

**UNITED STATES – IMPORT PROHIBITION
OF CERTAIN SHRIMP AND SHRIMP PRODUCTS**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MALAYSIA

BRIEF OF *AMICI CURIAE*

**TURTLE ISLAND RESTORATION NETWORK
THE HUMANE SOCIETY OF THE UNITED STATES
THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
DEFENDERS OF WILDLIFE
FISCALIA DEL MEDIO AMBIENTE (CHILE)**

**Submitted by:
EARTHJUSTICE LEGAL DEFENSE FUND
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
415-627-6700
J. Martin Wagner
Counsel for *Amici Curiae***

November 12, 2000

This brief is submitted on behalf of Turtle Island Restoration Network, The Humane Society of the United States, The American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and the *Fiscalia Del Medio Ambiente* (Chile), referred to jointly as *Amici*.

This Panel may receive and consider the information contained in the brief pursuant to the authority granted under Article 13.1 of the Dispute Settlement Understanding.¹ Moreover, this brief raises relevant issues not addressed by the submissions of either Party to the dispute. Specifically, the brief discusses the implications for this dispute of the US court ruling that US law requires the United States to ban the importation of *all* shrimp from nations that do not enforce an effective nationwide turtle-protection program. Because this is not the method of implementation presently employed by the United States, the United States may be required to change its present method of implementing the shrimp ban. To assist the Panel in taking this fact into account, this brief demonstrates that implementation of the US law consistent with the court's decision would satisfy the requirements of Article XX of the GATT and that the Panel should recognize as much in its report.

I. INTRODUCTION

This dispute centers on the protection of sea turtles, which are on the brink of extinction due, in large part, to the fact that large numbers of sea turtles are caught and killed in shrimp nets each year. While GATT's Article XX(g) purports to establish the right of nations to take steps to conserve exhaustible natural resources like sea turtles, this dispute will determine whether that right is real or only an illusion. The dispute may also determine whether sea turtles can recover, or will be lost forever from the oceans of the world.

The law of the United States includes provisions requiring all shrimp trawlers operating in US waters to use turtle excluder devices (TEDs), which prevent the killing of sea turtles by forcing them out of shrimp nets. In addition, Section 609 of the law permits the importation of shrimp only from nations that have adopted a nationwide program that will provide sea turtles "comparable" protection to the US program. In response to the Appellate Body's determination that the US application of its import restrictions violated the GATT, the United States made a number of changes to its policy. This dispute is based on Malaysia's claim that even with these changes, the US law violates the GATT.

One of the changes the United States will ask this Panel to consider in addressing Malaysia's claim is the United States' decision to permit the importation of shrimp that were claimed to have been caught with TED-equipped nets (the US "shipment-by-shipment" policy), even if they came from nations that had not adopted the nationwide policy required by the US law. Because this change exposes sea turtles to a much greater threat than under the nationwide turtle protection program in the United States, a US court has found the new US policy to be illegal. As a result, although the United States presently applies the shipment-by-shipment

¹ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, adopted 6 Nov. 1998, WT/DS58/AB/R, paras. 99-110. Dispute Panels have accepted such submissions in proceedings pursuant to Article 21.5 of the DSU. See, e.g., *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, Report of the Panel, 18 Feb. 2000, WT/DS18/RW, paras. 7.8-7.9 (accepting information submitted by nongovernmental entities).

policy, the courts may soon required it to return to the national certification requirement mandated by the US law. This possibility raises important issues for this Panel.

The national certification requirement mandated by Section 609 is consistent with the principle of sustainable development, which the WTO Members made a part of the WTO rules. The requirement is also consistent with GATT, and with the Appellate Body's previous report concerning Section 609. This is true even though the national certification requirement may cause the United States to treat shrimp that has been caught using turtle-safe methods differently depending on whether the exporting country has adopted a turtle-protection program. As the AB has noted, the rights established in Article XX(g) depend on the ability of nations to condition market access on the adoption of policies to conserve exhaustible natural resources. Such market-access conditions would be meaningless if nations could not treat products differently based on whether the exporting nation has adopted those policies. Therefore, if this Panel were to find that the national certification requirement does not satisfy Article XX, it would be falling into a trap against which the Appellate Body explicitly warned – that of “rendering illusory” the rights established in Article XX(g).

For these reasons, this Panel should be careful not to suggest that only a shipment-by-shipment regime could comply with GATT. Rather, the Panel should confirm that the national certification requirement of Section 609 satisfies the requirements of GATT. Such a finding would demonstrate the GATT's compatibility with the principle of sustainable development and affirm that Members have a meaningful right to shape their trade policy in accordance with that principle. Moreover, such a finding would ensure that the nations of the world can continue to fulfill their responsibility to ensure that international trade does not result in the extinction of sea turtles.

II. BACKGROUND

A. Sea Turtles and International Law

Sea turtles have lived on earth since the time of the dinosaurs. As this Panel and the Appellate Body noted, the community of nations has formally recognized that all species of sea turtles are threatened with extinction.² Sea turtles are also highly migratory, passing through waters subject to the jurisdiction of numerous coastal states.³

Shrimp fishing by commercial trawlers using mechanical retrieval devices is a significant cause of sea turtle mortality. Furthermore, as this Panel acknowledged, turtle excluder devices (TEDs) of the kind the United States requires to be used by all US commercial shrimp trawlers,

² This Panel noted that all species of sea turtles are included in Appendix 1 of CITES, which lists “all species *threatened with extinction* which are or may be affected by trade.” CITES, Art. II.1, available at <<http://www.wcmc.org.uk/CITES/eng/index.shtml>>. *See United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R, 6 Apr. 1998, para. 2.3. *See also United States – Shrimp*, Appellate Body Report, para. 132. The Panel also noted that sea turtles are listed in appendices to the 1979 Convention on Migratory Species of Wild Animals and in the IUCN Red List as endangered or vulnerable. *United States – Shrimp*, Panel Report, para. 2.3.

³ *See United States – Shrimp*, Panel Report, para. 7.53; *United States – Shrimp*, Appellate Body Report, para. 133.

“when properly installed and used and adapted to the local area, [are] an effective tool for the preservation of sea turtles.”⁴

These facts are accepted by experts around the world. In a letter submitted to this Panel by the United States and appended to Annex II of the Panel’s Report, 265 scientists from 31 nations emphasized the urgent need for measures to protect endangered sea turtles from being killed in shrimp nets.⁵ The experts consulted by the Panel agreed.⁶

Beyond recognizing the endangered status of sea turtles, the community of nations recognizes the responsibility of countries to protect sea turtles from threats due to fishing activities. For example, the FAO Code of Conduct on Responsible Fisheries calls on countries to adopt fisheries management measures that conserve biodiversity and protect endangered species.⁷ The Convention on Conservation of Migratory Species of Wild Animals requires nations whose waters are frequented by sea turtles to take steps to prevent the adverse effects of activities that interfere with turtle migration.⁸ In addition, the UN Convention on the Law of the Sea (UNCLOS, which Malaysia has ratified and the United States considers to constitute customary international law⁹), the Straddling and Migratory Stocks Agreement, and the FAO Code of Conduct all specifically call upon nations to regulate fishing practices so as to avoid harm to non-target species.¹⁰ The United Nations General Assembly has done the same.¹¹

⁴ *United States – Shrimp*, Panel Report, para. 7.60, footnote 674.

⁵ See *Earthjustice Legal Defense Fund* letter to Charlene Barshefsky, July 18, 1997. Selected Documents, Tab 1. (For the Panel’s assistance, we have provided courtesy copies of some of the less accessible documents cited in this brief. The inclusion of particular documents will be indicated by reference to the “Selected Documents.”)

⁶ The Appellate Body noted that the experts consulted by the Panel recognized that “the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality.” *United States – Shrimp*, Appellate Body Report, para. 140 (citing Panel Report, paras. 5.91-5.118). The Panel noted that the experts “generally acknowledged” the effectiveness of TEDs. See Panel Report, para. 7.60, footnote 674.

⁷ Food and Agriculture Organization Code of Conduct for Responsible Fisheries, adopted October 31, 1995, Art. 7.2.2. Available at <<http://www.oceanlaw.net/texts/faocode.htm>>.

⁸ Convention on the Conservation of Migratory Species of Wild Animals, Art. III.4 (“Parties that are Range States of a migratory species listed in Appendix I [including sea turtles] shall endeavor . . . to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species. . . .”). Available at <http://www.wcmc.org.uk/cms/cms_conv.htm>.

⁹ See *United States – Shrimp*, Appellate Body Report, para. 130, footnote 110.

¹⁰ United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, U.N. A/CONF. 62/122, 21 I.L.M. 1261 (1982), Art. 61.4, available at <<http://www.un.org/Depts/los/unclos/closindx.htm>> (“In taking such measures [to ensure proper conservation of living resources] the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.”); Agreement for the Implementation of the Provisions of [UNCLOS] Relating to the Conservation and Management of Straddling and Migratory Stocks, UN Doc. A/Conf.164/37, Sept. 8, 1995, Art. 5, available at <gopher://gopher.un.org/00/LOS/CONF164/164_37.TXT> (states must “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”); FAO Code of Conduct, supra note 7, Arts. 6.6 (“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 and protect fish quality. Where proper selective and environmentally safe fishing gear and practices exist, they should be recognized and accorded a priority in establishing conservation and management measures 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.”), 6.7 (“The harvesting . . . of fish and fishery

B. Sea Turtles and US Law

Consistent with the status of sea turtles, the threat posed by shrimp trawling, and the international obligations described above, the United States has enacted a law to protect sea turtles, the details of which are set forth in this Panel's Final Report.¹² In brief, the US Endangered Species Act requires US shrimp trawlers to implement measures to prevent sea turtles from drowning in shrimp nets. In particular, trawlers operating in areas frequented by sea turtles are required to be equipped with turtle excluder devices (TEDs) or comply with tow time limitations.¹³

In 1989, the United States added a provision to the Endangered Species Act, called Section 609, to address the threat that commercial shrimping activities pose to sea turtles while in the waters of other nations.¹⁴ Section 609 calls on the United States to initiate consultations with other nations, in particular those in which commercial fishing operations may threaten sea turtles, to enter into agreements to protect sea turtles.¹⁵ The law also required the Secretaries of State and Commerce to provide Congress a lists of nations in which shrimp trawling takes place within the range of sea turtles and in which commercial shrimping operations "may affect adversely" endangered species of sea turtles, along with a description of measures taken by those nations to protect sea turtles.¹⁶

Finally, Section 609 imposed a ban on the importation of shrimp harvested with commercial fishing technology that may adversely affect endangered sea turtles unless the US Department of State has certified that the shrimp harvesting nation has adopted a

products should be carried out in a manner which will . . . minimize negative impacts on the environment."), 7.6.9 ("States should take appropriate measures to minimize waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, and negative impacts on associated or dependent species, in particular endangered species. . . ."), 8.5.1 ("States should require that fishing gear, methods and practices, to the extent practicable, are sufficiently selective so as to minimize waste, discards, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species . . .").

In addition to these provisions, UNCLOS requires all nations to protect and preserve the marine environment, Art. 192, and "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species." Art. 194.

¹¹ UN General Assembly Resolution 51/36, A/RES/51/36, 21 Jan. 1997, Para. 5 (calling on States to "adopt policies [and] apply measures . . . to reduce by-catches"), available at <<http://www.un.org/documents/ga/res/51/a51r036.htm>>; UN General Assembly Resolution 52/29, A/RES/52/29, 26 Nov. 1997, Para. 9 (same), available at <<http://www.un.org/documents/ga/res/52/a52r029.htm>>. In addition, the Convention on Biological Diversity 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," 31 I.L.M. 818 (1992), Art. 7, available at <<http://www.unep.ch/bio/conv-e.html>>, and Agenda 21 sets forth an obligation of nations to "promote the development and use of selective fishing gear and practices that minimize the waste in the catch of target species and minimize the by-catch of non-target species," UN Doc. A/CONF.151/26 (1992), para. 17.46, available at <<http://www.igc.org/habitat/agenda21/ch-17.html>>.

¹² See *United States – Shrimp*, Panel Report, paras. 2.1 *et seq.*

¹³ See 16 U.S.C. § 1538(a)(1), Selected Documents, Tab 2; 50 C.F.R. §§ 223.205(a), 223.206(d)(2), available at <http://www.access.gpo.gov/nara/cfr/waisidx_00/50cfr223_00.html>.

¹⁴ Section 609 of Public Law 101-102, 103 Stat. 988, 1037-38, 16 U.S. Code § 1537 note (1989), Selected Documents, Tab 2.

¹⁵ See *id.*, § 609(a)(1)-(4).

¹⁶ See *id.*, § 609(a)(5).

regulatory program governing the incidental taking of [endangered] sea turtles in the course of such harvesting that is comparable to that of the United States; and . . . the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.¹⁷

The United States has modified its implementation of this ban several times. For the purposes of this submission, the following facts are relevant. By 1993, the US Department of State had clarified its guidelines implementing the import ban. Under those guidelines, shrimp could not be imported unless the harvesting country was certified as requiring *all* shrimp-fishing vessels operating in its national waters to use turtle-protective measures.¹⁸ It was this regime (referred to here as a “national certification requirement”) that was the subject of the first WTO challenge to the US ban and of the Appellate Body report.¹⁹

In 1996, the Department of State revised the Section 609 guidelines. Pursuant to the revised guidelines, even if a nation is not certified as requiring turtle protective measures for all shrimp vessels in its waters, shrimp harvested in that nation’s waters could be imported if accompanied by a form stating that the shrimp on board the *individual vessel* had been harvested using such measures.²⁰

The Shipment-by-Shipment Importation Policy Does Not Protect Sea Turtles

The US “shipment-by-shipment” policy does not protect sea turtles from being killed in shrimp nets. The shortcomings of the policy have been recognized by the US National Marine Fisheries Service (NMFS), which has worked closely with domestic and foreign shrimpers to implement Section 609. In a 1998 letter, NMFS warned the Department of State that the shipment-by-shipment policy would “significantly diminish the conservation benefit” of Section 609:

By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of incidental capture aboard non-TED equipped boats in a nation’s fleet.

This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles . . . [and] may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.

¹⁷ *Id.*, § 609(b)(1), (2)(A)-(B). A nation may also be certified if “the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.” *Id.* § 609(b)(2)(C).

¹⁸ 58 Fed. Reg. 9015, 9017 (Feb. 18, 1993), Selected Documents, Tab 3. The guidelines provided exceptions for certain fishing methods that do not harm sea turtles. *See id.* at 9016.

¹⁹ *See United States – Shrimp*, Appellate Body Report, para. 165.

²⁰ 61 Fed. Reg. 17342, 17343 (Apr. 19, 1996), available at <<http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=57848578+3+0+0&WAIAction=retrieve>>.

A 'shipment-by-shipment' approach will also create enforcement problems. It will be extremely difficult to verify that shrimp being imported as TED-caught from uncertified nations were actually harvested by a trawler using a TED.²¹

These concerns are supported by scientific studies, such as studies of incidental catch of sea turtles in Brazil and Australia, which have each taken advantage of the shipment-by-shipment policy to export shrimp to the United States despite the fact that they are not certified as having a nationwide turtle protection program that is comparable in effectiveness to the US program.²² Despite suggestions that Brazil enforces its TEDs requirement in its Northern shrimp fishery, the Brazilian study indicates that sea turtles move through both the Northern and Southern fisheries,²³ meaning that any turtles that escape trawls in the North may nevertheless be killed in the South. The same is true in Australia, where thousands of sea turtles have drowned in shrimp nets despite voluntary use of TEDs by some trawlers.²⁴

As NMFS noted, the shipment-by-shipment policy creates no incentive for these countries to provide full protection to sea turtles, because these nations can fill their US export needs through partial use of protective measures. The conclusions of the Australian study apply to any nation that does not enforce a nationwide turtle protection requirement:

Marine turtles are migratory and far ranging species. The movements of each species are not contained to the area of any one trawl fishery. Therefore, the implementation of TEDs in one fishery or the partial implementation of TEDs in another will not eliminate the risk of trawling to any one of Australia's six threatened turtle species. . . . [T]he mandatory blanket implementation of TEDs in all trawling operations where turtles are known to occur is the only strategy that will successfully abate this threat to turtles.²⁵

Even if the partial use of turtle-protective measures required by the shipment-by-shipment policy could be an effective means of protecting sea turtles, its value would be negated by the fact, also noted by NMFS, it is nearly impossible to verify that a particular shipment of shrimp was caught using turtle-protective practices. This is especially true if trawlers using protective measures operate in the same area as those that do not use such measures. It is also nearly impossible to track shrimp from the time they are caught to the time they are imported, particularly if they may be commingled with other shrimp. Because of these uncertainties, there is even less incentive for foreign shrimpers to adopt such practices.

²¹ Letter from Rolland A. Schmitt, Assistant Administrator for Fisheries, US National Marine Fisheries Service, to Mary Beth West, Deputy Assistant Secretary for Oceans, US Department of State, July 28, 1998, Selected Documents, Tab 4.

²² See Randall Arauz, Sea Turtles of Brazil: Species present, main nesting and foraging grounds, incidental capture by fisheries, and genetic composition of present populations, June 1999, Selected Documents, Tab 5; Letter from Humane Society International (HSI), Australian Office, to Peter Fugazzotto, Sea Turtle Restoration Project, June 25, 1999, Selected Documents, Tab 6.

²³ Arauz, *supra* note 22, p. 1 ("While the shrimp fisheries occurring in the North and South of Brazil may be distinct, the sea turtles found off the coast of Brazil move through both these regions in their annual migrations.").

²⁴ HSI letter, *supra* note 22.

²⁵ *Id.*, p. 5.

For the preceding reasons, a shipment-by-shipment policy cannot provide meaningful protection for sea turtles and is in no way comparable to the protection provided under the US system.

The US Court of International Trade Found the US Shipment-by-Shipment Policy to be Illegal

In light of the continued threat to sea turtles posed by the US shipment-by-shipment policy, a number of environmental groups, several of which are among the *Amici* submitting this brief, challenged the revised State Department guidelines that included the policy in the US Court of International Trade (CIT). On October 8, 1996, that court invalidated the revised guidelines, ruling that the purpose of the US law is to protect endangered sea turtles by ensuring that shrimp are not imported from nations whose *national* sea turtle protection programs do not provide protection comparable to the US program.²⁶ On that basis, the court held that Section 609 prohibits the importation of *any* shrimp from a nation that does not require turtle-protective measures for *all trawlers* in its waters.²⁷ *I.e.*, the court held that the US law requires application of the national certification requirement and does not permit a shipment-by-shipment practice.

In 1998, a court of appeals vacated the CIT decision on procedural grounds,²⁸ and the Department of State issued a new set of guidelines that continued the shipment-by-shipment policy.²⁹ Remediating the procedural problems identified by the appellate court, *Amici* filed a new action challenging the US guidelines on the same ground as before.

In 1999, the Court of International Trade reiterated its previous decision, again holding that Section 609 requires application of the national certification requirement.³⁰ Despite finding that the shipment-by-shipment importation policy violates Section 609,³¹ the CIT determined that it could not order the Department of State to implement the national certification requirement mandated by the law because the court was not convinced that the shipment-by-shipment policy would cause “irreparable injury.”³² *Amici* have appealed the court’s refusal to require the US government to comply with Section 609. Their argument is based on US law providing that when a court finds an agency’s action not to be in accordance with US law – as the CIT did regarding the shipment-by-shipment policy – that court “shall . . . hold unlawful and set aside” that action,³³ and “shall . . . compel” the agency to act lawfully.³⁴

²⁶ *Earth Island Institute v. Christopher*, 942 F. Supp. 597, 603-06, 617 (CIT 1996), Selected Documents, Tab 7.

²⁷ *Id.* at 605, 617.

²⁸ *Earth Island Institute v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998), Selected Documents, Tab 8 (vacating because plaintiffs had offered to withdraw their motion to enforce the judgment).

²⁹ 63 Fed. Reg. 46094, 46096 (Aug. 28, 1998), available at <<http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=5786213846+0+0+0&WAIAction=retrieve>>. The present US guidelines maintain the shipment-by-shipment policy. See Revised Guidelines for the Implementation of Section 609 of P.L. 101-162 relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946, 36949-50, Selected Documents, Tab 9.

³⁰ *Earth Island Institute v. Daley*, 48 F. Supp. 2d 1064, 1076 (CIT 1999), Selected Documents, Tab 10.

³¹ The CIT formalized this finding on July 19, 2000, when it granted a declaratory judgment that the shipment-by-shipment policy violates Section 609. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1018 (CIT 2000), Selected Documents, Tab 11.

³² *Id.* at 1020.

³³ US Administrative Procedure Act, 5 U.S.C. §706(2), Selected Documents, Tab 12.

When the court of appeals decides the case, there is a distinct possibility that it will require the United States to act in accordance with Section 609 and to revert to the national certification requirement.³⁵ It is thus possible that the shipment-by-shipment policy that is one component of the US measures to comply with the WTO Appellate Body decision will be removed and that the United States will revert to a ban based solely on national certification. As described below, however, a national certification requirement like the one mandated by Section 609 does not violate GATT and is consistent with the Appellate Body's recommendation. This Panel should confirm this in its decision in the instant challenge, and should be careful not to suggest in its decision that a shipment-by-shipment regime is necessary to comply with GATT and the Appellate Body's recommendation.

III. THE U.S. NATIONAL CERTIFICATION REQUIREMENT DOES NOT VIOLATE GATT AND IS CONSISTENT WITH THE APPELLATE BODY REPORT

As described above, the US court having jurisdiction to interpret Section 609 has held that the law prohibits the importation of shrimp, *no matter how they are harvested*, from nations that are not certified as having adopted a nationwide program that provides sea turtle protection as effective as the protection provided by the US program. Because this law is intended to protect endangered sea turtles, does so without discrimination, and is not a façade for trade-protectionism, it is justified as an exception to GATT whether or not it violates substantive provisions of the agreement.

³⁴ *Id.* § 706(1). *Amici* also argue that the US Supreme Court has specified that a court cannot refuse to order an agency to comply with a law intended to protect endangered species.

³⁵ If the court of appeals orders the United States to implement the national certification requirement, it will have to do so even if this Panel or the Appellate Body finds such a requirement to violate GATT. Under the US law implementing the WTO Agreements, “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.” Uruguay Round Implementation Act, 19 U.S.C. §3512(a)(1), Selected Documents, Tab 13. This provision applies specifically to environmental laws. *See, e.g., id.*, §3512(a)(2) (“Nothing in this Act shall be construed (A) to amend or modify any law of the United States, including any law relating to . . . (ii) the protection of the environment.”). Under these provisions,

neither federal agencies nor state governments are bound by any finding or recommendation included in [WTO panel] reports. In particular, *panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations, such as those related to human, animal or plant health, or the environment.*

The Uruguay Round Agreements Act, Statement of Administrative Action, p. 363 (emphasis added), Selected Documents, Tab 14. The Statement of Administrative Action is “an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements.” 19 U.S.C. §§3511(a), 3512(d), Selected Documents, Tab 13. US courts have acknowledged these principles. *See, e.g., Suramerica de Aleaciones Laminadas C.A. v. United States*, 966 F.2d 660, 667 (Federal Circuit Court of Appeals 1992) (“The GATT does not trump domestic legislation; if the statutory provisions are inconsistent with the GATT, it is a matter for Congress and not this Court to decide and remedy.”); *Mississippi Poultry Ass’n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Circuit Court of Appeals) (courts must give effect to a US law, “even if implementation of that intent is virtually certain to create a violation of the GATT).

A. Section 609's National Certification Requirement Is Justified Under the Terms of Article XX(g)

The Appellate Body clarified that the first step in considering whether a measure is justified under Article XX is to determine whether it falls within the terms of one of the exceptions in paragraphs (a) to (g).³⁶ In this case, the relevant exception is Article XX(g), which permits measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” Considering the same facts that apply today, the Appellate Body found Section 609 to satisfy the requirements of Article XX(g).

Rejecting arguments to the contrary, the Appellate Body easily determined that sea turtles are “exhaustible natural resources.”³⁷ This conclusion – based on the *WTO Agreement's* preambular recognition of the objective of sustainable development, the recognition in numerous international agreements of the need to conserve living as well as non-living natural resources, and international recognition of the endangered status of sea turtles – is beyond argument.

The Appellate Body similarly found Section 609 to be a measure “relating to the conservation” of sea turtles,³⁸ noting the agreement of this Panel’s experts that commercial shrimp fishing is a “significant cause of sea turtle mortality”³⁹ and the Panel’s agreement that ““TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles.””⁴⁰ Finally, the Appellate Body looked to the regulations requiring US shrimp trawl vessels to use TEDs and concluded that Section 609 is “made effective in conjunction with restrictions on domestic production.”⁴¹

On the basis of these determinations, the Appellate Body held that Section 609 satisfies the requirements of Article XX(g). This conclusion was based on the Appellate Body’s understanding that Section 609 imposes an import ban based on *national certification* and does not permit the importation of any shrimp, even those caught using turtle-protective practices, unless they were caught in a certified nation.⁴²

Because the plight of sea turtles has not improved since the Appellate Body’s report and the purpose of Section 609 has not changed, there is no basis for diverging from the Appellate Body’s determination that Section 609 falls within the terms of Article XX(g).

³⁶ Appellate Body Report, para. 117-22 (citing *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, adopted 20 May 1996, WT/DS2/AB/R, p. 22). Subsequent panels have adopted this approach. See, e.g., *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R, 18 Sept. 2000, para. 8.167.

³⁷ *United States – Shrimp*, Appellate Body Report, paras. 127-34.

³⁸ *Id.*, paras. 135-42.

³⁹ *Id.*, para. 140 (citing *United States – Shrimp*, Panel Report, paras. 5.91-5.118).

⁴⁰ *Id.* (quoting *United States – Shrimp*, Panel Report, para. 7.60, footnote 674).

⁴¹ *Id.*, paras. 143-45.

⁴² See *id.*, para. 138.

B. The Application of Section 609's National Certification Requirement Satisfies the Requirements of the Article XX "Chapeau"

The Appellate Body's conclusion that the US import ban was not justified under Article XX was based on its determination that the measure did not satisfy the article's chapeau, which provides 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." The Appellate Body made this determination because it considered that a number of characteristics of the US implementing guidelines, "considered in their cumulative effect," constituted arbitrary and unjustifiable discrimination between countries exporting shrimp to the United States.⁴³

The majority of the steps taken by the United States to comply with the Appellate Body's recommendation are modifications to the procedures for certification under Section 609. *Amici* take no position in this submission on those procedural modifications. However, the United States also cites its change from the national certification requirement to the shipment-by-shipment importation policy as a step taken to comply with the Appellate Body recommendation. As noted above, this change violates Section 609 and the United States may be required to return to the national certification requirement mandated by the law. It is therefore important that this Panel recognize that Section 609's national certification requirement satisfies the chapeau of Article XX.

1. The Context and Purpose of the Chapeau

Pursuant to customary rules of interpretation of international law, the Article XX chapeau must be interpreted and applied consistently with its context and purpose.⁴⁴ The Appellate Body recognized that an essential element of the chapeau's context is the principle of sustainable development, which has been accepted by the WTO Members in the preamble to the *WTO Agreement* and the Decision establishing the Committee on Trade and Environment.⁴⁵ In the context of fisheries practices and endangered species, the international community has indicated that the principle of sustainable development mandates the adoption of fisheries management measures to protect endangered species, specifically including measures to prevent them from being caught incidentally. Measures in accordance with these principles should be presumed to be consistent with the chapeau of Article XX.

The purpose of the chapeau is to prevent "abuse of the exceptions of [Article XX]."⁴⁶ The terms of the chapeau are thus intended to identify the use of one or more of the provisions of Article XX(a)-(g) to advance an objective *other* than the ones legitimized under those paragraphs. The application of the chapeau must be carefully limited, however, because the right of Members to protect the interests recognized as legitimate in Article XX "is not to be rendered

⁴³ See *id.*, paras. 176, 184.

⁴⁴ Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, art. 31; *United States – Shrimp*, Appellate Body Report, para. 155.

⁴⁵ See *United States – Shrimp*, Appellate Body Report, paras. 152-155.

⁴⁶ *Id.* para. 151; *United States – Gasoline*, Appellate Body Report, p. 22.

illusory.”⁴⁷ In the context of this dispute, therefore, the Panel must be careful not to interfere with the right and responsibility of nations to ensure that international trade does not contribute to the depletion or extinction of endangered species.

2. Section 609’s National Certification Requirement Does Not Discriminate Between Countries Where the Same Conditions Prevail

The Article XX chapeau does not prohibit *all* discrimination, but only discrimination “between countries where the same conditions prevail.” Section 609’s national certification requirement does not discriminate in this manner. To the contrary, it is precisely the “conditions” that prevail in each country that bring the law’s requirement into effect: where the conditions in *any* country are such that commercial shrimp fishing poses a threat to sea turtles, shrimp caught in that country may not be imported unless the country is certified as having adopted a regulatory program for protecting sea turtles that is of comparable effectiveness to the US program. This requirement applies equally to all countries based on the conditions that prevail in each one. As other panels have noted, “[i]f the measure is not discriminatory in general in its application, then *a fortiori* it cannot constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”⁴⁸

There is no question that a national certification requirement may result in some shrimp being treated differently on the basis of the conditions that prevail in the country in which the shrimp is caught – shrimp caught using turtle-protective methods may be banned from import in some instances and imported in others, depending on whether they were caught in a nation that has been certified as having adopted a nationwide turtle protection policy. In addition, such shrimp caught in the United States will always have access to the market, in contrast to the exclusion of shrimp from non-certified nations. This difference in treatment is not discrimination as defined by the chapeau for at least four reasons. Moreover, even if the different treatment were discrimination under the chapeau, the same reasons indicate that it is neither arbitrary nor unjustifiable, and thus does not violate that chapeau.

First, the chapeau prohibits discrimination “between countries where the same *conditions* prevail,” but does *not* prohibit different treatment of the same *product* if different conditions prevail in the countries of origin. It is obvious that the drafters of the GATT knew how to prohibit discrimination between “like products” when they so desired, as they did in Articles I and III:4. As the Appellate Body concluded in the *United States – Gasoline* case, customary rules of interpretation of public international law require giving words their ordinary meanings and do not permit assigning the same meaning to different terms and phrases in the GATT.⁴⁹ To find discrimination in violation of the chapeau because of the different treatment of shrimp caught the same way but in countries in which very different conditions prevail would be

⁴⁷ *United States – Shrimp*, Appellate Body Report, para. 156.

⁴⁸ *European Communities – Asbestos*, Report of the Panel, para. 8.226 (citing *United States – Import of Certain Automotive Spring Assemblies*, Report of the Panel, adopted 26 May 1983, BISD 30S/107).

⁴⁹ *United States – Reformulated Gasoline*, Appellate Body Report, p. 17 (rejecting the Panel’s application of the necessity standard that applies to Article XX(b), which uses the term “necessary,” to Article XX(g), which uses the phrase “relating to.”).

contrary to the ordinary meaning of the words of the chapeau and would impart to the chapeau the same meaning as the very different phrases used in Articles I and III:4.

Second, to base a violation on different treatment of shrimp would be to apply to the chapeau the same standard – different treatment of “like products” – used in determining whether there is discrimination in violation of Articles I and III:4. As the Appellate Body has stated:

The 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. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁵⁰

For this reason, the sole fact that TED-caught shrimp may sometimes be treated differently (depending on whether the harvesting nation has adopted a comparable turtle protection policy) cannot be a basis for finding that there has been discrimination in violation of the chapeau, because the very same standard applies to determining whether there is discrimination in violation of GATT Articles I and III:4.⁵¹

Third, to find a violation of the chapeau solely on the basis of a difference in treatment of shrimp caught using turtle-protective practices would render illusory the rights of nations under Article XX(g) to implement measures to conserve exhaustible natural resources. This Panel previously concluded that Section 609 violated the chapeau because the law required shrimping nations to adopt certain conservation policies.⁵² The Appellate Body explicitly rejected that conclusion, explaining that

conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. . . . It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by

⁵⁰ *Id.*, p. 22.

⁵¹ Article I provides: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation, [etc.], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Article III:4 provides: “The products of the territory of any contracting party imported in to the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

⁵² *United States -- Shrimp*, Appellate Body Report, para. 121 (citing *United States – Shrimp*, Panel Report, para. 7.5).

the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.⁵³

Any measure that conditions market access on the adoption of a particular policy will have the effect that some products produced in accordance with that policy will be excluded because they come from a country that has not adopted the policy, whereas products produced in the same manner will be imported if the exporting country has adopted the policy. To prohibit such different treatment would therefore make it impossible for Members to condition market access on the adoption of policies made legitimate under Article XX, exactly the result against which the Appellate Body warned.

Applying the Appellate Body's reasoning to this case, Article XX(g) mandates that nations be permitted to condition market access on the adoption of legitimate conservation policies. Section 609's national certification requirement is an implementation of this right and, as a logical result, has the effect that some TED-caught shrimp is banned because it is caught in nations that have not adopted the requisite policy. To consider such different treatment of shrimp to constitute a violation of the chapeau would be to render the exception of Article XX(g) "inutile, a result abhorrent to the principles of interpretation [this Panel is] bound to apply."

Finally, it would be contrary to the context and purpose of the chapeau to determine that Section 609's national certification requirement violates the chapeau because it requires different treatment of shrimp. As noted above, an important element of the context of the chapeau is the principle of sustainable development, pursuant to which the international community has called on nations to take steps to prevent harm to endangered species from fishing activities.⁵⁴ By requiring the adoption of fishing methods that prevent shrimp trawls from incidentally catching endangered sea turtle, Section 609's national certification requirement is a direct application of the principles of sustainable development described above. Any difference in the treatment of shrimp resulting from (and, as described above, a logical and necessary result of) this policy is not, therefore, "arbitrary or unjustifiable" and does not violate the chapeau. For the same reason, such treatment is not an abuse of the exceptions of Article XX, but is instead a direct result of a market access condition that preserves the right of nations to conserve exhaustible natural resources. To conclude otherwise would have the impermissible effect of removing all meaning from Article XX(g).

The chapeau's purpose is to avoid the use of Article XX to advance trade-restrictive objectives other than those recognized in that article. There is no basis for inferring that the national certification requirement has an illegitimate objective. Because all US shrimp trawlers are required to use turtle-protective fishing practices, national certification provides no competitive advantage to US-caught shrimp. The requirement therefore does not constitute an abuse of Article XX.

The Appellate Body addressed the distinction between national certification and a shipment-by-shipment policy in paragraph 165 of its report, in which it noted that, under the

⁵³ *Id.*

⁵⁴ *See supra*, notes 7-11 and accompanying text.

national certification requirement, “*shrimp caught using methods identical to those employed in the United States [i.e., TED-equipped nets] have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States.*”⁵⁵ However, for the reasons just described, it would be inconsistent with Article XX(g) and the chapeau, as well as with the Appellate Body’s own statements in its Report, to read this paragraph as a determination that Section 609’s national certification requirement, *per se*, constitutes arbitrary or unjustifiable discrimination in violation of Article XX’s chapeau.

The Appellate Body made clear that it did not intend such an illogical result. In the same paragraph, the Appellate Body explained that its concern was that the United States was applying the ban in a manner that required exporting countries “to adopt *essentially the same* comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, *even though many of those Members may be differently situated.*”⁵⁶ This concern arose out of the Appellate Body’s finding that the US State Department’s practice was to certify countries only if they required the use of TEDs, rather than incorporating sufficient flexibility to consider whether a regulatory regime – whatever it was – achieved sea turtle protection comparable to the United States’ program.⁵⁷

On the basis of these findings and concerns, the Appellate Body concluded that “discrimination results not only when countries in which the same conditions prevail are differently treated, but also *when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.*”⁵⁸ Or, phrasing the conclusion slightly differently in another paragraph, it is not appropriate for a Member to use a ban to require a nation “to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.”⁵⁹

The Appellate Body’s concern, therefore, was that the United States was requiring the adoption of particular *practices*, rather than the adoption of a *program or policy* that was consistent with the exception permitted under Article XX(g).⁶⁰ The national certification requirement of Section 609 does not raise these concerns. Indeed, the Appellate Body explicitly stated that Section 609 “do[es] not, in [itself], *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries.”⁶¹ As the United States has indicated in its present guidelines, the national certification requirement need not preclude

⁵⁵ *United States – Shrimp*, Appellate Body Report, para. 165.

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Id.*, paras. 162-63.

⁵⁸ *Id.*, para. 165 (emphasis added).

⁵⁹ *Id.* para. 164 (emphasis in original).

⁶⁰ This also clarifies the meaning of the Appellate Body’s statement that the different treatment of TED-caught shrimp depending on whether it was caught in a certified country “is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles.” *Id.* para. 165. If that is truly the objective, then any *equally effective* method of protecting sea turtles from shrimp nets must be acceptable.

⁶¹ *Id.* para. 161.

nations from demonstrating that they have adopted a program that is as effective as the US program in protecting sea turtles from drowning in shrimp nets, but that uses different methods in light of different conditions which may occur in their territories.⁶²

3. Section 609's National Certification Requirement Is Not a Disguised Restriction on International Trade

The Appellate Body has stated that

“disguised restriction,” whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary and unjustifiable discrimination,” may also be taken into account in determining the presence of a “disguised restriction” on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.⁶³

A measure that meets the requirements of Article XX(g) will thus constitute an abuse “if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.”⁶⁴

Consideration of the factors discussed above demonstrates that Section 609’s national certification requirement is not a disguised restriction on international trade. The requirement does not discriminate between countries in which the same conditions prevail and provides no competitive advantage to domestic shrimpers. Moreover, to consider the effect of the requirement – different treatment of shrimp because of different conditions in the country in which they are caught – to be evidence of a disguised restriction on trade would also “reduc[e] whole clauses or paragraphs of [GATT] to redundancy or inutility,” a result forbidden by applicable rules of interpretation. In addition, such differential treatment is, as the Appellate Body explained, a necessary corollary to the right of nations to implement measures to achieve the objectives of Article XX(g). Far from being an abuse of Article XX(g), therefore, the national certification requirement of Section 609 is precisely the kind of measure for the conservation of exhaustible natural resources envisioned by the exception.

⁶² See 64 Fed. Reg. at 36950, column 3, Selected Documents, Tab 9 (“If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification.”).

⁶³ *United States – Gasoline*, Appellate Body Report, p. 25.

⁶⁴ *European Communities – Asbestos*, Report of the Panel, para. 8.236.

IV. CONCLUSION

Without immediate and effective protection from the threat posed by shrimp trawling, sea turtles may not survive on our planet. Section 609 is a response to that threat and, according to a US court, requires the United States to condition access to the US shrimp market on the adoption by trawling nations of a nationwide program to protect sea turtles from death in shrimp nets. As noted above, this national certification requirement is a faithful application of the principles of sustainable development and protection of endangered species that are a foundation of the WTO Agreements, including the provisions of the GATT. The differential treatment of shrimp depending on the conditions in the country in which they are caught is a necessary corollary to the right of nations to promote sustainable development and protect endangered species.

For these reasons, this Panel should affirm the GATT consistency of the national certification requirement and be careful not to suggest that only a shipment-by-shipment shrimp importation policy could comply with Article XX. To do otherwise would render illusory the rights of WTO Members under Article XX(g) and might well doom sea turtles to extinction.

Respectfully submitted,

J. Martin Wagner, Esq.
EARTHJUSTICE LEGAL DEFENSE FUND
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
415-627-6700
mwagner@earthjustice.org
Counsel for *Amici Curiae*

November 12, 2000