bycatch of sea turtles and other living marine resources. In contrast, by refusing to implement TED programs the Complainants have failed to meet their commitments and obligations under these agreements and principles, and failed to abide by the broad international consensus regarding the goals and means of protecting endangered sea turtles. The measures, therefore, encourage Complainants to fulfill their own obligations under these laws to fish in a manner designed to restore associated populations above levels where they are threatened.

3.4.2 International law requires nations to control unsustainable consumption patterns that threaten global environmental resources. Under the Rio Declaration and the Agenda 21 action program developed in connection therewith, all nations have the duty to reduce and eliminate unsustainable

¹²⁶ See *Id.*, art. III.4(b).

patterns of production and consumption.¹²⁷ The United States, as one of the world's largest consumers, bears a heightened responsibility to eliminate unsustainable consumption patterns. As the world's second largest consumer of shrimp, the United States has an obligation to ensure that its demand for shrimp does not promote unsustainable fisheries practices and does not harm the global environment.

The import prohibition in the sea turtle conservation measures directly addresses these obligations by remedying harvesting practices that endanger sea turtles. The import prohibition does not apply to shrimp harvested by methods that are benign to sea turtles, such as with artisanal shrimping gear.¹²⁸

3.4.3 International law imposes duties to prevent environmental harms beyond territorial boundaries. The duty to prevent harm to the environments of other States and the global commons is

¹²⁷ Principle 8 of the Rio Declaration, *supra* note 104 (“[t]o achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption ...”); Agenda 21, *supra* note 104, at chap. 4 (“developed countries should take the lead in achieving sustainable consumption patterns” and “special attention should be paid to the demand for natural resources generated by unsustainable consumption”). *See also* Convention on Biological Diversity, *supra* note 118, art. 6 (calling on parties to ensure that the use of biological diversity is sustainable).

¹²⁸ *Amici* note that aquaculture-raised shrimp are not directly banned by this initiative. Nevertheless, we do not endorse industrial forms of shrimp aquaculture as

expressed clearly in international environmental laws, customs and statements of principle.¹²⁹ For example, the CBD requires states to ensure that “activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”¹³⁰ Pursuant to this duty,

they too have been proven to be environmentally destructive.

¹²⁹ *Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) 35 I.L.M. 809, 821 (stating that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is *now a part of the corpus of international law*” (emphasis added). This statement has been widely interpreted as acknowledging Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration as a customary norm of international law.) *See also* *Trail Smelter (U.S. v. Can.)*, 1941 3 R.I.A.A. 1938, 1965 (Mar. 11). In International law this duty is triggered when there is ‘convincing evidence’ that such harm will occur. (IUCN Draft International Covenant of Environment and Development, Environmental Policy and Law Paper No. 1, at 40 (referring to the *Trail Smelter Arbitration*).

¹³⁰ Convention on Biological Diversity, *supra* note 118 (requiring parties to “promote the ... maintenance of viable populations of species in natural surroundings” (art. 8(d)) and to “[d]evelop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations” (art. 8(k)). *See also id.*, art. 14.1(c) (“Each Contracting Party, as far as possible and as appropriate, shall: ... (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate”). *See also* FAO Code of Conduct, Sec. 6.12 (charges states to “cooperate at subregional, regional and global levels through fisheries management organizations, other international agreements or other arrangements to promote conservation and management, ensure responsible fishing and ensure effective conservation and protection of living aquatic resources throughout their range of distribution” while “taking into account the need for compatible measures in areas within and beyond

national practices – like shrimp trawling – must not harm areas beyond national jurisdiction and control, for example by depleting endangered migratory species when they move from the global commons.¹³¹

In determining the scope of this duty, a recent CSD Expert Report on International Law suggests consideration of “the likelihood of significant harmful effect on the environment and on potential or current activities in another State” and “the ratio between prevention costs and any damage.”¹³² Due to the highly migratory nature of sea turtles, the potential for significant environmental harm to areas outside the Complainant jurisdiction is high.¹³³ While the damage to the

environment from sea turtle extinction is incalculable and irreversible,¹³⁴ the cost of using TEDs to avoid the harm is low.¹³⁵

As turtles are highly migratory, moving within and beyond the limits of national jurisdiction, the failure of the Complainants to require adequate, inexpensive conservation measures breaches this responsibility under international environmental law. In refusing to allow imports of shrimp from countries that do not require the use of TEDs from endangered sea turtles, the United States is protecting its interest in the global commons. In furthering its duty to consume sustainably, the United States also meets its customary duty to reduce consumption and to avoid transboundary harm, by limiting, through the U.S. sea turtle conservation measures, the effect of its domestic shrimp consumption on the

national jurisdiction.”); Rio Declaration, Principle 19 (requiring states to “provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect” and to “consult with those States at an early stage and in good faith”).

¹³¹ See, e.g., Straddling Stocks Agreement, *supra* note 116, art. 5(h) (requiring parties to “take measures to prevent or eliminate overfishing and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources”); art. 31 (providing for the use of provisional measures in recognition of the need to act promptly to prevent further damage to depleted fishing stocks (and to preserve the respective rights of the parties)).

¹³² CSD Expert Report on International Law, *supra* note 107, at 15.

¹³³ The principle of avoiding extraterritorial damage is applicable to the marine environment. See UNCLOS, *supra* note 111, at art. 194(2) (providing: “States shall take all measure necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”). See also Straddling Stocks Agreement, *supra* note 116, art. 7(2).

¹³⁴ As noted by the CSD Expert Report on International Law, “[i]t may in fact be impossible to repair environmental harm once it has occurred ... compensation ... cannot make up of the loss of flora, fauna, other resources or entire species.” CSD Expert Report on International Law, *supra* note 107, at 16 (stating that the prevention principle is “based on the idea that protection of the environment is best achieved through anticipatory measures to prevent harm rather than through post-hoc efforts to repair or provide compensation for it.”) The report further notes that “[p]reventive measures are most effective and efficient when they eliminate the source of the environmental harm rather than attempting to manage harmful effects.” *Id.* at 17. TEDs, with their emphasis on eliminating the source of environmental harm, fall within this category of “measures most effective” to prevent environmental damage.

¹³⁵ See Statement of Facts, section 2.2.1.

global commons and the environment of other States.

3.4.4 The precautionary principle, which is part of the international law of sustainable development, provides independent support for the U.S.

measures. The precautionary principle, which is part of the international law of sustainable development, provides independent support for the sea turtle conservation measures. Under the precautionary principle, “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹³⁶

This principal has gained almost universal acceptance as a principle guiding activities facing the ocean environment.¹³⁷ The SSA

¹³⁶ Rio Declaration, *supra* note 104, at Principle 15 (“In order to protect the environment, the precautionary approach shall be widely applied . . . according to their capabilities Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”); *see also* Straddling Stocks Agreement, *supra* note 116, art. 6(2) (“The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures”). The precautionary principle has been expressed in many other recent international environmental agreements. *See, e.g.*, Convention on Biological Diversity, *supra* note 118, at Preamble (providing that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”).

¹³⁷ The precautionary principle has also been cited repeatedly as a principle of customary international law by international jurists. *See e.g.*, Jon M. Van Dyke, *The*

bases its expression of the duty to protect migratory species on the precautionary principle.¹³⁸ The FAO Code adheres to the precautionary principle as well.¹³⁹ The Appellate Body acknowledged increasing claims of authority for the precautionary principle when applied in the context of international environmental law in *Hormones*.¹⁴⁰

Straddling and Migratory Stocks Agreement and the Pacific, 11 Int’l J. Marine & Coastal Law 410 (1996) (“Commentators have discussed whether the precautionary principle has been officially accepted as a norm of customary international law that is formally binding on all nations. The principle has been so universally included in recent treaties that it appears now to have that status”). *See also* CSD Expert Report on International Law, *supra* note 107, (“the precautionary principle could require activities and substances which may be harmful to the environment to be regulated and possibly prohibited, even if no conclusive or overwhelming evidence is available as to the harm or likely harm those activities may cause to the environment”); *IUCN Draft International Covenant on Environment and Development, Environmental Policy and Law Paper* no. 31, at 40 (1995) (stating that the precautionary principle requires action “even where there is scientific uncertainty about the precise degree of risk or the magnitude of potentially significant or irreversible environmental harm”); David Hunter et al., *Concepts and Principles of International Environmental Law: An Introduction*, 6 UNEP Trade & Environment Series No. 2 (1994); *See also* HUNTER, SALZMAN & ZÄELKE, *supra* note 107, at chap. 7.

¹³⁸ Straddling Stocks Agreement, *supra* note 116, art. 6(1).

¹³⁹ FAO Code, *supra* note 112, sec. 6.5 (instructing states and subregional and regional fisheries management organizations to “apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available” and warning that “[t]he absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non target species and their environment”). *See also Id.*, sec. 7.5 (elaborating on the application of the precautionary principle).

¹⁴⁰ *Hormones*, *supra* note 95, para. 47 (stating that “there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle,” and noting that the precautionary principle is reflected in the Preamble to the *SPS Agreement* and in articles 3.3 and 5.7); *id.* at

Where, as here, the potential environmental harm is serious and irreversible, the precautionary principle dictates that countries employ cost-effective technologies, such as TEDs, to prevent the potential harm.

3.4.5 The principle of common but differentiated responsibilities, which is part of the international law of sustainable development, provides further support for the U.S. measures.

Under international environmental law, measures taken by developed countries to protect the global commons must be guided by the principle of common but differentiated responsibility, which is the equitable keystone to international law of sustainable development. Common but differentiated responsibility is expressed in Principle 7 of the Rio Declaration and is regularly included in the multilateral agreements to protect the global

para. 123 (“The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law.”) (emphasis in original) (citing recent texts affirming the principle, including: P. Sands, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 212 (Manchester University Press 1995); J. Cameron and T. O’Riordan, eds., *The Status of the Precautionary Principle In International Law*, INTERPRETING THE PRECAUTIONARY PRINCIPLE 262, 283 (1994)). Appellate Body also referred to older texts which expressed more cautious positions on the authority of the precautionary principle, including P. BIRNIE and A. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 98 (Clarendon Press 1992); L. Gündling, *The Status in International Law of the Precautionary Principle*, INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW 25 (1990); A. DEMESTRAL (et. al), INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA, 5TH ED. 765 (Edmond Montgomery, 1993); D. Bodansky, in PROCEEDINGS OF THE 85TH ANNUAL MEETING OF THE

environment.¹⁴¹ When allocating responsibility for sustainable development under this principle, a nation’s impact on the global environment must be considered. The principle holds developed nations, with their disproportionate impact on the environment and greater access to resources and technologies, to higher standards, faster timetables, and more stringent commitments than developing countries. The principle also requires wealthier nations to facilitate poorer nations’ access to environmentally safe technologies and to provide financial and technical support.¹⁴²

In undertaking efforts to ensure that its consumption of shrimp becomes sustainable, the United States has taken

AMERICAN SOCIETY OF INTERNATIONAL LAW 415 (ASIL, 1991).

¹⁴¹ Rio Declaration, *supra* note 104, Principle 7 (“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment . . .”). *See also* Straddling Stocks Agreement, *supra* note 116, at Part VII (requiring developed countries to provide assistance to developing countries; CBD, *supra* note 118, at art. 8(m) (requiring parties to “[c]ooperate in providing financial and other support for in-situ conservation . . . particularly to developing countries”). *See, e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987; United Nations Framework Convention on Climate Change, May 9, 31 I.L.M. 849 (1992).

¹⁴² CSD Expert Report on International Law, *supra* note 107, at 89-92; David Hunter, et al., *supra* note 137. For textual statement of this principle, *see* Principle 9 of the Rio Declaration (“States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development,

significant steps to meet its obligations under the principle of common but differentiated responsibility. The United States required its shrimp fleets to use TEDs many years before requiring foreign shrimpers to use them, it bore the expense of designing, testing and validating the effectiveness of TEDs has provided interested nations with substantial assistance in the fabrication and use of TEDs, including transferring TED technology to numerous nations in Asia, Africa and South America. The United States has developed and delivered training courses in over 30 countries on the installation and use of TEDs, and field tested and evaluated TEDs on foreign fishing boats at sea. The United States funded research into sea turtle biology and conservation, implemented training programs and offered to provide material assistance and training to all developing countries with respect to the implementation of TEDs.¹⁴³

The financial and technical support provided by the United States to protect sea turtles from the ravages of shrimp trawling furthers the principle of common but differentiated responsibilities.

adaptation, diffusion and transfer of technologies, including new and innovative technologies”).

¹⁴³ See Statement of Facts, section 2.4.

3.4.6 Under the international law of sustainable development, unilateral measures are allowed, although multilateral agreements are preferred.

While allowing unilateral measures under certain circumstances, the international law of sustainable development prefers multilateral agreements. Specifically, Principle 12 of the Rio Declaration notes that:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

The Rio Declaration provides that states should cooperate to, *inter alia*, build technological capacities to enable sustainable development, create a supportive and open international economic system, and “address the problems of environmental degradation.”¹⁴⁴

Similarly, the CBD provides that parties should, “as far as possible and as appropriate,” cooperate bilaterally or where appropriate, through international organizations, in connection with “the conservation and sustainable use of biological diversity.”¹⁴⁵

¹⁴⁴ Rio Declaration, *supra* note 104, Principles 9 and 12.

¹⁴⁵ CBD, *supra* note 118, art. 5; see also UNCLOS, *supra* note 111, art. 64.

At the same time, it must be noted that these agreements clearly contemplate unilateral action, as does Article XX itself, and there is no general obligation for states to refrain from the use of economic measures to pressure others to change their policies.¹⁴⁶

The United States took steps towards obtaining a multilateral agreement on the protection of endangered sea turtles from shrimp trawls. However, as noted by the *Shrimp/Turtle* Panel, these overtures were not made to the Complainants prior to a decision to implement the import ban. If the Appellate Body finds that the United States failed to exhaust multilateral efforts and thereby violated Article XX then any remedy should be narrowly tailored to correct this specific deficiency. The WTO should also make it clear that they will not condone future refusals by Complainants to negotiate a multilateral agreement to protect sea turtles.

3.4.7 In sum, the sea turtle conservation measures flow from

¹⁴⁶ Case Concerning Military and Para Military Activities In and Against Nicaragua (Nic. v. U. S. A.) 1984 I.C.J. Rep 14, 244. While multilateral agreements are best in theory, in practice the motivation to negotiate is often too weak to secure an agreement in time to protect the resource, especially when delay may lead to the loss of species or otherwise be irreversible. It is critical that the weak dynamic furthered by such carefully tailored unilateralism, as involved in the U.S. measures, be given ample scope in Article XX to pursue environmental protection and sustainable development.

fundamental principles of sustainable development. In sum, the sea turtle conservation measures flow from the fundamental principles of sustainable development embodied in international environmental agreements and customary law principles. They are based on an international consensus that sea turtles are endangered, that endangered species should be protected, that by-catch should be eliminated, that selective fishing gear should be used, and that unsustainable consumption patterns should be eliminated. Indeed, the U.S. measures are so carefully guided by international consensus, they should be given considerable deference, including a presumption that they fall within the scope of GATT Article XX(g).

3.5 The U.S. measures satisfy the requirements of paragraph (g) of Article XX. The U.S. measures satisfy the requirements of paragraph (g). As noted by the Appellate Body in *Gasoline*, Article XX requires a two-tiered analysis: the U.S. sea turtle conservation measures must be examined first under paragraph (g), and only then under the terms of the introductory paragraph of Article XX.¹⁴⁷

¹⁴⁷ *Gasoline*, *supra* note 93, at 22 (“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of

Paragraph (g) allows members to take unilateral measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

3.5.1 Sea turtles are an “exhaustible natural resource.” Sea turtles are a natural resource; they are a vital part of the earth’s biodiversity, they migrate widely and provide ecosystem services within the environments of each of the parties to this dispute,¹⁴⁸ and they have cultural significance.¹⁴⁹ And sea turtles are exhaustible. As noted already, all seven species risk extinction – a fact recognized by all parties as members of CITES, and by their adoption of at least some measures to protect turtles.

the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.”).

A two-tiered approach is also supported by the ordinary language of Article XX. According to its ordinary language, the introductory paragraph considers the “application” of “such measures” as are enumerated in paragraphs (a) to (j). Thus, a panel must first determine the content of a measure and the kind of degree or connection the measure has with one of the justifying policies described under Article XX, before it can, for example, determine that any discrimination caused by the measure is arbitrary or unjustifiable. Paradoxically, reversing the order of application, as was done by the Panel, would logically require the introductory paragraph to be applied to all measures that failed a substantive GATT obligation, and not merely those of a kind considered by Article XX (after which the measure would be examined to see if it satisfies one of the enumerated exceptions).

¹⁴⁸ See Statement of Facts, section 2.1.1.

¹⁴⁹ See First Submission of Thailand to Panel on *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, para. 20.

3.5.2 The U.S. measures are measures “relating to” the conservation of exhaustible natural resources. The sea turtle conservation measures are measures “relating to” the conservation of sea turtles. The ordinary meaning of the words “relating to” implies that a measure must “stand in some relation to” or be “connected” with a policy conserving exhaustible natural resources.¹⁵⁰ Notably the ordinary meaning does *not* suggest that a measure must be “primarily aimed” at conservation. This was confirmed by the Appellate Body in *Gasoline* when it ruled that measures fell within Article XX(g) because they exhibited a substantial relationship with, and were not “merely incidental or inadvertently aimed at” the conservation of an exhaustible natural resource.¹⁵¹

In examining the relationship between the measure and the policy goal of conserving sea turtles, it is necessary to examine the measure as a whole and not merely the trade restrictive aspect of it.¹⁵²

¹⁵⁰ C.T. ONIONS, 1 THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (Clarendon Press 1965) [hereinafter “SHORTER OED”] at 1695.

¹⁵¹ *Gasoline*, *supra* note 93, at 19

¹⁵² *Gasoline*, *supra* note 93, at 16. The Appellate Body noted it is the “measures” which are to be examined under Article XX(g), not the legal finding of “less favorable treatment.” Further, the Appellate Body went on to require that the baseline establishment rules “as a whole” be examined in relation to the protection of the exhaustible natural resource, as “those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the

Recognizing that sea turtles are endangered, that shrimping without TEDs is a major cause of sea turtle mortality, and that the United States is the world's largest shrimp consumer, the U.S. sea turtle conservation measures ensure that shrimp imported into the United States has been harvested in a way that does not endanger sea turtles. Breaking the nexus between U.S. shrimp consumption and unsafe shrimping methods is an important step towards protecting endangered sea turtle populations.

The sea turtle conservation measures do more than ensure that U.S. consumption is of responsibly harvested shrimp; they also provide incentives for other countries to require the use of TEDs even on trawls not selling shrimp to the United States. As noted, this aspect of the sea turtle conservation measures flow from relevant multilateral agreements and customary international law principles on the protection of endangered species. These agreements and principles express the international community's consensus to protect living marine resources, specifically sea turtles and other endangered species, and specifically through environmentally sound and cost-effective fishing gear such as TEDs.

Given the fundamental relationship

Gasoline Rule which certainly constitute part of the

between the measures and the underlying policy objective of sea turtle conservation, the U.S sea turtle conservation measures “relate to” the conservation of sea turtles.

3.5.3 The U.S. measures are made effective in conjunction with restrictions on domestic production or consumption.

The second phrase of Article XX(g) requires measures to be “promulgated or brought into effect together with restrictions on domestic production or consumption.”¹⁵³ It requires a measure of even-handedness in how countries pursue the conservation of exhaustible natural resources. It does not require equality between measures and domestic restrictions; to do so would render the words “arbitrary or unjustifiable discrimination” redundant.¹⁵⁴

The United States has imposed restrictions on domestic production and consumption. By requiring all shrimp trawl vessels operating in U.S. waters where there is a likelihood of harming sea turtles to use TEDs at all times, the United States has placed restrictions on the consumption or

context of these provisions." *Id.* at 19.

¹⁵³ *Id.* at 20.

¹⁵⁴ *Id.* at 23. *See also* Corfu Channel Case (1949) I.C.J., 24. Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad) (1994) I.C.J. 23; 2 *Yearbook of the International Law Commission* 219 (1966); 1 OPPENHEIM'S INTERNATIONAL LAW 1280-81 (1992); P. DALLIER AND A. PELLET, DROIT INTERNATIONAL PUBLIC, para. 17.2 (1994); D. CARREAU, DROIT INTERNATIONAL para. 369 (1994).

depletion of endangered sea turtles by regulating domestic production of shrimp which is not turtle-safe.¹⁵⁵ These measures parallel, and in fact, long precede, the corresponding U.S. sea turtle conservation measures applicable to the Complainants.¹⁵⁶

The U.S. measures satisfy the requirement of even-handedness. There are no essential differences between the way the sea turtle conservation measures treat domestic and foreign shrimp trawling fleets. They allow any nation whose shrimping industry does not pose a threat of incidental taking of sea turtles to be certified to import shrimp in to the United States, “without the need for any action on the part of the government of the harvesting nation.”¹⁵⁷ All other nations may be certified if they adopt a regulatory program -- including the use of TEDs --

comparable to the United States’ regulatory program.¹⁵⁸

3.6 Trade measures meet the requirements of the introductory paragraph of Article XX if they are applied in a manner that avoids arbitrary or unjustifiable discrimination between countries where the same conditions prevail and disguised restrictions on international trade. The introductory paragraph of Article XX (the “chapeau”) is designed to prevent abuse of the Article XX exceptions. It states that measures must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Thus, not all discrimination between countries is prohibited by the GATT. When determining what discrimination should be allowed, the Appellate Body should bear in mind the need to permit principled adoption of measures to address environmental harm affecting the global commons and to provide certainty to national governments about the scope of the *General Agreement* when applied to environmental regulation.

¹⁵⁵ 61 Fed. Reg. 17342 (1996).

¹⁵⁶ The question arises whether Article XX(g) requires “restrictions” to be imposed on the domestic production or consumption of *exhaustible natural resources* (sea turtles) or on other products, including those subject to the import measures (shrimp). The words “restrictions on domestic production or consumption” are *not qualified by reference to ‘exhaustible’ natural resources.*” Amici therefore submit that Article XX(g) should be read to apply to both restrictions on exhaustible natural resources and to restrictions on products whose production or consumption impact the conservation of exhaustible natural resources. This interpretation is supported by the Appellate Body in *Gasoline* when it stated that Article XX(g) “is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline.” *Gasoline*, *supra* note 93, at 20.

¹⁵⁷ 61 Fed. Reg. 17342, 17343 (1996).

¹⁵⁸ *Id.*

3.6.1 Trade measures must avoid causing arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In

examining whether a measure is applied to cause “arbitrary and unjustifiable discrimination between countries where the same conditions prevail,” a panel must first identify any discrimination between countries where the same conditions prevail. Next, a panel must determine whether the extent of any discrimination, in light of all the circumstances of the case, is “arbitrary or unjustifiable.”

3.6.1.1 The U.S. measures do not facially discriminate where the same conditions prevail. The sea turtle conservation

measures do not discriminate between countries where the same conditions prevail. The measures provide parity where the same conditions prevail and differentiate only where *different* environmental and technical conditions prevail in shrimp fisheries.¹⁵⁹ All nations whose shrimp fishing conditions are not harmful to sea turtles are certified

automatically.¹⁶⁰ All nations whose shrimp fishing conditions may threaten harm to sea turtles are certified when they have adopted turtle conservation programs comparable to the United States’ conservation programs, including the use of TEDs.¹⁶¹

If, however, the Appellate Body identifies discrimination between countries where the same conditions prevail, it will be necessary to determine whether the discrimination was “arbitrary or unjustifiable. The words “arbitrary or unjustifiable” must be given their ordinary meaning in light of their context and the object and purpose of the *WTO Agreement*.

¹⁵⁹ In this manner, the measures in this controversy are distinct from the measures in *Gasoline*, *supra* note 93. In *Gasoline*, differing baseline rules were applied between domestic and foreign refiners. The measures here do not apply different standards to the foreign and domestic shrimping industries. *Amici* also note that the ordinary words of the introductory paragraph do not require discrimination between “like products,” as do GATT Articles I and III, but rather between “like countries.”

¹⁶⁰ Included are nations which only export shrimp harvested in aquaculture facilities, harvested in cold-water areas where sea turtles do not occur, or harvested using means that do not involve the retrieval of nets using mechanical devices. *Amici* note that some countries were afforded more time to implement the TEDs requirements than others. The Complainants argue that this constitutes discrimination between countries where the same conditions prevail, which is arbitrary and unjustifiable. This brief does not address this issue except to note that if the Panel were to find this feature inconsistent with GATT, the proper remedy would be to require the United States to afford more time to all nations, taking into consideration the relatively greater ease countries now have applying modern TEDs technology, the increase in shrimping and the continuing threat to sea turtles.

¹⁶¹ Nations whose shrimp are harvested by mechanical shrimp trawls in areas inhabited by sea turtles are certified only if they require the use of TEDs. Similarly, TEDs are required on all U.S. boats harvesting shrimp by mechanical means in waters where turtles are found. But a comparison between the United States and other nations is not required by the “arbitrary and unjustifiable discrimination” criteria of the chapeau. Rather, the object and purpose of these criteria disclose that they require a comparison of the conditions prevailing in exporting countries only. See JOHN JACKSON, *THE WORLD TRADING SYSTEM* 207 (1994). *Amici* note that the Chapeau’s “field of application” was not determined by *Gasoline*, *supra* note 93, at 24.

As noted by the Appellate Body in *Hormones*:

characterizing a treaty provision as “exception” does not by itself justify stricter, “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words viewed in light of the treaty’s object and purpose or, in other words, by applying the normal rules of treaty interpretation.¹⁶²

3.6.1.2 The U.S measures are not applied in a manner that constitutes *arbitrary* discrimination.

The sea turtle conservation measures are not applied in a manner that constitutes arbitrary discrimination. The ordinary meaning of “arbitrary” is “capricious” or “despotic.”¹⁶³ The ordinary meaning thus preserves substantial discretion as to how governments pursue environmental protection.

The sea turtle conservation measures are based on reason and are not capricious. As noted above, the measures are applied according to the environmental and technical conditions prevailing in each nation’s shrimp fisheries. They are grounded in science and reflect a growing international consensus on how to ensure the survival of sea turtle populations and they are consistent with multilateral

agreements, including in the use of “environmentally safe and cost-effective” fishing equipment. Finally, they employ trade restrictions that are narrowly tailored to minimize disruption to market access.

3.6.1.3 Trade measures must not be applied in a manner that constitutes *unjustifiable* discrimination.

The ordinary meaning of “unjustifiable” is “*not able to be justified.*”¹⁶⁴ Like the standard for arbitrariness, “unjustifiable” sets a deferential standard that preserves a Member’s sovereignty to protect the environment. Deference is especially important given the deteriorating condition of the world’s environment, including the increasing number of species facing extinction, and the limited means available to countries taking the initiative to protect the environment. “Unjustifiable” recognizes that sovereignty and the complexity of the government decision-making process require the WTO to accord substantial deference to member states’ decisions. The Appellate Body in *Gasoline* acknowledged this, explaining that the “fundamental theme” of the chapeau is “avoiding abuse or illegitimate use of the exceptions.”¹⁶⁵

¹⁶² *Hormones*, *supra* note 95, at 39.

¹⁶³ SHORTER OED, *supra* note 150, at 91.

¹⁶⁴ *Id.* at 1076. The dictionary meaning of “justifiable” is “capable of being justified.”

¹⁶⁵ *Gasoline*, *supra* note 93, at 25.

Notably, the ordinary meaning of “unjustifiable discrimination” precludes use of a “least trade restrictive” test. “Justifiable” implies that a panel should not overturn a measure simply because there are other possible means of application which may, in their opinion, be more justified (for example, by reason of an alternative being less discriminatory). Rather, the Panel must determine that the cited reason for the discrimination is *incapable* of providing a valid justification. The term “unjustifiable” does not invite WTO dispute resolution bodies to substitute their preferences for those of Members seeking to preserve the environment. Avoiding “unjustifiable” discrimination shows that other goals can lay legitimate claims on the world trading system. The concept of justification demands a more sophisticated analysis than a least trade restrictive test, which elevates the principle of non-discrimination over other legitimate policy concerns and threatens to bring the WTO into conflict with nationally and democratically determined environmental and social policy.¹⁶⁶

¹⁶⁶ See Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 A.J.I.L. 193, 211 (1996) (commenting on the interpretation of the least trade restrictive test in Article XX(b), “the treaty word ‘necessary’ in the text like that of GATT Article XX . . . may need to be interpreted to recognize that governments should be authorized to have some choice among several

The international law principles that define and support sustainable development also support a reading of “unjustifiable” that preserves a Member’s sovereignty to protect the global environment.¹⁶⁷

government measures (not mandated to choose, e.g. the ‘least restrictive’ measure), as long as the choice does not unduly detract from the basic broader policy goals of the treaty.) Similarly, according to the economist Robert Repetto:

recent GATT decisions have ... limit[ed] unduly the scope of environmental policy. Trade officials have interpreted the GATT text to be far more restrictive of environmental policy than that agreement was originally intended to be ... In a dispute over Thailand’s restrictions on cigarette imports, a panel ruled that measures for the protection of human health must be “the least GATT-inconsistent” of all available measures. A variant, requiring such measures to be “the least trade-restrictive” has been used in other GATT trade disputes and in the Dunkel draft Standard Code. However, the GATT text does not require that measures necessary to protect life and health be the least GATT-inconsistent or the least trade-restrictive of all measures available. This criterion might call into question many existing environmental regulations on the grounds that they are not the least trade-restrictive of all available measures. Under most circumstances, for example, a pollution tax would be less trade-restrictive than a command-and-control regulation or ban, but the former are rarely adopted by environmental policymakers.”

See ROBERT REPETTO, *TRADE AND SUSTAINABLE DEVELOPMENT* 30 (UNEP 1994).

¹⁶⁷ The *Shrimp/Turtle* Panel decision purports to identify the objects and purposes of the WTO, but their analysis is too flawed to provide guidance to the Appellate Body. To determine the WTO’s “objects and purposes,” the Panel turned to the Preamble of the Agreement. It rightly noted that the Preamble identifies one WTO objective as “the optimal use of the world’s resources in accordance with the objective of sustainable development.” They also rightly noted that liberalization of international trade on a nondiscriminatory basis is referred to in both the WTO and the GATT. At this point, however, the Panel’s analysis faltered.

While it is true that the provisions of the GATT operate to create liberalized, nondiscriminatory international markets, that is not an end in itself. Indeed, this is clear from the third paragraph of the WTO Preamble, which explains that these liberal, nondiscriminatory trading relations are being established to achieve the objectives set forth in the first two paragraphs. The Panel incorrectly identified the *means* for achieving the WTO’s objects and purposes as the sole object and purpose of the WTO itself.

Further exaggerating its already flawed analysis, the Panel reasoned that members’ measures would

International law principles of sustainable development form part of the “rules of international law applicable in the relations between the parties” and must therefore be considered when setting the legal standard for “unjustifiable.”¹⁶⁸ Discrimination should be regarded as *prima facie* justifiable if it is undertaken in furtherance of established principles of international law for sustainable development.

A reading of “unjustifiable” that preserves a Member’s sovereignty to protect the global environment is also supported by the object and purpose of the WTO Agreements as described in the

undermine the WTO multilateral trading system when they operated so that “*guaranteed* market access and nondiscriminatory treatment with a multilateral framework would no longer be possible.” (*Shrimp/Turtle* Panel decision para. 7.44 (emphasis added)). This statement suggests a fundamental misunderstanding of the purpose of the Article XX exceptions. The purpose of having exceptions to the GATT rules is clearly to disallow market access for certain limited reasons and to allow discrimination based on specific environmental policy goals. Thus, the GATT does not aim to provide *guaranteed* market access under all circumstances. Indeed, the Panel may have recognized this inconsistency between the test it set forth and the purpose of the environmental exceptions as later it seemed to equate the goal of guaranteed market access on a nondiscriminatory basis with secure and predictable trade relations. The Panel never spelled out precisely the terms of the equation, but it concluded that “the WTO Agreement could not longer serve as a multilateral framework for trade among Members” when the “security and predictability of trade relations under those agreements [is] threatened.” (*Shrimp/Turtle* Panel decision at para. 7.45). The security and predictability of the international trade system will be served by the Appellate Body following the ordinary meaning of Article XX’s environmental exceptions. In this context, it also must be understood that the security and predictability of the international trade system will be threatened by the failure to implement sustainable development as a growing population battles over a shrinking resource base.

¹⁶⁸ Vienna Convention, *supra* note 101, art. 31(3)(c).

Preamble.¹⁶⁹ The Preamble identifies specific objectives in the first two paragraphs, and then identifies *means* to achieve these objectives in the third paragraph.

The objectives set forth in the first paragraph are to raise standards of living; ensure full employment; ensure a large and steadily growing volume of real income and effective demand; expand the production of trade in goods and services. These primarily economic objectives, however, are further defined through a limitation. They are WTO objectives *only to the extent* that they can be achieved “while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [Members] respective needs and concerns

¹⁶⁹ The requirements of the introductory paragraph of Article XX must be read in light of their interpretive context, including Article III:2. Article III:2, second sentence, requires determining whether dissimilar taxation is applied as to afford protection. It has been interpreted as an effects test requiring an analysis of the “design, the architecture, and the revealing structure of a measure.” It does not require an analysis of legislative or regulatory intent. However, as noted by the Appellate Body in *Gasoline*, *supra* note 93, at 22, “provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.” As an exception to Article III:2, Article XX thus allows Members to take measures that do have some protectionist effect so long as the aim of the measure is not protectionism, but rather the bona fide promotion of one of the policies enumerated in Article XX(a) to (j).

at different levels of economic development.”

The second paragraph of the Preamble adds the objective of “ensur[ing] that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” The objectives of the WTO as expressed in its Preamble, then, can be summarized as improving the global standard of living and increasing global trade to the extent possible consistent with principles of sustainable development, and then ensuring that the fruits of sustainable trade are equitably distributed by promoting growth in developing countries.

The third paragraph identifies that the *means* for achieving these objectives is developing and implementing a rules-based multilateral trading system that reduces barriers to trade and discriminatory treatment in international trade relations. The role of the environmental exceptions in Article XX is to ensure in part that the sustainability aspects of the WTO objectives are achieved.

Thus, the ordinary meaning of “unjustifiable,” when read in its context and in light of the object and purpose of the WTO Agreements, suggests a broad

test for the extent of discrimination permitted under the chapeau. The application of a measure must be characterized as justifiable where it has been taken in furtherance of the fundamental principles of sustainable development that are embodied in international law and the Preamble of the WTO Agreement, and where the measure in its application avoids abuse of the other objects and purposes of the WTO. This test, which must be applied on a case-by-case basis, accords an appropriate level of deference to national sovereignty and provides Member states with flexibility to justify measures by consideration of other legitimate public policy objectives. At the same time, it allows the WTO to ensure against abuse of Article XX. A justification that avoids abuse of the objects and purposes of the WTO Agreements will not be so permissive as to allow for abuse of the Article XX exceptions. Nor will it be so strict as to impose unjustifiable burdens on national governments, or to unduly restrain their flexibility when responding to threats to their own environment or the global commons.

3.6.1.4 The U.S. measures have been applied consistently with the fundamental principles of sustainable development that are embodied in

international law and the Preamble. The U.S. measures have been applied in furtherance of the fundamental principles of sustainable development that are embodied in international law.

Determining whether the application of a measure is “unjustifiable” requires consideration of a wide range of factors contributing to sustainable development including:

- Whether the nation imposing the measure made sufficient prior efforts to stimulate multilateral agreement on the need for such a measure;
 - Whether a multilateral agreement or other international instrument recognizes the environmental benefits of the requirements being enforced through the trade measure;
 - Whether the nation imposing the measure consulted with its potentially affected trading partners in the development of the trade measure;
 - What cost might be imposed on the developing countries, both their producers/shrimpers, and their governments, in terms of implementation, monitoring, and enforcement of the conservation measures;
 - Whether the nation imposing the measure offered appropriate financial and technical assistance to developing countries and their industries seeking to meet the standards called for by the measure;
 - Whether the measure makes other appropriate provision for developing countries to achieve compliance (this might include, for example, additional time allowed for developing countries to phase in the required standards);
 - Whether the resource at issue is being used sustainably, such that it will continue to be available to future generations of developing country users, as required by the inter-generational equity principle of sustainable development (and by the requirement in the WTO Preamble for developing countries to share in the benefits of trade);
 - Whether the benefits from such resource use are being shared equitably among all citizens of the affected countries, as required by the intra-generational equity principle of sustainable development;
 - Whether the nation imposing the measure has a recognized, legitimate interest in promoting the goal of the
-

measure (such as protecting endangered species in the global commons);

- Whether the measure focuses on the objective of reducing unsustainable domestic consumption; and
- Whether the measure avoids singling out an environmental problem linked to an ecological condition that is peculiar to only some foreign producers, or to foreign as opposed to domestic producers. (In other words, whether the measure avoids discriminatory approaches such as banning imports of tropical timber while permitting trade in temperate timber, whether or not it is sustainably produced.)

No one factor should be determinative of the justifiability of a measure; the WTO dispute settlement system would need to examine each measure on a case-by-case basis. This dispute presents the Appellate Body with the opportunity to clarify how such a case-by-case analysis should be conducted.

In the present dispute, by demonstrating that the requirement of the use of TEDs is supported by international law principles of sustainable development, the United States can satisfy the first part of the test for meeting the *prima facie* obligation to

demonstrate a valid justification for discrimination under Article XX. The international law principles at issue here include, *inter alia*, the requirements to protect endangered migratory marine resources by reducing destructive bycatch with cost-effective improvements in fishing gear; to control unsustainable consumption patterns that threaten global environmental resources; and to prevent environmental harms beyond territorial boundaries.

3.6.1.5 The U.S. measures are consistent with the object and purpose of the WTO

Agreements. The second half of the test for justifiability requires the United States to show that its measures, in their application, avoid abuse of the objects and purposes of the WTO. The United States meets this standard because its measures are consistent with the object and purpose of the WTO Agreements as described in the Preamble. The sea turtle conservation measures respect the WTO's goals of sustainably increasing global trade and raising global living standards, and ensuring to developing countries an equitable share in these global benefits.

First, the U.S. measures are consistent with the WTO's goal of increasing global trade in a manner that is in accordance with sustainable development. In particular, the U.S. measures allow shrimping to continue

while saving endangered sea turtles. Moreover, the U.S. measures promote the sustainability of endangered sea turtle species, and the sustainability of shrimp resource by internalizing the external environmental cost of shrimping. They do not threaten the security and predictability of the multilateral trading system. The U.S. measures condition market access on the adoption by exporting Members of policies requiring the use of selective fishing gear for harvesting shrimp in a way that does not threaten endangered sea turtles.¹⁷⁰ The

¹⁷⁰ The *Shrimp/Turtle* Panel, in noting these aspects of the sea turtle conservation measures, concluded that the measures threatened the security and predictability of the entire trading system. (*Shrimp/Turtle* Panel decision para. 7.43. Note, however, that the *Shrimp/Turtle* Panel made a fatal error in logic when determining whether the sea turtle conservation measures would frustrate or defeat the purposes and objects of the WTO. It stripped the U.S. sea turtle conservation measures of all their qualities save one. The only aspect of the measures considered by the Panel was the fact that the measures conditioned access to U.S. shrimp markets on the conservation laws of the exporting nation. The Panel completely ignored even those aspects of the measures that qualified them for Article XX protection in the first place. The fact that the measures related to the production of a species recognized internationally as endangered was ignored. The fact that the measures required technology that was scientifically recognized as a critical component of an overall effort to protect the endangered species was ignored. Even the U.S. efforts to assist its trading partners to meet the conditions of its import restrictions were ignored.

Looking solely at this single aspect of the U.S. sea turtle conservation measures, the Panel determined that if Members were allowed “to adopt measures, conditioning access to [the country’s] market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.” (*Shrimp/Turtle* Panel decision para. 7.45). The logic of the Panel in reaching its conclusion was that if WTO members were allowed to adopt such measures, each might adopt conflicting requirements, making it “impossible for exporting Members to comply at the same time with multiple

use of this particular fishing technology is recognized scientifically as critical to ensuring that the harvesting of the product (shrimp) does not endanger a species that has been internationally acknowledged as threatened with extinction (turtles).

Moreover, the policy changes the United States has imposed as a condition for market access in this case press the Complainants to meet their obligations under international law. Scientific evidence shows, and international environmental law recognizes, that TEDs are the only effective means of protecting turtles of breeding age that are critical to the long term survival of the species.

Thus, the requirements of the sea turtle

conflicting policy requirements.” (*Shrimp/Turtle* Panel decision para. 7.45).

The Panel then concluded that threatening the security and predictability of trade relations would undermine the WTO and “rapidly lead” to its end (*Shrimp/Turtle* Panel decision para. 7.45) and denied Article XX protection to the U.S. sea turtle conservation measures.

Had the Panel applied its test to the sea turtle conservation measures and not to one aspect of those measures stripped completely from its factual context, the Panel would have concluded very differently. The hypothetical situation of conflicting requirements dreamed up by the Panel would not likely occur. It is difficult to think of a requirement imposed by another WTO member that would qualify for Article XX protection *and* directly conflict with the U.S. sea turtle conservation measures, as TEDs are the only effective way to protect turtles while still allowing shrimping to continue.

Had the Panel looked at all features of the sea turtle conservation measures, it would have asked whether allowing countries to adopt measures conditioning market access for a given product upon the adoption by the exporting Members of certain technologies that have been scientifically proven to be a critical component to the conservation of an internationally recognized endangered species would so threaten the predictability and security of trade relations as to undermine the multilateral trading system. Moreover, the Panel also would have asked whether the failure to implement

conservation measures flow from the international laws protecting endangered marine resources. Because the importing Member states' ability to condition market access is circumscribed by international environmental law, any negative impacts of trade measures on the security and predictability of the multilateral trading system are accordingly circumscribed. Consequently, the sea turtle conservation measures are consistent with the WTO's goal of increasing global trade in a manner that is in accordance with sustainable development.

Second, the U.S. measures do not compromise the WTO's goal of improving the global standard of living in accordance with the objective of sustainable development. Sustainable development principles such as common but differentiated responsibility require consideration of whether developing countries can afford to meet the requirements of trade measures. (Moreover, whether developing countries can afford to meet the requirements of trade measures will affect whether these countries adequately share in the fruits of the international trade). In applying a unilateral trade measure, countries should consider whether the measure would

sustainable development principles would itself lead to a far greater threat to the multilateral trading system.

impose an undue burden on developing countries affected by the measure.

In the present case, the sea turtle conservation measures impose an expense on some shrimp *producers* in developing countries by requiring industrial trawlers to use TEDs. However, TEDs are inexpensive to purchase, install and employ. In addition, the country imposing the measures (the United States) provided significant technical assistance to increase the capacity of affected developing country producers to use the mandated technology. It is difficult to argue that the producers in the exporting nations were unable to meet the requirements of the U.S. import restrictions.

The sea turtle conservation measures also, however, impose an expense on developing country *governments* in addition to the expense imposed on shrimp trawlers (expenses which they should assume in any event to implement their obligations under relevant multilateral agreements and the principles of sustainable development). The expense to developing countries (and especially the least developed countries) of complying with the sea turtle conservation measures lies primarily in monitoring and enforcing the conservation laws and policies the sea turtle conservation measures in the exporting nation to adopt. The U.S.

measures do not require any specific enforcement means, however, and the Complainants have not demonstrated that the implementation of the TEDs requirement poses undue economic or technical burdens. Should the Appellate Body find that the measures were unjustifiable in that they were undertaken without adequate consideration of the economic impacts on developing countries, the ruling should be limited to this concern and the United States should be granted the opportunity to remedy the fault.

Finally, the U.S. measures do not compromise the WTO's goal of ensuring that developing countries receive an equitable share in the growth of international trade. Under the U.S. measures, a country that uses TEDs to avoid environmental harm can continue to trade unimpeded. Moreover, ecologically healthy oceans, with stable populations of marine life including shrimp and sea turtles, will have significant benefits in developing countries where the ability to ameliorate the consequences of environmental degradation is often more limited than in more developed ones. In the present case, the environmental harm to coastal fisheries from shrimp trawling has a significant effect on the sustainability of fisheries in the Complainants coastlines. Without adequate cost internalization, the

consumption of shrimp in the United States is being subsidized by current and future generations that rely on these fisheries. Because the sea turtle conservation measures have been taken in furtherance of the fundamental principles of sustainable development that are embodied in international law and the WTO Preamble, and because these measures do not compromise the other objects and purposes of the WTO, the Appellate Body should find that they qualify for protection under Article XX of the GATT.

3.6.2 The sea turtle conservation measures do not constitute a disguised restriction on international trade. The sea turtle conservation measures do not constitute a disguised restriction on international trade. The ordinary meaning of “disguised restriction” would seem to exclude “publicly announced” restrictions on trade.¹⁷¹ The Appellate Body in the *Gasoline* decision, however, determined that “*concealed or unannounced* restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction’.”¹⁷²

The better interpretation is that “disguised restriction” refers to protectionist measures

¹⁷¹ See *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD 29 S/91, para. 4.8 (adopted Feb. 22, 1982).

¹⁷² *Gasoline*, *supra* note 93, at 25.

that are taken under the guise of environmental goals. In other words, for a measure to fall within Article XX's protective scope, preservation of the environment must constitute the aim of the measure, rather than just a "disguise" for some other protectionist purpose.¹⁷³ This reading is supported by the drafting history of Article XX.¹⁷⁴ It provides recognition that trade liberalization may conflict with environmental goals in certain circumstances, and, to the extent of the conflict, these goals should be given preference as long as they are not abused for protectionist purposes.

The United States must prove *prima facie* that the measure was aimed at the conservation of sea turtles. In determining whether the United States has established a *prima facie* case, the Appellate Body must

¹⁷³ "Disguised" implies an *aim or intention* to obscure the true nature of the measure. The ordinary meaning of "disguised restriction" does not suggest use of a balancing test, nor a 'least trade restrictive' test. To interpret the language of this requirement to include these tests would contravene the Vienna Convention by depriving the terms of their ordinary meaning. Rather, the terms suggest a standard that preserves significant discretion for governments to pursue environmental policy.

¹⁷⁴ During the London negotiations of the draft ITO Charter, delegates cited the potential for protectionist abuse of the exceptions as the reason for including the Chapeau requirements: "exceptions such as (b) are often used for indirect protection," France, E/PC/T/C.II/50; "provisions to prevent the abuse of these exceptions ought to be included in Article [XX]," South Africa, E/PC/T/C.II/50; "[m]any times the stipulations "to protect animal or plant life or health" are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection," Netherlands and Belgo-Luxembourg Economic Union, EPTC7C.11/32.

offer significant deference to the factual determinations of the United States. If the United States is successful in establishing a *prima facie* case, the burden shifts to the Complainants to rebut a presumption of consistency. To overcome this presumption, the Complainants must show that the United States lacked the bona fide regulatory purpose of protecting sea turtles and must evince convincing evidence of a dominant legislative purpose to afford protection. The measure's actual or potential effect on trade, as disclosed by its architecture or structure, should only be relevant to the extent they disclose veiled protectionism. In other words, an effects test would only be relevant where the trade effects are grossly disproportionate to the stated environmental goal.

There are a number of factors demonstrating that the sea turtle conservation measures are aimed at environmental and not protectionist ends. First, the sea turtle conservation measures flow from and are consistent with numerous multilateral obligations: to protect and prohibit trade in endangered species such as sea turtles (CITES); to preserve the marine environment and to use and promote environmentally safe and cost-effective fishing gear such as TEDs (UNCLOS, the FAO Code of Conduct, the Straddling Stock Agreement, and Agenda

21); and to control unsustainable consumption patterns (Rio Declaration, Agenda 21 and Convention on Biodiversity). Further, the importance of TEDs has been acknowledged internationally in the Inter-American Convention on the Protection of Sea Turtles. These agreements, and general principles of sustainable development, motivate the sea turtle conservation measures.

Second, the sea turtle conservation measures were based on compelling scientific evidence.¹⁷⁵ This, and the United States' efforts or assist countries interested in using TEDs, demonstrates that these measures are motivated by genuine environmental and not protectionist purposes.¹⁷⁶

Finally, the sea turtle conservation measures seek to minimize restrictions on market access and maximize sea turtle conservation. And the cost of using TEDs is too low to substantially harm competition. Indeed, as noted already, their use may offer competitive advantages as TEDs exclude up to 97 percent of sea

turtles and 50 percent of other bycatch which eliminates drag and saves fuel.¹⁷⁷ The international community – and not the United States alone – has determined that sea turtles are threatened with extinction, and that they must be protected from incidental takings by the use of environmentally safe and cost-effective fishing gear. This is precisely what the sea turtle conservation measures do by requiring TEDs.

3.7 The DSU permits civil society participation in WTO disputes. The acceptance of *amicus* briefs is supported by Articles 11 and 13 of the DSU and by the reference to sustainable development in the Preamble to the WTO Agreement. The *Shrimp/Turtle* Panel erred in law when it rejected the *amicus* brief submitted by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL) on the basis that acceptance of “non-requested information” is “incompatible with the provisions of the DSU.”¹⁷⁸ The Appellate Body should overturn the Panel’s restrictive interpretation of the DSU and retain flexibility within the WTO dispute settlement to accept *amicus* briefs.

¹⁷⁵ See Statement of Facts, sec. 2.2.

¹⁷⁶ The United States ran workshops to demonstrate the use of TEDs, how to enforce TEDs legislation and how to construct TEDs locally and from local materials. Had the United States been interested in using its sea turtle conservation measures to provide its industry with a competitive advantage, it would not have undertaken

such great efforts to assist foreign competitors to meet the requirements of the measures.

¹⁷⁷ See Statement of Facts, sec. 2.2.1.

Acceptance of *amicus* briefs is consistent with the ordinary language of the DSU. Article 11 and 13 of the DSU permits WTO panels to consider *amicus* briefs offered by groups with expertise in the subject matter of the dispute. Article 11 provides that a panel must undertake “an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”¹⁷⁹ Article 13 empowers panels to “seek information and technical advice from any individual or body which it deems appropriate” and to “seek information from any relevant source and . . . consult experts to obtain their opinion.”¹⁸⁰ The CMC/CIEL *amicus* brief offered “information and technical advice”

including significant additional scientific and legal expertise critical to the Panel’s deliberations. Accepting this *amicus* brief would have enhanced the ability of the Panel to undertake “an objective assessment of the matter before it” as required by Article 11. Moreover, the ordinary language of Article 13 preserves the ability of Panels to seek formal submission of *amicus* briefs after being notified of their existence by one of the parties to the dispute or by the Amici.

Acceptance of *amicus* briefs is also supported by the context, object and purpose of the WTO Agreements. First, the WTO Preamble forms an important part of the DSU’s interpretive context. Public participation is central to the objective of sustainable development endorsed by all Member States in the Preamble of the WTO Agreement.¹⁸¹ Second, public participation is supported by “international law relations between the parties,” and, in particular, developing norms of customary international law.¹⁸² The Rio Declaration and Agenda 21 recognize the necessity of adequate public participation in the decision making of international bodies and call for the inclusion of contributions from NGOs and broad access to dispute settlement

¹⁷⁸ Panel Report on *United States -- Import Prohibition of Certain Shrimp and Shrimp Products* [WT/DS58/R], dated 6 April 1998, para. 7.8.

¹⁷⁹ DSU, *supra* note 96, art. 11(1).

¹⁸⁰ DSU, *supra* note 96, art. 13.(1) (stating that Panels have “the right to seek information and technical advice from any individual or body which it deems appropriate”), art. 13(2) (stating that “Panels may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter”). Center for Marine Conservation and Center for International Environmental Law, co-counsel of record on the brief, offered significant expertise in the Panel’s deliberations. CMC, as a private, non-profit organization with more than 120,000 members worldwide, has significant expertise on the importance of marine biological diversity, threats to sea turtles, use and development of TEDs, the ineffectiveness of other conservation measures, and the significance of this dispute for biological diversity conservation. In addition, CIEL, a non-profit public-interest law firm, offers expertise in the *amicus* through its analysis of applicable multilateral environmental agreements, the developing relationship between WTO jurisprudence and customary international law, and the “standard of review” applicable to WTO dispute panels.

¹⁸¹ WTO Agreement, *supra* note 3, at Preamble.

mechanisms.¹⁸³ Finally, public participation, and the acceptance of amicus briefs, is common practice in other multilateral judicial bodies.¹⁸⁴

4 CONCLUSION

For the foregoing reasons, *Amici* urges the Appellate Body to interpret Article XX in light of sustainable development and the commitment of the WTO to enhance the means for protecting the environment, and to determine that the sea turtle conservation measures are within the protection of Article XX.

¹⁸² Vienna Convention, *supra* note 101, art. 31(3)(c).

¹⁸³ Rio Declaration, *supra* note 104; *see also The World Commission on Environment and Development, Our Common Future*, 65 (1987) (stating that “the pursuit of sustainable development requires a political system that secures effective citizen participation in decision-making”).

¹⁸⁴ International and regional dispute settlement bodies also allow participation by NGOs and citizens. The World Bank, the Asian Development Bank and the Interamerican Bank all have independent Inspection Panels that provide direct access for citizens and NGOs harmed by failures to follow bank environmental policies. *See The International Bank for Reconstruction and Development, The Inspection Panel Operating Procedures*, paras. 50-51 (1994), Office of the Secretary, Asian Development Bank, *ADB’s Inspection Policy: A Guidebook*, para. 54 (1996), Interamerican Development Bank, *IDB Independent Investigation Mechanisms*, sec. 3.2. Similarly, the Commission on Environmental Cooperation established under the NAFTA environmental side agreement provides direct access for NGOs and citizens to enforce the environmental requirements of the agreement. *See The Commission for Environmental Cooperation, Guidelines for Submission on Enforcement Matters under Article 14 and 15 for the North American Agreement on Environmental Cooperation*, 7.
