

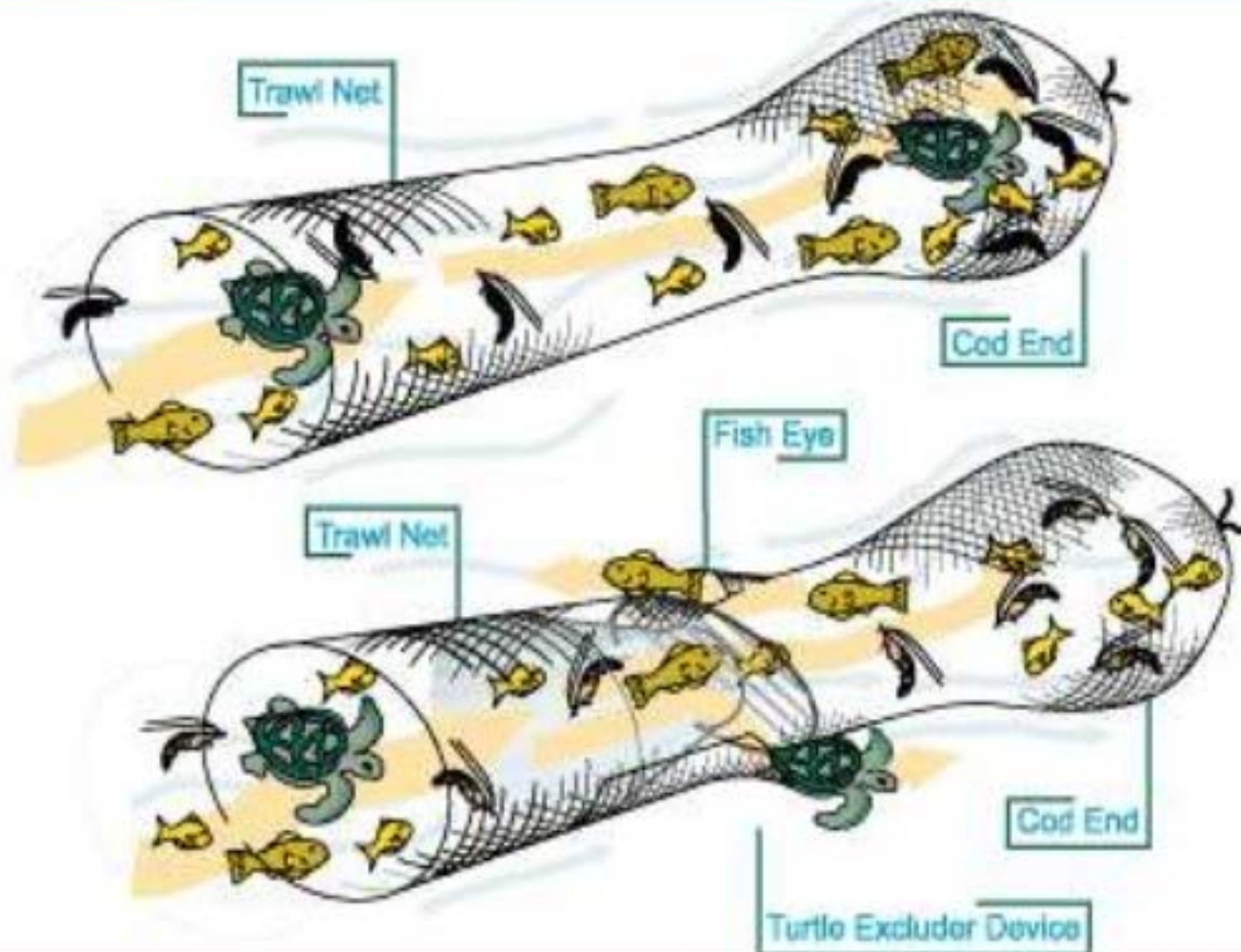
# Sustainable Development: Do We Know What it Means?

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Bangkok, Thailand

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# **THE SHRIMP TURTLE CASE**

# Solution to the problem by US TED systems





# Thailand



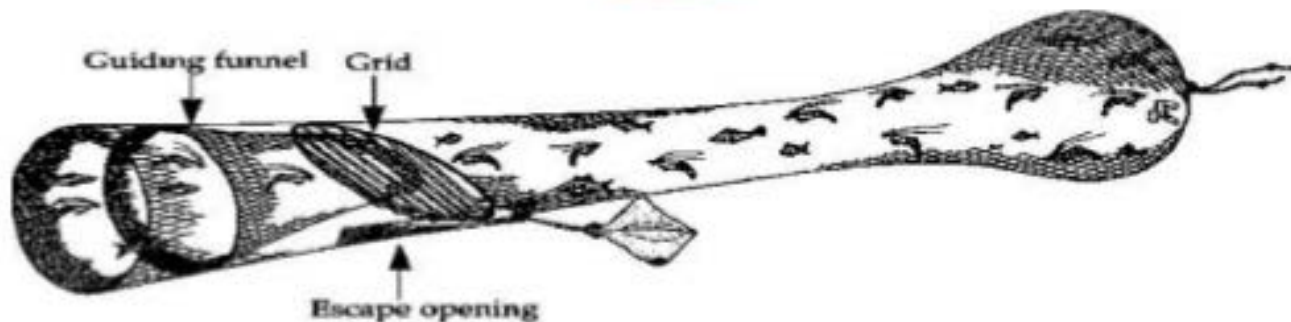
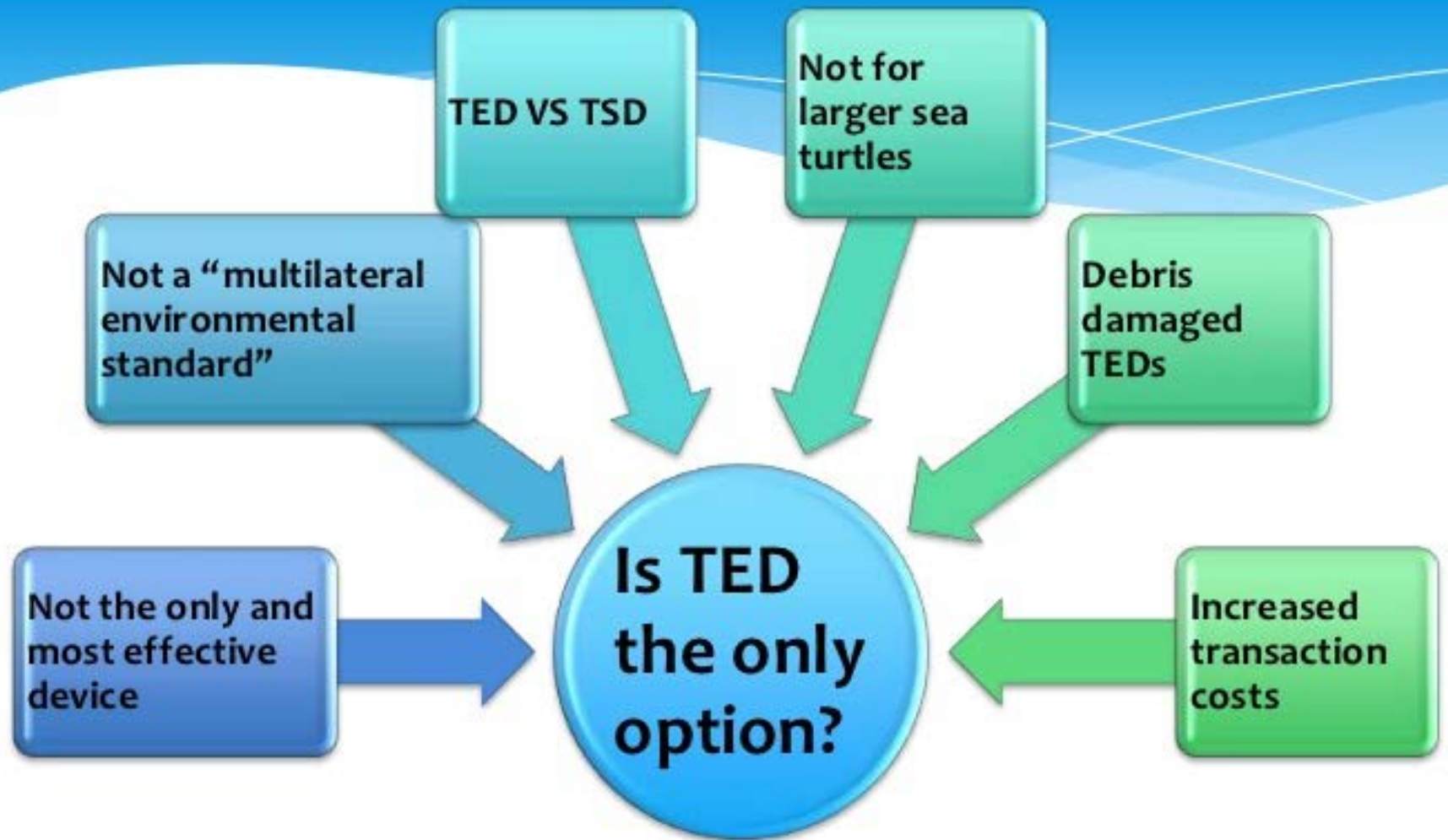
**1947 - the Fisheries Act prohibiting the catching, harvesting or harming of any sea turtle**

**Extensive sea turtle restoration programs: the Department of Fisheries, the Department of Forestry, and the Royal Thai Navy**

**1967 to 1996, no observed sea turtle killing in connection with shrimping**

**Suggested in ASEAN meetings of March 1997 to draft MOU jointly for the protection and conservation of sea turtles**





# Ulterior Motives for US



Our tropical shrimps had much more demand than the temperate shrimps in the US market

The Asian countries had the comparative advantage of providing shrimps at lower costs than were available domestically

Protectionist measures – saving its domestic industry

Adhering to richer lobbyists representing environmental and angling interests

# **POLICY SPACE IN INDIRECT EXPROPRIATION**

# Direct Expropriation

- Formal decree taking specific property.
- Law nationalizing an industry (*e.g.* telecom).
- Seizure by the army of a company's assets.



# Indirect Expropriation

- Taxation that is excessive or arbitrary adversely affecting value of investment.
- Interference with management of the investment.
- Gov't denial or revocation of permits, licenses or concessions.
- Required sale of a company's shares or assets.

# Legal Expropriation under CIL

- Conditions for Lawful Expropriation under CIL:
  - Public purpose for takings.
  - No discrimination;
  - Payment of compensation (prompt, adequate and effective?); and
  - Takings in accordance with due process.

# Article 14 ACIA

## Expropriation and Compensation [fn.9]

1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (“expropriation”), except:10

- (a) for a public purpose
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with **due process of law**.

Fn.9 This Article shall be read with **Annex 2 (Expropriation and Compensation)**

**Note:** The ACIA and AANZFTA both include an Expropriation Annex that further elaborates on certain expropriation principles. The Parties to the AKIA agreed to enter into discussion on an Expropriation Annex within five years of the date of entry into force unless the Parties agreed otherwise.

ACHIA does not have an Annex but replaces “due process of law” with “applicable domestic laws including legal procedures”

# ACIA Annex 2:

## Expropriation and Compensation

1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.

2. Article 14(1) addresses two situations:

(a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) the second situation is where an action or series of related actions by a Member State has **an effect equivalent to direct expropriation** without formal transfer of title or outright seizure.

# ACIA Annex 2

3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:

- (a) the economic impact of the government action...;
- (b) whether the government action breaches the government's prior binding written commitment to the investor ...; and
- (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).

4. **Non-discriminatory** measures of a Member State that are designed and applied **to protect legitimate public welfare objectives**, such as public health, safety and the environment, **do not constitute an expropriation** of the type referred to in sub-paragraph 2(b).



# Other Issues

- Compensation for expropriation (*e.g.* additional specific provisions including currency and valuation method).
- “Regulatory” takings.
- Special dispute settlement provisions related to tax measures in some IIAs. (*e.g.* ANZFTA, Ch. 15, Art. 3.4; U.S. 2004 Model BIT, ; ACIA, Art. 36).
- Carve-outs from Expropriation obligation (*e.g.* land takings in ACIA n.10 – subject to national laws).

# **GENERAL EXCEPTION CLAUSES**

# US Argentina BIT

(signed 1991, entry into force 1994)

- ARTICLE XI
- This Treaty shall not preclude the application by either Party of measures **necessary** for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

# Recent Argentinean Cases on Interpretation of Exception Clauses

- *CMS, Sempra & Enron* – A.XI of the US-Argentina BIT “necessary” means the customary international law standard of “necessity” being the “only way” for the State to safeguard an essential interest
- *CMS, Sempra & Enron* (annulments) – “only way” requires factual findings of the measure’s “reasonableness”
- *LG&E* – Argentina could invoke A.XI – while there were different ways to draft the economic recovery plan, there were no other ways to respond to the crisis (factual finding)
- *Continental* – WTO GATT A.XX (GATS A.XIV?) test of necessity applied - balancing test of whether there were reasonable alternatives less in conflict with the obligations that could achieve the reasonable objective

# **NAFTA Article 1114:**

## **Environmental Measures**

- 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.



# 1987 and 1998 ASEAN IIA

## 1987 IGA

- ARTICLE V EXCEPTION
- The Provision of this Agreement shall not apply to matters of taxation in the territory of the Contracting Parties. Such matters shall be governed by Avoidance of Double Taxation between Contracting Parties and the domestic laws of each Contracting Party.

## 1998 AIA

- ARTICLE 13 GENERAL EXCEPTIONS (similar to WTO GATT Art XX)
- ARTICLE 14 EMERGENCY SAFEGUARD MEASURES
- ARTICLE 15 MEASURES TO SAFEGUARD THE BALANCE OF PAYMENTS

# Article 17 ACIA General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;  
[fn.12]

(b) necessary to protect human, animal or plant life or health;

Fn.12 The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

# WTO Exceptions and ACIA

- General Exceptions “public order” (GATS Art XIV) (replicated in ACIA A.7)
- IMF Fund Request (GATS Art XI:2) (replicated in ACIA A.13)
- Safeguard BoP (GATS Art XII) (replicated in ACIA A. 16)
- For Financial Services in GATS Financial Services Annex (incorporated in ACIA by reference):
  - “measures for prudential reasons... to ensure the integrity and stability of the financial system”
  - Note the absence of a “necessary” requirement like that found in GATS Art XIV.
  - (Q: Self-judging? Good faith? Reasonable?)

When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871)