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Will the European Union Packaging Directive Reconcile Trade and the Environment?

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COMMENT

WILL THE EUROPEAN UNION PACKAGING DIRECTIVE RECONCILE TRADE AND THE ENVIRONMENT?

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INTRODUCTION

Traditionally, environmentalists and proponents of free trade have been at odds with one another.[1] A recent General Agreement on Tariffs and Trade[2] ("GATT" or "General Agreement") ruling that a tuna embargo, pursuant to a U.S. law protecting dolphins,[3] was an unfair trade barrier illustrates the clash between free trade and environmental protection.[4] To protect endangered habitats, species, and resources, environmentalists have helped weave a safety net of national laws and international agreements.[5] Free trade advocates, however, regard these laws as protectionist barriers that impede the flow of commerce.[6]

From a GATT perspective, a potential conflict between free trade and environmental advocates could arise from the European Union[7] ("EU" or "Union") directive[8] regarding packaging

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1. *See* Tom Wathen, *A Guide to Trade and the Environment*, *in* TRADE AND THE ENVIRONMENT, LAW, ECONOMICS, AND POLICY 3 (Durwood Zaelke et al. eds., 1993) (illustrating conflict between free trade and environmental preservation); Ralph Nader, *Trade in Secrets*, WASH. POST, Oct. 6, 1994, at A31 (noting that all U.S. environmental groups, even those who supported NAFTA, opposed GATT).

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950) [hereinafter GATT 1947]. The objective of GATT was to induce nations to liberalize trade barriers without resorting to tariffs or quotas, which were found to be debilitating to trade. JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 9-10 (1990).

3. U.S. Marine Mammal Protection Act, 16 U.S.C §§ 1361-1407 (1988 & Supp. V 1993) [hereinafter MMPA]. The MMPA allows the Secretary of Treasury to ban imports from other countries that buy fish for reexport from the offending country. *Id.* An offending country is defined as one whose fishermen kill more dolphins than U.S. fishermen do. *Id.*

4. *See* General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter Tuna Panel II] (noting EU challenge of U.S. secondary embargo on yellowfin tuna from countries that import and process tuna from offending nations).

5. Wathen, *supra* note 1, at 20.

6. *Id.* at 20-21.

7. *See* Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1

and packaging waste for commercial products ("Packaging Directive" or "Directive").[9] Adopted December 20, 1994,[10] the Directive establishes guidelines to harmonize measures in Member States concerning the management of packaging waste and to eliminate unfair trade practices in the European Union.[11] It applies to all packaging of products sold in the European Union and affects all EU and non-EU companies that sell products in the EU market.[12]

In the European Union, each Member State enacts separate legislation to fulfill the objective of a directive.[13] Therefore, fifteen sets of laws and regulations will result from the implementation of the Directive.[14] As a result, a Member State may adopt legislation[15] under the Directive that favors EU countries over

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C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Before the Treaty of the European Union, the collective Member States were called the European Community ("EC" or "Community"). *See* EC Treaty, *supra* (referring to European Community). After the TEU, the Member States are now called the European Union. *See* TEU, *supra* (referring to European Union). The European Union is an organization of fifteen European nations. *Id.* The twelve Member States before the recent accession were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *Id.* On January 1, 1995, Finland, Sweden, and Austria joined the Union. Decision of the Council of the European Union of 1 January 1995 Adjusting the Instruments Concerning the Accession of New Member States to the European Union, O.J. L. 1/1 (1995).

8. *See* EC Treaty, *supra* note 7, art. 189(3). "A directive shall be binding, as to the result to be achieved, upon each member-state . . . but shall leave to the national authorities the choice of form and methods." *Id.*

9. European Parliament and Council Directive No. 94/62/EC, O.J. L 365/10 (1994) [hereinafter Packaging Directive].

10. *Id.*

11. *See id.* art. 1(1), O.J. L 365/10, at 12 (seeking to provide environmental protection and to avoid obstacles to trade that restrict competition within European Community).

12. *Id.* art. 2(1), O.J. L 365/10, at 12. "This Directive covers all packaging place on the market in the Community and all packaging waste, whether it is used or released at industrial, commercial, office, shop, service, household or any other level, regardless of the material used." *Id.*

13. *See supra* note 8 (noting that Member States are allowed to pass own laws and regulations to implement directive).

14. *See supra* note 7 (naming fifteen Member States).

15. *See* John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, *in* TRADE AND THE ENVIRONMENT, LAW, ECONOMICS, AND POLICY 219, 222

non-EU countries and that may be construed as a non-tariff barrier to trade.[16] Such a restriction to trade between the European Union and a non-EU country allows a nation to bring a complaint before a World Trade Organization ("WTO") tribunal.[17]

This Comment examines the issue of whether the Packaging Directive, meant to protect the health and safety of EU citizens and the environment, could be construed as a non-tariff trade barrier. Part I provides an overview of the general debate between trade and the environment and relevant EU laws and GATT disputes. Part II discusses the history and pertinent provisions of the Directive. Part III argues that the Directive is a not non-tariff trade barrier. This Comment concludes that directives, such as the Packaging Directive, that balance free trade and environmental protection, are a harbinger of future legislation and treaties.

I. *RECENT TRADE-ENVIRONMENT BATTLES*

Free trade has come under attack from environmentalists who argue that international free trade fosters the exploitation of natural resources.[18] Proponents of free trade consider oner-

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(Durwood Zaelke et al. eds., 1993) (providing hypothetical situation where GATT oversight may be triggered).

> [A member country] establishes a rule that requires a special deposit or tax on packaging that is not biodegradable, arguing that such packages are a danger to the environment. It so happens that [the member country's] producers use a different package that is not so taxed. Only the packages from [importing countries] are affected.

Id.

16. *See* A. G. KENWOOD & A. L. LOUGHEED, THE GROWTH OF THE INTERNATIONAL ECONOMY 1820-1990, at 280 (1992) (defining non-tariff barrier as rule restricting quantity of imports between countries). "The types of [non-tariff] measures used were varied in character but orderly marketing arrangements (OMAs) and voluntary export restraints (VERs) were the most common. The effectiveness of Japan's penetration of American and European markets was of major concern to those countries and was the initial reason for such [non-tariff barrier] restrictions." *Id.*

17. *See* General Agreement on Trade and Tariffs: Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, *opened for signature* Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994] (providing organization to implement and administer rules and regulations governing international trade agreed to in Uruguay Round and in future global trade negotiations). *Id.* art. III, at 1145. The World Trade Organization encompasses trade agreements involving goods, services, and intellectual property rights. *Id.* art. II, at 1144.

18. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 700 (1992). "The GATT is under attack by

ous environmental regulations to be a barrier to free trade.[19] A mechanism for one country to resolve its trade disputes with another country is to utilize the WTO dispute resolution mechanism.[20] In the European Union, the mechanism for resolving trade disputes is through the EU court system.[21]

A. *Free Trade Versus Environmental Protection*

Proponents of free trade and environmental protection are at odds over the correct policy to pursue.[22] Free trade advocates want to remove all barriers to trade throughout the world.[23] Environmentalists fear that eliminating all barriers to trade will weaken environmental regulations.[24] Nowhere is this conflict more clear than in the clash between developing[25] and developed[26] countries regarding environmental regulations.[27] Developed countries believe GATT may erode the environmental ini-

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some in the environmental community who charge that international free trade blindly fosters the exploitation of natural resources." *Id.*

19. *See, e.g., id.* (noting that passage of U.S. Clean Air Amendments of 1990 would impose costs on U.S. factories that would make them less competitive with those in other countries).

20. *See* General Agreement on Tariff and Trade: Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2, art. 4, 33 I.L.M. 1226, 1228 (1994) [hereinafter GATT DSB] (describing procedure for dispute resolution).

21. *See* GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY, ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 69 (1993) (describing European court system and European Court of Justice, final arbiter in resolving disputes).

22. *See* Wathen, *supra* note 1, at 4 (describing three broad approaches to international trade: protectionism, free trade, and managed trade).

23. *Id.* at 5.

24. *See* Wendell Berry, *A Big Bad Idea*, *in* THE CASE AGAINST FREE TRADE 158, 159 (1993) (arguing that harmonization is GATT euphemism for lowering standards to lowest international common denominator).

25. *See* Robert Cassen et al., *Overview*, *in* RICH COUNTRY INTERESTS AND THIRD WORLD DEVELOPMENT 1, 5 (Robert Cassen et al. eds., 1982) (describing four groups of developing countries). There are at least four groups of developing countries: OPEC nations with large financial surpluses; newly industrialized countries that are expanding rapidly; middle income countries whose economies are expanding but still depend on exports of primary products; and low income countries with a per capita income of less than US$350 per year. *Id.*

26. *See* THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 31 (1980) (noting that developed countries are those countries that have industrialized market economies). They have a quarter of the world's population but control four-fifths of the world's income. *Id.* at 32.

27. *See* Wathen, *supra* note 1, at 10 (explaining why free trade advocates fear environmental regulation). "Free trade advocates fear that stronger measures to protect the environment will stifle open business competition between nations. For example, companies from developing countries may not have the technology or expertise to

tiatives that they have long sought.[28] Developing countries, on the other hand, argue that environmental standards are merely protectionism in disguise[29] and are designed to increase manufacturing costs, thereby restricting their access to the markets of the developed countries.[30]

1. Free Movement of Goods

Free trade is the unlimited exchange of commerce between buyers and sellers across national borders.[31] Although free trade is often painted as anti-environment,[32] it does not necessarily require the elimination of environmental regulations.[33] As long as a country's environmental regulations do not discriminate against non-domestic companies, these regulations will not conflict with free trade.[34] The conflict between free trade and environmental protection arises when the lack of technology to implement environmental regulations causes companies to lose access to markets in developed countries.[35] By precluding companies from these markets, developed countries have unintentionally created a non-tariff barrier to trade.[36]

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meed advanced environmental standards in developed countries and may lose access to those markets." *Id.*

28. Bronwen Maddox, *Business and the Environment: Troubled Waters - The Uruguay Round May Be Concluded, But It Leaves a Handful of Potential Trade Conflicts*, FIN. TIMES, June 15, 1994, at 18.

29. *See After Free Trade Euphoria, Now Comes the Hard Part*, 13 Daily Rep. for Executives (BNA) Supp. No. 14, at D109 (Jan. 20, 1995) [hereinafter *After Free Trade Euphoria*] (noting that trade ministers of several developing countries said they were concerned that environmental protection could become pretext for trade protectionism).

30. *Id.* For developing countries, there is a "general feeling of anxiety that these new tendencies will restrict access to new markets . . . since many Latin American countries have neither the technology nor the resources to respond to such demands." *Environmental Policies: Where are the Trade Barriers?*, BUS. & ENV., Jan. 1, 1994, *available in* LEXIS, News Library, Curnws File [hereinafter *Environmental Policies*].

31. Wathen, *supra* note 1, at 5.

32. *Id.* at 3.

33. *Id.* at 5.

34. *Id.*

35. *Id.* at 10.

36. *See* Alberto Bernabe-Riefkohl, *"To Dream the Impossible Dream": Globalization and Harmonization of Environmental Laws*, 20 N.C.J. INT'L L. & COM. REG. 205, 211 (1995) (explaining why environmental regulations are considered non-tariff trade barriers). "Because the regulations have an effect on trade, even though they are not specifically related to it, they are considered 'non-tariff trade barriers' that operate as obstacles to economic development." *Id.*

2. Developing Versus Developed Countries

The creation of trade barriers because of environmental regulations has led free trade proponents to advocate for the harmonization of environmental regulations throughout the world.[37] Theoretically, with the same environmental regulations, no discrimination could exist as a result of environmental regulations.[38] The problem, however, is in reaching a compromise on the appropriate level of environmental protection.[39] Developed countries would lobby for high environmental protection,[40] and corporate lobbyists and developing countries would lobby for low international environmental standards.[41]

An example of such a fear[42] has been voiced by the Venezuelan government with regard to Clean Air regulations for reformulated gasoline.[43] The Clean Air Rule required non-U.S. refiners to use a different formula to comply with the regulation from U.S. refiners.[44] At the first session of the WTO's dispute settlement body,[45] Venezuela registered a dispute on U.S. imported gasoline regulations.[46] Venezuela initially brought this

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37. *World: World Trade and Environment*, PETROLEUM ECONOMIST, June 21, 1994, at 91.

38. *See* Wathen, *supra* note 1, at 10 (noting that harmonized environmental regulations throughout world would provide situation where non-domestic companies are not at disadvantage with respect to domestic companies).

39. *See id.* at 19-21 (describing previous attempts in harmonizing international and national environmental regulations).

40. *Id.* at 10.

41. *Id.*

42. *Environmental Policies*, *supra* note 30. Another country with a similar fear is South Korea. *Id.* An editorial in a South Korean newspaper expressed fears that higher standards on energy efficiency and emissions will restrict import of South Korean combustion engines and electronic goods. *Id.*

43. *See* 40 C.F.R. § 80.91(a)(1) (1994) (stating baseline requirements for importers of gasoline); 59 Fed. Reg. 22,800 (1994) (requesting comments regarding amendment of non-U.S. refinery baselines).

44. *See Clean-Air Rule Defied by Venezuela Under GATT May Be Killed*, WALL ST. J., Mar. 18, 1994, *available in* Westlaw, Allnws File (noting that Caracas argued that U.S. E.P.A. rule discriminates against non-U.S. oil companies because U.S. formula, based on Venezuela's 1990 gasoline production, differs from one used by U.S. companies).

45. *See* GATT DSB, *supra* note 20, art. 2, at 1226 (establishing Dispute Settlement Body).

46. *Venezuela Brings Gasoline Dispute to WTO*, Reuters, Feb. 10, 1995, *available in* Westlaw, Int-News File. "Venezuela and the United States have agreed to discuss their dispute over U.S. regulations on imported gasoline under the speedier proceeding of the World Trade Organization . . . ." *Id.*

dispute under GATT in October 1994.[47] On January 11, 1995, Venezuela withdrew the initial complaint and brought it to the WTO, with hopes for an expeditious resolution.[48] Under WTO rules, the two countries have sixty days to hold bilateral talks.[49] If there is no resolution from the talks, Venezuela could ask the WTO to establish a panel to resolve the dispute.[50]

3. Cost to Developing Countries

Developing countries have argued that the cost of implementing environmental regulations of developed countries is a protectionist barrier to trade.[51] Potential areas of concern are restrictions on recycling content of packaging,[52] the quantity of heavy metals,[53] and packaging labeling.[54] Regulation of this scope will undoubtedly mandate regulatory oversight.[55]

Another possible cost to implementing solid waste reduction regulations is the availability or access to modern reclamation technology to process solid waste.[56] Specifically, the re-

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47. *Id.*

48. GATT DSB, *supra* note 20, art. 3(11), at 1227. Although the WTO is now a reality, any cases brought to the GATT dispute resolution board before January 1, 1995, can still be decided under the pre-WTO rules. *Id.* The 1947 GATT treaty and dispute mechanism will continue to exist this year in parallel with the successor WTO. *WTO Completes Organization*, Agence Europe, Feb. 10, 1995, *available in* Westlaw, Int-News File.

49. *Venezuela Brings Gasoline Dispute to WTO*, *supra* note 46. Talks began with the United States on February 24, 1995. *Id.*

50. GATT DSB, *supra* note 20, art. 4(7), at 1228.

51. *See* Frances Williams, *First Steps to 'Green the GATT' - A Look at Preparations for a Negotiating Programme for Trade, Environment, and Sustainable Development After Uruguay*, FIN. TIMES, Feb. 22, 1994, at 7 (noting fear of developing countries that environmental move to 'green GATT' is merely another name for protectionism). "There is . . . a wide gulf between the views of environmentalists, who favour changing GATT rules to facilitate the use of trade restrictions for environmental protection, and those of developing countries who fear that moves to 'green the GATT' may spread a virulent new form of protectionism." *Id.*

52. Roger King, *Recycling Laws Vulnerable Under GATT*, PLASTICS NEWS, Dec. 12, 1994, at 4. "GATT requires similar treatment for similar or like products that serve the same function. If virgin and recycled products are classified as similar, state recycling laws can be challenged for giving unfair advantage." *Id.*

53. *U.S.A: Citizens Trade Campaign Denounces GATT Tuna Boycott Decision*, PRNewswire, May 23, 1994, *available in* LEXIS, News Library, Curnws File.

54. *Environmental Policies*, *supra* note 30.

55. *See Packaging and Packaging Waste Directive*, European Commission Press Release (Dec. 15, 1994) (requiring national harmonized databases as monitoring mechanism for implementing Directive objectives).

56. SUSAN E. SELKE, PACKAGING AND THE ENVIRONMENT 124-28 (1990).

cycling of containers made of composite or multilayer materials[57] would require sophisticated recycling processes that may not be available to all non-EU countries.[58] Lack of advanced recycling technology could limit import and export of certain products unless these products are repackaged or special licensing fees for waste reprocessing are paid.[59]

B. *GATT*

The GATT is a contractual agreement between member countries with the common objective that trade be conducted without discrimination.[60] As of January 1995, the WTO began oversight of all GATT agreements. Disputes between Member States can be brought to a WTO Dispute Settlement Body and resolved.[61] Environmental protection regulations will conflict with the WTO's goal of free trade if they are found to discriminate between Member States.[62]

1. Structure of GATT

The GATT is a multilateral agreement with the common goal of reducing tariffs between member countries. Since 1947, GATT has sponsored rounds of multilateral trade negotiations that have cut tariffs on manufactured goods from forty to five percent.[63] The Uruguay Round was the eighth international trade agreement undertaken under GATT.[64] With the reduction

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57. *Id.* at 171. An example of a multilayer product that is difficult to recycle is one containing a combination of paper and plastic, such as a juice box. *Id.* Separating paper from plastic is very difficult. *Id.* If the plastic is not separated, it could cause serious problems in the paper making process by building up in the papermaking equipment. *Id.*

58. *Id.* at 129-31.

59. *See* Wathen, *supra* note 1, at 10 (lack of technology preventing developing countries from selling in certain markets).

60. *See* GATT 1947, *supra* note 2, art. III(2), 61 Stat. at A18, 55 U.N.T.S. at 205 (noting that imported products will not be treated differently from domestic products).

61. GATT DSB, *supra* note 20, art. 4(7), at 1228.

62. *See* Bernabe-Riefkohl, *supra* note 36, at 211 (noting that environmental protection polices frequently conflict with economic polices, including free-trade theories). One hypothetical example of such a trade barrier occurs when a country attempts "to protect the environment or the health of its citizens [and creates] barriers to the importation of foreign products [by not meeting] the country's regulations." *Id.*

63. Wathen, *supra* note 1, at 6.

64. JACKSON, *supra* note 2, at 38. GATT 1947 began the trend in reducing tariffs. *Id.* at 36. The following rounds at Annecy (1949), Torquay (1950), Geneva (1956), and Dillon (1961) continued this trend. *Id.* at 36-37. The sixth round, Kennedy (1962-

of tariffs came the concomitant rise of non-tariff barriers.[65] As with tariffs, non-tariff trade barriers trigger GATT oversight when a trade barrier discriminates between domestic and non-domestic countries.[66]

There are two ways GATT is enforced.[67] In the case of a non-domestic company violating the GATT in the domestic market, the injured company can ask the home government to impose trade sanctions on goods entering the home market.[68] In the case of a domestic company's export sales being reduced because of GATT violations, the company can ask its government to lodge a formal compliant with the GATT Secretariat.[69]

To lodge a formal complaint, the disputing countries must first conduct diplomatic negotiations to resolve the dispute.[70] If the matter cannot be resolved, a WTO dispute panel is appointed to resolve the dispute.[71] If the dispute resolution board votes in favor of the complaining party, the penalty for the losing party would be modification of the dispute law or regulation to eliminate the trade barrier[72] or payment of trade sanctions.[73] As opposed to the old version of GATT, no veto by the losing coun-

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1967), "planned to look seriously at non-tariff barriers, but that aim was only minimally achieved." *Id.* at 36. The Tokyo round (1973-1979) was "the first major negotiating round to make non-tariff barriers the priority objective of the negotiation." *Id.* at 36-37.

65. *Id.* at 37. The subject of non-tariff barriers first arose in the Tokyo Round of GATT negotiations. *Id.* at 36-37.

> As GATT became established, and tariffs were substantially reduced, non-tariff barriers became significantly more important. Many domestic producer interests began turning to a variety (more than a thousand) of non-tariff barriers as a way to minimize the competition from imports, since tariffs would no longer provide that type of protection.

Id.

66. *See* GATT 1947, *supra* note 2, art. III(2), 61 Stat. at A18-19, 55 U.N.T.S. at 205 (noting that GATT Member States must treat imported and domestic products equally).

67. Wathen, *supra* note 1, at 12.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. GATT DSB, *supra* note 20, art. 19(1), at 1237. "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." *Id.* The body in charge of settling the dispute is called the Dispute Settlement Body ("DSB"). *Id.* art 1(2), at 1226.

73. *Id.* art. 22(1), at 1239. "Compensation and the suspension of concessions are . . . measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time." *Id.*

try is allowed under the WTO.[74] The resolution stands unless all members of the WTO decide by consensus to veto the ruling.[75] As a result, an adverse ruling concerning an existing environmental law could recommend that the member country substantially modify its laws or standards to conform to WTO regulations.[76]

2. Pre-WTO Environmental Cases

Three GATT panel dispute rulings have defined what environmental regulations conflict and do not conflict with GATT.[77] Two tuna-dolphin cases, involving an environmental law's discriminatory language against non-U.S. countries, conflicted with GATT. On the other hand, the CAFE dispute, involving an environmental law that applied equally to domestic and non-domestic companies, was held non-discriminatory and not a trade barrier.

a. Tuna Dolphin Dispute Between Mexico and the United States

In 1991, the Mexican government brought a trade dispute to a GATT tribunal alleging that U.S. tuna quota restrictions pursuant to the Marine Mammal Protection Act[78] ("MMPA") vio-

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74. *The Vote on GATT: The Trade Pact's Key Provisions*, WALL ST. J., Dec. 2, 1994, at A8.

75. GATT DSB, *supra* note 20, art. 16(4), at 1235.

> Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a [Dispute Settlement Board] meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

Id.

76. *Id.* art. 19(1), at 1237.

77. *See* General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1623 (1991) [hereinafter Tuna Panel I]; Tuna Panel II, *supra* note 4, ¶¶ 6.1-6.2, at 899 (noting that MMPA environmental law was trade barrier); General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Taxes on Automobiles, ¶¶ 6.1-6.2, 33 I.L.M. 1397, 1457 (1994) [hereinafter CAFE Dispute] (noting that U.S. CAFE regulation was not trade barrier).

78. 16 U.S.C §§ 1361-1407 (1988 & Supp. V 1993). Under the MMPA, if a country's fishing operations take more than one and one quarter times the number of marine mammals taken by the United States during the same time period, the Secretary of the Treasury may ban the imports of that country's fish and fish products. 16 U.S.C. § 1371(a)(2)(b)(II).

Mexico was targeted as an offending country under GATT because its tuna fishing grounds were in Eastern Tropical Pacific ("ETP"). Tuna Panel I, *supra* note 77, ¶ 2.2, at

lated free trade principles.[79] The dispute concerned a U.S. boycott against tuna captured in a purse seine fishing net.[80] In addition to trapping tuna, these nets caused many dolphins to drown.[81]

Mexico argued that the MMPA and its associated regulations were import restrictions and violated Article XI of the GATT.[82] In turn, the United States argued that the measures under the MMPA were internal regulations and thus valid under Article III(4).[83] Article III(4) prohibits a contracting party from discriminating between its own domestic products and imported products regarding matters of internal taxation and regulation.[84] The United States argued that the MMPA treated U.S. and non-U.S. tuna alike and that the MMPA regulated the internal sale of products, which is allowed under Article III(4).[85]

The GATT dispute panel held that the regulation based

1598. In the ETP, dolphins travel with tuna. *Id.* They do not travel with tuna in other oceans of the world. *Id.*

79. *Id.* ¶¶ 1.1, 3.1-3.5, at 1598, 1601.

80. Hon. R. Kenton Musgrave & Garland Stephens, *The GATT-Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957, 958 n.1 (1993). A purse seine net is a net weighted on one end and buoyed on the other end. *Id.* Its purpose is to encircle a school of fish. *Id.* The bottom of the net is closed by drawing a line through rings attached to the weighted end and trapping the fish inside. *Id.*

81. *Id.* ¶ 2.2, at 1598. The fishing net encircled both the tuna and the dolphins, causing many of the air-breathing dolphins to drown. *Id.*

82. GATT 1947, *supra* note 2, art. XI(1), 61 Stat. at A32-A33, 55 U.N.T.S at 224. Article XI(1) forbids restrictions on imports other than duties, taxes, or other charges. *Id.*

83. *Id.* art. III(4), 61 Stat. at A18-A19, 55 U.N.T.S. at 205-09.

84. *Id.* Article III states:

> 1. The contracting parties recognize that internal taxes and other internal charges . . . should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> 2. The products of the territory of any contracting party imported into the territory shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. . .
>
> 4. The products of the territory of any contracting party imported into the territory . . . shall be accorded treatment no less favorable than that accorded to like products or national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Id. In addition, the explanatory comments accompanying Article III allows a regulation or internal tax to be applied on imported products if it is also applied to domestic products. *Id.*, n. add. art. III.

85. Tuna Panel I, *supra* note 77, ¶ 3.6(a), at 1601. "The United States requested the Panel to find that: (a) The measures imposed under the MMPA with respect to

upon fishing methods, rather than physical condition, violated the GATT principle of treating imported and domestic products alike.[86] The panel reasoned that the power to enforce domestic regulations on imports at the border is limited to regulations that pertain directly to the imported product itself, and not to the underlying production processes.[87] Thus, a regulation, that addressed the taking of dolphins would not affect tuna as a product.[88] The panel concluded that if a contracting party applied environmental regulations to non-domestic products at the time of the importation, such regulations would constitute quantitative restrictions if they did not regulate an innate quality of the product.[89]

In addition, the United States argued that even if the measures violated GATT, the embargo was valid under Article XX.[90] The United States further argued that the tuna ban and the MMPA were justified under Article XX(b) because they served the sole purpose of protecting the dolphin.[91] The panel, however, held that the language of Article XX(b) did not apply to measures outside the jurisdiction of the contracting party.[92] In response to the U.S. argument that the MMPA measures were justified under Article XX(g) because they were primarily aimed at preventing the capture of dolphins,[93] the panel disagreed because a contracting party can only control production within its

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certain domestic yellowfin tuna from Mexico were internal regulations . . . consistent with Article III:4; . . . ." *Id.*

86. *Id.* ¶ 5.15, at 1618. "Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product." *Id.*

87. *Id.* at ¶¶ 5.14-5.15, at 1618.

88. *Id.* ¶ 5.15, at 1618.

89. *Id.* ¶ 5.14, at 1618. "[T]hese regulations [the MMPA] could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product." *Id.*

90. *Id.* ¶ 3.27, at 1605. Article XX allows for certain exceptions to Article XI. GATT 1947, *supra* note 2, art. XX, 61 Stat. at A60-A62, 55 U.N.T.S. at 262-64. These exceptions are: 1) Article XX (b) - measures necessary to protect human, animal, or plant life or health, 2) Article XX (d) - measures inconsistent with GATT, and 3) Article XX (g) - measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. *Id.*

91. Tuna Panel I, *supra* note 77, ¶ 3.33, at 1606. "[T]he MMPA embargo was necessary to protect the life and health of dolphins." *Id.*

92. *Id.* ¶¶ 5.28-5.29, at 1620.

93. *Id.* ¶ 3.40, at 1607.

jurisdiction.[94] The GATT dispute panel ruled that the U.S. embargo of Mexican tuna products violated Article XI(1),[95] and Article XX exceptions[96] were not applicable.[97]

The panel, however, determined that the labeling provisions of the Dolphin Protection Consumer Information Act[98] ("DPCIA") did not violate GATT.[99] The restriction on the right to use a "dolphin-safe" label applied equally to all countries who chose to harvest tuna in the Eastern Tropical Pacific.[100] The DPCIA did not distinguish between products originating in Mex-

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94. *Id.* ¶ 5.31, at 1621. "Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction." *Id.*

95. *Id.* ¶ 5.18, at 1618. "No prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party." GATT 1947, *supra* note 2, art. XI(1), 61 Stat. at A32-A33, 55 U.N.T.S. at 224.

96. GATT 1947, *supra* note 2, art. XX, 61 Stat. at A60-A62, 55 U.N.T.S. at 262-64. Article XX only protects conservation measures within a country's jurisdiction. *Id.* Countries "may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." Tuna Panel I, *supra* note 77, ¶ 6.2, at 1622.

97. *Id.* ¶ 5.28, at 1620.

> The United States had not demonstrated to the [GATT] Panel - as required of the [contracting] party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative agreements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.

Id. Tuna Panel I did not consider Article XX exceptions applicable because the United States had not demonstrated that it had used all other means to stop the killing of dolphins before resorting to the embargo.

> Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for [U.S.] fishermen during the same period. consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the [U.S.] dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

Id.

98. 16 U.S.C. § 1385 (1988 & Supp. V 1993).

99. Tuna Panel I, *supra* note 77, ¶ 5.44, at 1622.

100. *Id.* ¶ 5.43, at 1622.

ico and products originating in other countries.[101] In addition, the labeling provisions of the DPCIA did not restrict the sale of tuna products,[102] as products with or without the "dolphin-safe" label could be sold freely in the United States.[103]

The *Tuna Panel I* tribunal stated that a GATT member may control the consumption of an exhaustible natural resource only to the extent that it is under its jurisdiction.[104] This limitation would only apply to actions outside the member country's borders.[105] The panel stated that GATT imposes few constraints on the ability of signatory nations to implement their environmental policies domestically.[106] Regulating products would not conflict with GATT as long as the treatment for imported and domestic products was the same and non-discriminatory.[107]

Mexico did not pursue the matter before the GATT Council[108] for political reasons.[109] As a result, the panel ruling had no

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101. *Id.*

102. *Id.* ¶ 5.42, at 1622.

103. *Id.*

104. *Id.* ¶ 5.31, at 1620. In response to this extra-territorial limitation, some commentators have recommended that "GATT should be amended to allow for some extra-territorial applications of domestic environmental law, especially where resources being protected are part of the international commons." Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 192 (1993).

105. *See supra* note 92 and accompanying text (stating that Article XX(b) did not apply to measures outside jurisdiction of GATT contracting party).

106. Tuna Panel I, *supra* note 77, ¶ 6.2, at 1622.

107. *Id.* "[A] contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers." *Id.*

108. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT Doc. L/4907, BISD 26S/210 (1980), Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), ¶ 6. "The reports of working parties are advisory opinions on the law of which the CONTRACTING PARTIES may take a final decision." *Id.* All members of the GATT council must finalize GATT rulings by consensus for the ruling to have legal force. *See* JACKSON, *supra* note 2, at 65 (noting that losing party may block adoption of panel report because of "consensus rule"). Because Mexico chose not to finalize the GATT ruling and continue proceedings in the GATT, the panel ruling has no legal force. *See* Establishment of Dispute Settlement Panel Concerning U.S. Import Restriction on Certain Tuna, 57 Fed. Reg. 38,549 (Aug. 25, 1992).

> The Governments of the United States and Mexico have worked together since the issuance of the panel report to resolve their dispute without further proceeding in the GATT. The panel report has not been adopted by the GATT Council of Representatives and consequently is not an official determination of U.S. obligations under the GATT.

Id.

legal force.[110] Mexico and the United States resolved the dispute by entering into a compromise agreement in June 1992.[111]

b. Tuna Dolphin Dispute Between the European Union and the United States

The U.S. boycott that affected Mexican tuna fishermen also impacted nations that purchase and process Mexican tuna.[112] Under the MMPA,[113] the U.S. Secretary of Treasury can ban imports from countries that buy fish for reexport from an offending country.[114] On March 15, 1991, the National Marine Fisheries Services announced a second embargo on Italy, France, Costa Rica, Japan, and Panama.[115]

As a result, the European Union and the Netherlands filed a

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109. *See Pro-Dolphin Accord Made*, N.Y. TIMES, June 16, 1992, at D9 (discussing agreement between United States and Mexico to stop setting tuna nets around dolphins' thereby resolving trade dispute); Larry B. Stammer, *White House Urges End to Ban on Mexican Tuna*, L.A. TIMES, Mar. 5, 1992, at A3, A22 (noting that Mexico, fearing loss of NAFTA approval, declined to press GATT contracting parties to ratify GATT Panel ruling in its favor).

110. Timothy Noah & Bob Davis, *Tuna Boycott is Ruled Illegal by GATT Panel*, WALL ST. J., May 23, 1994, at A2. Mexico at the time feared that the dispute would spoil its chances for gaining U.S. congressional approval for the North American Free Trade Agreement. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289; 1993 WL 572901 (N.A.F.T.A) (establishing free trade zone in Canada, United States, and Mexico).

111. *Pro-Dolphin Accord Made*, *supra* note 109, at D9. The compromise resulted in the United States implementing the International Dolphin Conservation Act of 1992, 16 U.S.C. § 1361 (Supp. V 1993), which lifted the tuna import ban. Michael Parrish, *United States Approves Pact to Protect Pacific's Dolphins*, L.A. TIMES, Oct. 9, 1992, at D2. The legislation also committed the United States to a five-year moratorium on dolphin-depleting tuna harvesting methods, to which the parties agreed in the compromise. 16 U.S.C. § 1371(a) (Supp. V 1993).

112. Establishment of Dispute Settlement Panel Concerning U.S. Import Restriction on Certain Tuna, 57 Fed. Reg. 38,549 (Aug. 25, 1992).

> Pursuant to court order, the United States has, under the MMPA, prohibited the importation of certain yellowfin tuna and tuna products from several countries, including Mexico (as a 'primary embargo country') and from a number of additional countries, including member states of the EC and the Netherlands Antilles (as 'intermediary nations' or 'secondary embargo countries').

Id.

113. 16 U.S.C §§ 1361-1407 (1988 & Supp. V 1993).

114. *Id.*

115. National Marine Fisheries Service, National Oceanic and Atmospheric Administration, *Taking and Importing of Marine Mammals*, 56 Fed. Reg. 12,367 (Mar. 25, 1991).

complaint against the U.S. boycott.[116] Although the panel again ruled against the United States,[117] the ruling is different from the *Tuna Panel I* decision in that it recognizes the legitimacy of the U.S. extraterritorial measures.[118] In arguing for the legitimacy of its extraterritorial measure, the U.S. government claimed that the jurisdictional location of the resource to be conserved was not relevant for the purposes of Article XX(g) or (b) of GATT.[119] The ordinary meaning of Articles XX(g) and (b) contained no territorial or jurisdictional limitation on the location of the resources to be conserved.[120] In addition, international agreements *per se* concern matters outside the jurisdiction of one nation.[121] International tribunals have routinely interpreted treaty provisions to apply outside of the jurisdiction of the country taking the measure.[122] The panel in *Tuna Panel II* agreed with the U.S. arguments and eliminated the extra-territorial limitation imposed in *Tuna Panel I*.[123] By eliminating this limitation, the Panel conceded that the tuna embargo fell within the exceptions covered by Article XX.[124]

The dispute panel, however, still ruled that the tuna boycott violated GATT because it found that the embargo, meant to protect the dolphin, was not necessary for the dolphin's conservation.[125] To invoke an Article XX(b) exception, the contracting party's conservation measure had to be necessary to protect animal life.[126] As a result, the *Tuna Panel II* tribunal recom-

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116. Tuna Panel II, *supra* note 4, ¶¶ 1.1-1.2, at 844.

117. *Id.* ¶ 6.1, at 899. "United States import prohibitions on tuna and tuna products . . . did not meet the requirements of the Note ad Article III, were contrary to Article XI:1, and were not covered by the exceptions in Article XX(b), (g), or (d) of the General Agreement." *Id.*

118. *Id.*

119. *See supra* note 90 (describing Articles XX(g) & (b) of GATT).

120. Tuna Panel II, *supra* note 4, ¶ 3.16, at 854.

121. *Id.* ¶ 3.17, at 854.

122. *Id.*

123. *Id.* ¶ 5.16, at 891. It should not be said that "the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure." *Id.* "[U]nder general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory." *Id.* ¶ 5.17, at 892.

124. *Id.* ¶ 5.33, at 896.

125. *See id.* ¶¶ 5.34-39, at 896-98 (discussing whether embargo was necessary to protect dolphin).

126. GATT 1947, *supra* note 2, art. XX(b), 61 Stat. at A60-A62, 55 U.N.T.S. at 262-

mended that the Member States request that the United States modify the MMPA accordingly to conform with GATT.[127]

The United States appealed the ruling.[128] The U.S. Trade Representative,[129] Mickey Kantor, has not said whether the United States will block the GATT ruling if the appeal was unsuccessful.[130] He did say, however, that the United States would refuse to alter the MMPA, which the U.S. courts[131] have interpreted to require a boycott of tuna products from offending countries.[132]

Legally, the GATT dispute resolution panel ruling has no domestic legal effect.[133] As stated in *Suramerica De Aleaciones Laminadas v. United States*,[134] GATT cannot trump domestic legislation.[135] If a statute is inconsistent with GATT, the U.S. Con-

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64. "[N]othing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal, or plant life . . . ." *Id.*

127. Tuna Panel II, *supra* note 4, ¶ 6.2, at 899. "The Panel recommends that the CONTRACTING PARTIES request the United States to bring the above measures into conformity with its obligations under the General Agreement." *Id.*

128. *Id.* preface, at 839.

> The United States Trade Representative indicated in a Press Release of May 23, 1994, that: "[t]he United States will challenge the dispute settlement panel's failure to provide a fair hearing and due process, and will ask for a full review of the report, both substantively and procedurally, by the GATT Council, or reconsideration by the panel in this case."

Id.

129. *See* 19 U.S.C. § 2171(c) (1988) (defining Trade Representative's role as one who negotiates and drafts trade agreements for final consideration by congress).

130. Noah & Davis, *supra* note 110, at A2.

131. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 975-76 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). Before this ruling, the U.S. government was not enforcing the MMPA. *Earth Island Institute*, 746 F. Supp., at 968. Earth Island Institute, a California lobbying group, brought suit to compel the government to enforce the MMPA and won. *Id.* at 966. The court issued an injunction barring the importation of yellowfin tuna harvested in the eastern tropical pacific from any nation, until the Secretary of Commerce made a finding under MMPA that the average rate of dolphin deaths for that nation was within the standards set by the MMPA. *Id.* at 976.

132. Noah & Davis, *supra* note 110, at A2.

133. Musgrave & Stephens, *supra* note 80, at 973.

134. Suramerica De Aleaciones Lamidas v. United States, 966 F.2d 660, 668 (Fed. Cir. 1992).

135. *See* RE Draft Treaty on a European Economic Area, Case 1/91, [1992] — E.C.R. —, [1992] 1 C.M.L.R. 245, 275 (holding that dispute resolution panel rulings also have no domestic legal effect in European Union). In *RE Draft Treaty*, the European Court of Justice held that dispute resolution panels have no jurisdiction over matters requiring the interpretation of European Community law. *Id.*

gress must remedy the situation.[136]

c. European Union Dispute on U.S. CAFE standards

Other U.S environmental regulations that have triggered GATT oversight are the Corporate Average Fuel Economy[137] ("CAFE") regulation, the 1978 gas guzzler tax,[138] and the 1991 luxury tax.[139] These regulations have been challenged as inconsistent with GATT by the European Union.[140] These environmental regulations, however, were held by a dispute panel not to conflict with GATT.[141]

With regard to the luxury tax,[142] the European Union argued that the tax violated Article III(2)[143] of the GATT, which prohibits a contracting party from imposing taxes on imported automobiles that exceed taxes applied to domestically produced vehicles.[144] The Union argued that automobiles costing over US$32,000 were similar to automobiles costing less than US$32,000, because they had the same end use and basic physical characteristics.[145] Further, the Union argued that if the luxury tax were applied in a neutral manner, there should be objective product differences[146] between cars priced above US$32,000

136. *Suramerica*, 966 F.2d at 668. "The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.*

137. *See* 15 U.S.C. § 2002(a) (1988) (requiring automakers' fleets to average at least 27.5 miles per gallon). This regulation has affected Mercedes Benz AG and Bayerische Motoren Werke AG ("BMW"). Timothy Noah, *GATT backs Car-Fuel-Efficiency Rule, Recognizing U.S. Environmental Laws*, WALL ST. J., Oct. 3, 1994, at A2.

138. *See* 26 U.S.C. § 4064(a) (1988 & Supp. V 1993) (affecting cars with fuel efficiency of less than 22.5 miles per gallon).

139. *See* 26 U.S.C. § 4001(a) & (b) (Supp. V 1993) (applying to passenger vehicles weighing 6000 pounds or less and costing more than US$32,000). The retail excise tax amounts to 10% of the excess of the retail price above US$32,000. *Id.* The tax does not apply to the sale of any passenger vehicle used for commercial purposes. *Id.*

140. CAFE Dispute, *supra* note 77, ¶¶ 1.1, 3.1, at 1399, 1402.

141. *Id.* ¶ 6.2, at 1457.

142. 26 U.S.C. § 4001 (Supp. V 1993).

143. GATT 1947, *supra* note 2, art. III(2), 61 Stat. at A18-A19, 55 U.N.T.S. at 205-09.

144. CAFE Dispute, *supra* note 77, ¶ 3.3, at 1403.

145. *Id.* ¶ 5.2, at 1447.

146. *Id.* ¶ 3.78, at 1412. In its argument, the European Community cited the GATT Japan-Alcoholic Beverages Panel which addressed taxation of "like products." *Id.* In essence, the panel stated that taxes were justified as long as they were due to objective product differences. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on Japan Alcoholic Beverages, BISD 34S/83, ¶ 5.9(b). Thus, the Euro-

and below US$32,000.[147] Thus, the application of the luxury tax expressly violated Article III(2).[148]

The United States argued that the luxury tax did not violate Article III because contracting parties may recognize internal taxes on imported and domestic products as long as they do not protect domestic production under Article III.[149] It noted that if the policy purpose for the tax were unrelated to the protection of domestic production, then the tax was justified.[150] After examining the objective and purpose of Article III in the context of the GATT, the Panel concluded that the purpose of Article III was not to prohibit regulations whose purpose was to achieve other policy goals.[151] In light of this conclusion, the Panel then examined whether the US$32,000 threshold distinction violated Article III by protecting domestic production.[152] The Panel held

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pean Community argued that Japan could have justified its system of taxation on certain alcoholic products if it had "shown that tax differential corresponded to some objective product difference, such as much higher alcohol content of special grade whisky." CAFE Dispute, *supra* note 77, ¶ 3.79, at 1412.

147. *See id.* ¶¶ 5.1-5.2, at 1446-47 (arguing that reason for tax should have been because of objective product difference).

148. GATT 1947, *supra* note 2, art. III(2), 61 Stat. at A18, 55 U.N.T.S. at 205. Article III states that imported goods cannot be subjected to taxes in excess of those imposed on domestic like products. *Id.*

149. CAFE Dispute, *supra* note 77, ¶ 5.3, at 1447.

150. *Id.* The United States argued that:

> In determining whether automobiles over [US$32,000] were 'like' those selling for less, . . . it was necessary only to determine whether the [US$32,000] threshold had been applied 'so as to afford protection to domestic production.' The purpose of Article III was not to prevent contracting parties from differentiating between products for policy purposes unrelated to the protection of domestic production.

Id.

151. *Id.* In support of its conclusion, the panel added that this same view has been expressed by another GATT panel on a 1992 dispute concerning malt beverages. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Measures Affecting Alcoholic and Malt Beverages, GATT Doc. No. DS23/R, BISD 39S/206 (1992). In that report, the panel stated that:

> [t]he purpose of Article III [was] . . . not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection do domestic production . . . .

Id.

152. CAFE Dispute, *supra* note 77, ¶ 5.11, at 1449.

that it did not.[153] Automobile prices above and below US$32,000 could not be considered like products under Article III(2).[154]

With regard to the gas guzzler tax,[155] the Union argued that a difference in fuel economy was insufficient to make one automobile unlike another for the purpose of Article III(2).[156] The United States noted that under Article III(2), a distinction could be made as long as it was based on objective criteria aimed at promoting a policy other than the protection of domestic production.[157] The Panel agreed with the United States[158] and concluded that the gas guzzler calculation methods could not be construed as affording protection to domestic production[159] and was, therefore, in compliance with Article III(2) and (4) of the General Agreement.[160]

The Panel disagreed, however, with the United States regarding the method the United States used to calculate penalties under the 1974 auto fuel economy standards.[161] The dispute panel held that the CAFE regulation discriminated against European carmakers because the CAFE calculation was based on separate non-U.S. fleet accounting.[162] Under CAFE, a manufacturer could not average together the miles per gallon ("mpg") ratings of its imported and domestic car fleets.[163] Each manufacturer's passenger car product line was separated into "foreign" and "domestic" fleets.[164] The Panel held that this provision was discriminatory and could not be justified under Article XX(g) or (d).[165] The purpose for the separate averaging systems was not

153. *See id.* ¶¶ 5.15, 6.2, at 1449, 1457 (concluding that luxury tax on automobiles was not inconsistent with Article III(2) of GATT 1947).

154. *Id.* ¶ 5.15, at 1449.

155. 26 U.S.C. § 4064 (Supp. V 1993).

156. CAFE Dispute, *supra* note 77, ¶ 5.19, at 1450.

157. *Id.* ¶ 5.20, at 1450.

158. *Id.* ¶ 5.38, at 1452.

159. *Id.* ¶ 5.31, at 1451.

160. *Id.* ¶ 5.38, at 1452.

161. 15 U.S.C. § 2002(a) (1988).

162. CAFE Dispute, *supra* note 77, ¶ 6.1(c), at 1457.

163. *Id.* ¶ 3.288, at 1438.

164. 15 U.S.C § 2003 (b)(1) (1988). For the purpose of CAFE, a foreign car is defined as any vehicle of which less than 75% of its value came from the United States or Canada. *Id.* Section 2003 has been repealed. Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994).

165. CAFE Dispute, *supra* note 77, ¶ 6.2, at 1457.

to conserve an exhaustible natural resource, fuel, but to preserve small car production in the United States.[166] In fact, as the European Community noted, a report commissioned by the U.S. National Highway Traffic Safety Administration[167] stated that the two-fleet accounting rule should be eliminated because it had no effect on fuel economy.[168] Although it proposed the elimination of the two fleet provision, the panel upheld the underlying CAFE law as consistent with GATT.[169]

3. WTO Dispute Mechanism

The World Trade Organization, ratified on April 15, 1994, at a GATT conference in Morocco, succeeded the GATT and became effective on January 1, 1995.[170] The Marrakesh conference, composed of delegates from 117 nations[171] finalized the Uruguay Round of trade agreements, which had been under negotiation since 1986.[172] These agreements established a code of conduct for international commerce based on the principles that trade should be conducted without discrimination,[173] that

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166. *Id.* ¶ 3.288, at 1438. As stated in the legislative history of the CAFE law, the foreign/domestic distinction was added at the request of the United Auto Worker's union. *Id.* The union was concerned that CAFE would cause the Big Three manufacturers to import small cars to achieve U.S. fuel economy goals. *Id.* Because of this concern, Congress added the two fleet rule to keep small car production in the United States. *Id.*

167. 15 U.S.C. §§ 1381-1431 (1988). The National Highway Traffic Safety Administration ("NHTSA") was created by The National Traffic and Motor Vehicle Safety Act of 1966. *Id.* The 1966 Act gave the NHTSA to promulgate crashworthiness regulations. *Id.* The 1966 Act has been repealed. Pub. L 103-272, § 7(b), 108 Stat. 1379 (1994).

168. *See* CAFE Dispute, *supra* note 77, ¶ 3.289, at 1438 (stating that CAFE has no connection to achievement of fuel economy and that consideration should be given to eliminating provision).

169. *Id.* ¶ 5.66, at 1456. "This analysis suggested to the Panel that in the absence of separate foreign fleet accounting it would be possible to include in a revised CAFE regulation an averaging method that would render the CAFE regulation consistent with the General Agreement." *Id.*

The European Union refused to accept the panel's findings. *After Free Trade Euphoria*, *supra* note 29, at D109. It is bringing the matter up to the WTO. *Id.*

170. *See* GATT 1994, *supra* note 17, art. III, at 1145 (describing implementation of World Trade Organization).

171. *See id.* (signatures to Uruguay Round Instruments).

172. JACKSON, *supra* note 2, at 3. The latest GATT accord is known at the Uruguay round because the negotiations for the agreement began in Montevideo, Uruguay in 1986. *Id.*

173. *See* GATT 1947, *supra* note 2, art. III(2), 61 Stat. at A18, 55 U.N.T.S. at 205. Article XVI of GATT 1994 states that "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT

tariffs should be reduced through multilateral negotiations,[174] and that Member States should consult together to avoid trade problems.[175] In addition to handling oversight over trade in goods, the WTO will now have oversight over trade in services,[176] intellectual property,[177] and environment.[178]

The World Trade Organization will continue to operate, as GATT 1947 did, on the basis of consensus and mutual agreement.[179] However, there are differences between the WTO and GATT 1947. Under GATT, countries could choose not to observe some GATT obligations, by vetoing panel decisions against them.[180] Dispute panel reports will be automatically adopted by the WTO unless there is a consensus to reject them.[181] A losing party may appeal to a permanent appellate body, but the body's verdict will be binding.[182] If offenders fail to comply with panel recommendations, the winning party may have the right to compensation.[183]

1947 and the bodies established in the framework of GATT 1947." GATT 1994, *supra* note 17, art. XVI, at 1152.

174. GATT 1994, *supra* note 17, pmbl. ¶ 3, at 1144. The Member States of the WTO will enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barrier to trade and to the elimination of discriminatory treatment in international trade relations." *Id.*

175. *Id.*

176. General Agreement on Tariff and Trade: General Agreement on Trade in Services, annex 1B, 33 I.L.M. 1168 (1994) [hereinafter GATS].

177. General Agreement on Tariff and Trade: General Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIP].

178. *See* General Agreement on Tariff and Trade: Decision on Trade and Environment, 33 I.L.M. 1267 (1994) [hereinafter GATT Environment] (stating need to identify relationship between trade measures and environmental measures to promote sustainable development).

179. GATT 1994, *supra* note 17, art. IX(1) at 1148. Decision making is to be by consensus, similar to GATT 1947. *Id.* at 1148 n.1. "The body . . . shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." *Id.*

180. *See supra* note 108 and accompanying text (discussing consensus rule).

181. Frances Williams, *GATT's Successor to Be Given Real Clout - The Likely Workings of the World Trade Organization*, FIN. TIMES, Apr. 7, 1994, at 6.

182. GATT DSB, *supra* note 20, art. 17(14), at 1236. "An Appellate Body report shall be adopted by the DSB [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within [thirty] days following its circulation to the Members." *Id.*

183. *Id.* art. 19(1), at 1237.

C. *European Union*

In the European Union, while free trade is the goal of the Union,[184] the goal of the individual Member States is to write their own environment laws. Although EU environmental regulations are protected under Article 130r of the EC Treaty,[185] distortions in trade may occur under the guise of environmental protection.[186] German and Danish environmental packaging regulations have caused trade distortions inside[187] and outside the Community.[188]

1. Article 30 and Free Movement of Goods

A quantitative restriction of goods restricts the import of a given product by amount or value.[189] Such a restriction is the antithesis of the free movement of goods and is prohibited in Article 30 of the EC Treaty.[190] In addition to quantitative restric-

184. *See* EC Treaty, *supra* note 7, art. 3(a) (stating that activities of Community shall include elimination of customs duties, quantitative restrictions on import and export of goods, and that all measures have equivalent effect).

185. *See id.* art. 130r (defining objective and general principles of action by Community relating to environment).

186. Bruce Barnard, *EU Packaging, Recycling Law Takes Effect Jan. 1*, J. COM., Dec. 19, 1994, at A3. One example of a trade distortion is the result of Germany's Packaging Law. Verpackungsverordnung - Verpack V [Ordinance on the Avoidance of Packaging Waste], June 12, BGBl I, June 20, 1991, at 1234, *reprinted in* 31 I.L.M. 1135 (1992) [hereinafter Disposal Law]. "Germany's ambitious recycling laws have led to companies to dump their waste in other member states because they lacked the capacity to meet high [recycling] targets. Germany has 'exported' nearly 270,000 metric tons of waste in 1994. The 'importing' states argued [that] Germany was stifling their infant recycling industries." *Id.* Before the European Union implemented its directive, its vice-president, Sir Leon Brittan, worried that "there was a real danger that measures introduced by Member States to protect the environment could easily damage free trade. . . . [D]istortions being caused by Germany's recycling laws were affecting competitions and trade within the EC and beyond." Julian Hunt, *Sir Leon Lends Weight to German Waste Fight; Leon Brittan, Vice President of the European Commission*, PACKAGING WK., Sept. 23, 1992, at 1.

187. Hunt, *supra* note 186, at 1.

188. Doral Cooper & Melissa Coyle, *Special Report on International Trade*, LEGAL TIMES, June 20, 1994, at 32. The Danish recycling requirement that all beer sold in Denmark be in returnable glass containers has been said to discriminate against U.S. beer, which is typically sold in recyclable aluminum cans. *Id.* The German packaging requirement that manufacturers take back all packaging materials for goods sold in Germany has been said to discriminate against imported goods handled primarily by an agent, who is at a disadvantage (relative to local manufacturers) in developing a system to collect and recycle packaging materials. *Id.*

189. DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 208 (1993).

190. EC Treaty, *supra* note 7, art. 30. "Quantitative restrictions on imports and all

tions, Article 30 also prohibits measures that have the equivalent effect of a quantitative measure.[191]

One example of a measure having an equivalent effect to a quantitative restriction is a national rule imposing conditions on imported products that are not imposed on domestic products.[192] Environmental regulations may also rise to the level of a quantitative restriction if a national government subsidizes domestic goods to the detriment of imported goods.[193] Two EU countries, Denmark and Germany, have triggered Article 30 violations over their packaging regulations.[194]

a. Danish Bottle Law

Denmark had a bottle recycling program that required a deposit on the sale of bottles of beer and soft beverages.[195] The objective of the program was to keep undeveloped land and open spaces free of discarded bottles.[196] By the mid-1970's, however, manufacturers were increasing the number of containers used in selling beverages.[197] The reclamation of these new containers was overloading Denmark's existing recycling plant capacity.[198]

In 1981, Denmark passed Order No. 397 requiring beer and soft drinks to be sold only in approved returnable and refillable glass bottles.[199] Penalties were prescribed for the sale of bever-

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measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member-States. *Id.*

191. *Id.*

192. WYATT & DASHWOOD, *supra* note 189, at 217.

193. *See* Clare Sambrook, *A German Threat on Paper*, MARKETING, Aug. 20, 1992 (noting that Germany's recycling effort is undercutting U.K. wastepaper prices by 15%).

194. *See* Commission v. Denmark, Case 302/86, [1988] E.C.R. 4607, [1989] 1 C.M.L.R. 619 (ruling that Danish bottle law violated Article 30 of EC Treaty); Patrick Chalmers, *Belgium: Commission to Challenge German Packaging Rules*, Reuters News Service - Western Europe, Oct. 14, 1994, *available in* LEXIS, German Library, Allnws File (noting that Commission is preparing challenge to German packaging ordinance).

195. *Denmark*, [1988] E.C.R. at 4619, [1989] 1 C.M.L.R. at 622.

196. *Id.*

197. *Id.*

198. *See id.* at 4624, [1989] 1 C.M.L.R. at 627 (stating that Denmark's present recycling system could not absorb more than thirty types of bottles).

199. Bekendtgørelse om emballage til øl og læskedrikke [Regulation on Containers for Beer and Beverages], Order No. 397, art. 2(2), Lovtidende A 1981, July 2, 1981, at 1081. A description of an approved glass bottle is described in the Appendix of this regulation. Bilag til bekendtgørelse om emballage til øl og læskedrikke [Appendix to

ages in non-approved containers.[200] These measures achieved Denmark's objective of protecting the environment and streamlined the recycling of bottles.[201] Producers of beverages and retailers outside of Denmark complained that the legislation prevented the importation of non-Danish beer and soft drinks in their original containers because of the increased costs and administrative difficulties associated with non-approved containers.[202]

In response to these complaints, the Commission of the European Union ("Commission") sent a letter of formal notice to the Danish authorities saying that Order No. 397 violated Article 30 of the EC Treaty.[203] As a result of the letter, the Danish government amended its regulation and promulgated Order No. 95, allowing the limited sale of beverages in non-approved containers, as long as the containers were not made of metal.[204] This amendment, however, was considered insufficient by the Commission, and further discussions between the Commission and Denmark failed.[205] On December 16, 1986, the Commission sought legal judgment against Denmark in the European Court of Justice[206] for unfairly restraining free trade.[207] The

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Regulation on Containers for Beer and Beverages], Order No. 397, Lovtidende A 1981, July 2, 1981, at 1083.

200. *Id.* at 4620, [1989] 1 C.M.L.R. at 622.

201. *Id.* at 4623, [1989] 1 C.M.L.R. at 626. "The measures taken by Denmark in relation to approved bottles are highly effective. . . . In the result, it is said, 99% of such bottles are returned and they may be used up to 30 times." *Id.* Bottles that are not returned by the purchaser are returned by those seeking a deposit. *Id.* "The result is a cleaner countryside and a saving of raw materials." *Id.*

202. *Id.* at 4609, [1989] 1 C.M.L.R. at 620. Examples of increased costs cited by the Advocate General are the added cost incurred with the required transfer of beverages from non-approved containers to approved glass containers, the cost of bringing back empty bottles to the importers' plants in their Member States, or the cost of setting up a bottling plant in Denmark. *Id.* at 4624, [1989] 1 C.M.L.R. at 627.

203. *Denmark*, [1988] E.C.R. at 4620, [1989] 1 C.M.L.R. at 623.

204. Bekendtgørelse om ændring af bekendtgørelseom emballage til øl og læskedrikke [Amendment to Regulation on Containers for Beer and Beverages], Order No. 95, art. 1(1), Lovtidende A 1984, Mar. 16, 1984, at 345. "Order No. 95 of 16 March 1984 . . . allow[s] the use of non-approved containers except for any of metal container, either within well-defined limits ([3000 hectoliter] per producer per annum) or in order to test the market, provided that a deposit-and-return system is established." *Denmark*, [1988] E.C.R. at 4609, [1989] 1 C.M.L.R. at 620.

205. *Id.* at 4620, [1989] 1 C.M.L.R. at 623.

206. EC Treaty, *supra* note 7, art. 165. The duty of the European Court of Justice is to interpret and apply the defining EU treaties and other community texts, legislation, and decisions. *Id.* art. 164.

207. *Denmark*, [1988] E.C.R. at 4607-08, [1989] 1 C.M.L.R. at 619.

Commission considered Denmark's mandatory recycling system a measure equivalent to a quantitative restriction, contrary to Article 30 of the EC Treaty.[208] Although the law applied to both imported and domestic products, the Commission argued that imported products were being placed at an unfair disadvantage in relation to domestic products and that the law could be achieved by less restrictive means.[209]

The European Court of Justice was confronted with the issue of the extent to which environmental protection had precedence over the principle of a common market.[210] The United Kingdom, intervenor,[211] in support of the Commission, argued that a balance between environmental protection and the free movement of goods must be sought and that a bottle recovery rate of ninety-nine percent was a disguised restriction to trade.[212] The Danish government argued that the legislation was justified by a legitimate concern to protect the environment and to conserve resources.[213] It was not a disguised market barrier.[214] In addition, all parties to the dispute employed cost arguments to support their respective sides of the argument.[215] The Court stated that cost arguments, on their own, would not justify a

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208. EC Treaty, *supra* note 7, art. 30.

209. *Denmark*, [1988] E.C.R. at 4610-11, [1989] 1 C.M.L.R. at 620.

210. *Id.* at 4611, [1989] 1 C.M.L.R. at 620.

> The Commission stressed that it attaches special importance to the question of whether and to what extent the concern to protect the environment has precedence over the principle of a common market without national frontiers since there is a risk that Member States may in future take refuge behind ecological arguments to avoid opening their markets to bear as they are required to do by the case law of the Court.

Id.

211. *Id.* at 4629, ¶ 4, [1989] 1 C.M.L.R. at 630. The United Kingdom was granted leave by the Court to intervene in support of the Commission's conclusions. *Id.*

212. *Id.* at 4613, [1989] 1 C.M.L.R. at 620. "Measures intended to achieve extremely high aims must be regarded as a means of arbitrary discrimination or a disguised restriction on trade between Member States." *Id.*

213. *Id.* at 4615, [1989] 1 C.M.L.R. at 620. It was not a disguised attempt to "wall off the market." *Id.*

214. *Id.*

215. *Id.* at 4612, [1989] 1 C.M.L.R. at 620. Denmark argued that the "adoption of reusable containers and the setting up of refilling plants locally or event in the country of origin would be more advantageous for a foreign producer than the use of non-returnable containers." *Id.* The United Kingdom argued that metal cans, even with their higher costs, were still being bought by the consumer, and were therefore not an obstacle to the sale of the product. *Id.* at 4613, [1989] 1 C.M.L.R. at 620.

breach of the quantitative restrictions clause of Article 30.[216]

The Court upheld the ban on non-returnable containers. It stated that the ban was necessary to achieve the EU objective of protecting the environment.[217] The Court, however, held that the limitation on the sale of non-approved containers to 3000 hectoliters per producer per year was not justified.[218] The Danish regulation was ruled discriminatory to non-Danish manufacturers because it restricted the free movement of beverages in Denmark.[219] In the balance between free trade and environmental protection, the Court found the Danish environmental regulation to be too restrictive of the free movement of goods.[220]

b. German Waste Disposal Law

The German Waste Disposal Law[221] ("Disposal Law") was implemented on June 12, 1991.[222] With certain exceptions,[223]

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216. *Id.* "The costs argument cannot justify a breach of Article 30." *Id.*

217. *Id.* at 4630, ¶ 13, [1989] 1 C.M.L.R. at 631.

218. *Id.* at 4632, ¶ 22, [1989] 1 C.M.L.R. at 632.

219. *Id.* at 4625, [1989] 1 C.M.L.R. at 628. The Court held that

> the system as it presently operates does have greater disadvantages for the non-Danish brewer because the requirement that containers be *reused, rather than merely recycled,* necessarily bears more heavily upon him that upon his Danish counterpart, and because the use of approved bottles for sales to the Danish market may well involve incurring additional overhead costs for plant and bottling machinery. I am not satisfied that the costs imposed on Danish manufacturers of collecting the bottles and sorting them is of the same order as that faced by manufacturers from other Member States.

Id. (emphasis added).

220. *Id.* at 4626, [1989] 1 C.M.L.R. at 629. In dicta, the Court even suggested that the Danish government would have to lessen its environmental standards if no other remedy were available to satisfy the ruling. *Id.* "There has to be a balancing of interests between the free movement of goods and environmental protection, even if in achieving the balance the high standard of the protection sought has to be reduced." *Id.*

221. Disposal Law, *supra* note 186, 31 I.L.M. at 1135.

222. *Id.*

223. *Id.* art. 2(3), 31 I.L.M. at 1138. The exceptions to the German Waste Disposal Law primarily concerned hazardous waste and other laws:

> The provisions of the Regulation shall not apply to packaging [associated with toxic substances or other legal provisions. They will not apply to packaging:]
> 1. with remnants or residue of substances or derivatives thereof that are
> - dangerous to health pursuant to § 1, nos. 6-15 of the Regulation on the Toxic Characteristics of Substances and Derivative Products pursuant to the Toxic Substances Control Act, or
> - dangerous to health within the meaning of § 3a(2) of the Toxic Substances Control Act, such as plant protection agents, disinfectants or pesticides, solvents, acids, lyes, mineral oil or mineral oil products,
> 2. subject to special disposal under legal provisions.

this Disposal Law was aimed at a reduction of packaging waste by minimizing both the weight and volume of the packaging and reusing packaging materials.[224] This law was intended to ensure that waste disposal and recycling of used objects were not detrimental to the general welfare.[225] In an effort to protect the environment, the German government now gave the responsibility for packaging waste to the manufacturers[226] of the waste, as opposed to the end users.[227] The ordinance required industry to take back and reuse all one-way packaging on the German market, with the exception of those handling hazardous wastes.[228]

The regulations set dates for packaging goals to be achieved.[229] By December 1991,[230] all manufacturers and dis-

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Id.

224. *Id.* art. 1(1), 31 I.L.M. at 1138.

225. *Id.* art. 2(3), 31 I.L.M. at 1138.

226. BETTE K. FISHBEIN, GERMANY, GARBAGE, AND THE GREEN DOT 147 (Sharene L. Azimi ed., 1994). This concept of the manufacturer paying for the disposal of its waste has led to a change in corporate thinking and a new manufacturing strategy for products. *See id.* (noting that product design is influenced by environmental regulations); CURTIS MOORE & ALAN MILLER, GREEN GOLD - JAPAN, GERMANY, AND THE UNITED STATES AND THE RACE FOR ENVIRONMENTAL TECHNOLOGY (1994) (discussing premise that country's economic success in world will depend on developing "green" technologies aimed at protecting environment).

One example of "green" product engineering is Apple Computer's response to the DSD fee for its 21 inch monitor. FISHBEIN, *supra*, at 67. Under the 1992 rules, the fee was DM0.25. *Id.* In 1993, a new fee schedule based on the weight and material used in the packaging was announced. *Id.* Under the new schedule, Apple's packaging cost for the monitor increased sixteen times. *Id.* In response to these higher fees, Apple plans to design packages that contain more cardboard and less plastic, thereby minimizing the need to pay higher fees for plastics. *Id.* at 227. As seen from the table below, the fees per pound of plastic are almost 10 times higher than for paper. *See id.* (citing INFORM calculations based on DSD fees). The following Green Dot Fee Schedule became effective October 1993:

Material	US$ per Material Pound
Plastic	0.82
Composites	0.45
Aluminum	0.27
Tinplate	0.15
Paper/paperboard	0.09
Natural materials	0.05
Glass	0.04

Id.

227. *Id.* art. 3(5), 31 I.L.M. at 1138. The end user is defined as the purchaser who does not sell the goods in the form supplied to him. *Id.* This means that the end user can be not only private consumers, but also industrial and commercial undertakings or individuals engaged in a trade or business. *Id.*

228. *See id.* art. 2(3), 31 I.L.M. at 1138 (discussing hazardous waste exception).

229. *Id.* art. 13, 31 I.L.M. at 1143.

tributors were required to take back transport packaging, such as crates or flats, used in the transportation of the goods.[231] By April 1992,[232] all outer or secondary packaging had to be collected at the point of sale.[233] By January 1993,[234] the consumer had the right to return all used packaging materials to the point of sale.[235] If one could not comply with the law, a fee had to be paid to the Duales System Deutschland GmbH ("DSD").[236]

By limiting the amount of non-reusable packaging in products sold within the country, the Disposal Law forces companies to either develop recyclable packages for their products or collect their discarded transportation packaging.[237] If a non-German company cannot collect and recycle the packaging itself, it has to pay for a third party to provide this service.[238] Because it is less expensive for German companies to retrieve and recycle their used packaging, non-German companies have argued that this increase in the cost of imported products acts as a hidden tariff and a trade barrier against their products.[239]

Although this law would indeed protect the environment, little consideration was given by the German government to the logistical difficulties of reclamation of waste materials in a non-German country.[240] Under the Disposal Law, the export company must arrange for a licensed waste disposal facility to handle solid waste packaging or take direct responsibility for transport-

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230. *Id.*

231. *Id.* art. 5, 31 I.L.M. at 1140.

232. *Id.* art. 13, 31 I.L.M. at 1143.

233. *Id.* art. 4, 31 I.L.M. at 1140.

234. *Id.* art. 13, 31 I.L.M. at 1143.

235. *Id.* art. 6(1), 31 I.L.M. at 1140.

236. *Id.* art. 5(2), 31 I.L.M. at 1140. "If the distributor does not himself remove the packaging, he must indicate, by means of easily visible and legible notices at the check-out, that the consumer has the possibility of removing the packaging from the purchased goods and leaving it at the point of sale or on the premises . . . ." *Id.* To comply with the law, the Duales System Deutschland GmbH ("DSD") was conceived which arranged for collection points which guaranteed that packaging marked with a Green Dot could be disposed at these points. *See generally* FISHBEIN, *supra* note 226, at 49-53 (describing establishment of DSD and its purpose).

237. Disposal Law, *supra* note 186, art. 6(3), 31 I.L.M. at 1140.

238. *Id.* art. 11, 31 I.L.M. at 1143.

239. *See* FISHBEIN, *supra* note 226, at 125 (citing U.S. Department of Agriculture claims of discrimination). Importers argue that since they will have longer distances to travel, their products will have more packaging, and they will therefore have to pay higher fees. *Id.*

240. Dean E. Murphy, *Germany's Recycling Nightmare*, L.A. TIMES, Sept. 12, 1993, at D3.

ing it out of the country.[241] The transportation costs for recovering and recycling exported packaging materials will affect the price at which these goods can be sold to consumers.[242] In addition, the recycling costs for transportation and secondary packaging will curtail import trade on many products.[243]

II. *EUROPEAN UNION PACKAGING DIRECTIVE*

The European Union Packaging Directive seeks to protect the environment and eliminate trade barriers throughout the Union.[244] Without this EU-wide directive, waste measures introduced by Member States governments could cause trade distortions throughout the Union.[245] By having each Member State write its own laws to implement the Directive, however, the possibility of fifteen disparate sets of laws will arise.[246] Member States with more aggressive packaging laws may trigger a complaint to the WTO by non-EU manufacturers claiming that the Directive is a barrier to trade.[247]

A. *History of the European Union Packaging Directive*

In 1991, the European Community, whose population density was then five times that of the United States, was concerned over the shortage of landfill space.[248] The Community had an acute shortage of space to dispose of an estimated 2.2 billion metric tons of waste annually.[249] The European Community targeted packaging as a major component of the municipal solid

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241. *See supra* notes 226-27 and accompanying text (stating that manufacturers are now responsible for their packaging waste).

242. *See UK: Marketing Reports on Packaging - The Duales System? Nein Danke*, Reuter Textline, Aug. 20, 1992, *available in* LEXIS, Nexis Library, Marketing File (stating that Disposal Law has led to increase of nearly all goods in supermarket).

243. *See* MOORE & MILLER, *supra* note 226, at 36 (noting that Disposal Law has caused companies to abandon use of polyvinyl packaging, plastic foams, and 117 other types of packaging).

244. *See supra* note 11 and accompanying text (describing purpose of Packaging Directive).

245. *See supra* note 186 (discussing trade distortions caused by German Disposal Law).

246. *See supra* notes 13-14 and accompanying text (discussing possibility of fifteen different sets of laws from Member States).

247. *See supra* note 16 and accompanying text (defining non-tariff trade barriers).

248. Bob Hagerty, *Europe Seeks to Be a Greener Continent, But Treaty Fails to Boost EC Environmental Powers*, WALL ST. J., Dec. 30, 1991, *available in* Westlaw, Allnws File.

249. *Id.* A metric ton is equal to 2204.62 pounds. *Id.*

waste produced in the Community.[250] Although the need existed to develop a plan to decrease the amount of waste produced and to reduce the amount of landfill space required,[251] the European Community was still arguing over the best way to deal with packaging waste.[252]

Meanwhile, Germany[253] and other Member States were developing their own packaging laws.[254] Many importers regarded these differing laws as cumbersome and unfair.[255] They desired a uniform program for all EU countries.[256] Intending to harmonize[257] the packaging laws throughout the European Union and to provide an alternative to filling limited landfill space, the Commission[258] proposed a directive on Packaging and Packag-

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250. FISHBEIN, *supra* note 226, at 165. Packaging accounts for 25-30% of the total municipal waste generated in the European Community. *Id.*

251. Hagerty, *supra* note 248.

252. *Id.*

253. *See supra* note 221 and accompanying text (discussing German Disposal Law).

254. *See supra* note 199 and accompanying text (describing Danish Bottle Regulation).

255. *See supra* note 186 (describing effect of Disposal Law on trade in European Community). The inconsistency of the legislation from one country to another was considered by exporting companies unfair and posed a significant threat to the packaging industry. Barnard, *supra* note 186, at A3. Companies wanted to comply with legislation, but found it difficult when all the Member States had different laws. *Id.* Packaging legislation per se was not considered unfair by the exporting companies if it was a uniform law. *Id.*

256. *Id.* Without an EU-wide law, there was a danger that countries with ambitious recovery and recycling programs would limit certain types of packaging, thereby limiting cross-border trade in packaged goods or packaging materials. *Id.*

257. *European Rubbish - Tied up in Knots*, ECONOMIST, Jan. 28, 1995, at 62. Some argue that these rules will not eliminate trade distortions in the European Union because they will not prevent countries from "using environmental rules as an excuse to keep out competitors." *Id.* For example,

> Germany insists that at least 72% of all bottles containing drink are refillable. This hits the canning industry and favours existing local drinks suppliers. Denmark also bans the use of drinks cans, whether made of steel or aluminum, thus protecting its local bottlers. Meanwhile, Belgium intends to introduce an 'eco-tax', which will vary from one product to another according to their environmental characteristics.

Id.

258. *See* EC Treaty, *supra* note 7, art. 155 (delineating Commission's role in Community).

> In order to ensure the proper functioning and development of the common market, the Commission shall:
>
> - ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
>
> - formulate recommendations or deliver opinions on matters dealt with in

ing Waste on July 15, 1992.[259] After negotiations between the Member States lasting over two years, a majority of the Member States approved the directive on December 14, 1994,[260] with Denmark, Germany, and the Netherlands voting against it.[261]

B. *Provisions of the Directive*

The Directive covers all types and all kinds of packaging,[262] from hamburger wrappers to cardboard boxes that come with consumer products such as televisions and refrigerators.[263] It re-

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the Treaty, where the latter expressly so provides or if the Commission considers it necessary;

- have its own power of decision and participate in the shaping of the measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;

- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

Id.

259. *Packaging and Packaging Waste Directive*, *supra* note 55.

260. *Environment: Packaging Waste Directive finally adopted*, European Information Service, Jan. 5, 1995, *available in* Westlaw, Allnws File.

261. *Id.* Denmark, Germany, and the Netherlands were the three countries in the European Union with the most advanced programs for recovering and recycling waste packaging. *Environmental Policies*, *supra* note 30. They argued that the text of the Directive was not sufficiently ambitious and will force them to water down their own national recovery and recycling targets. *Id.*

262. *EU Packaging Waste Directive to be Enforced*, RECYCLING LAWS INTERNATIONAL, Feb. 1995, at 2 [hereinafter *Packaging Enforcement*]. "Every company supplying companies within the European Union with raw materials for packaging, finish packaging, packaging components or packaged goods will be affected by the Directive, as will distributors of packaged goods and companies engaged in the collection, sorting, recovery or disposal of packaging waste." *Id.*

263. *See* Packaging Directive, *supra* note 9, art. 3(1), O.J. L 365/10, at 12-13 (1994) (detailing scope of directive).

For the purposes of this Directive:

1. 'packaging' shall mean all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the produced to the user or the consumer. . . .

'Packaging' consists only of:

(a) sales packaging or primary packaging, i.e. packaging conceived so as to constitute a sales unit to the final user or consumer at the point of purchase;

(b) grouped packaging or secondary packaging, i.e. packaging conceived so as to constitute at the point of purchase a grouping of a certain number of sales units whether the latter is sold as such to the final user or consumer or whether it serves only as a means to replenish the shelves at the point of sale; it can be removed from the product without affecting its characteristics;

(c) transport packaging or tertiary packaging, i.e. packaging conceived so as to facilitate handling and transport of a number of sales units or grouped

quires Member States to adopt mandatory rates of recycling into their packaging regulations.[264] Within five years, the Member States must: a) recover[265] between fifty to sixty-five percent (by weight) of their packaging waste; b) recycle twenty-five to forty-five percent of all packaging materials contained in packaging waste; and c) adopt substantially increased targets for recovery and recycling.[266] Member States must promulgate legislation, regulations, and administrative provisions concerning the requirements of the Directive by June 30, 1996.[267]

In addition, the new rules allow each country to meet the environmental targets under their own individual guidelines.[268] Ireland, Portugal, and Greece were granted an extra five years to implement legislation.[269] Germany, Belgium, and Denmark,[270]

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packaging in order to prevent physical handling and transport damage. Transport packaging does not include road,rail, ship and air containers; . . . .

Id.

264. *Id.* art. 6(1)(b), O.J. L 365/10, at 14 (1994).

265. *Id.* arts. 3(6), 3(8), O.J. L 365/10, at 13 (1994). Recovery includes all processes that recover value from waste, including waste-to-energy incineration. *Id.*

266. *Id.* art. 6(1), O.J. L 365/10, at 13-14 (1994). To comply with the Directive, Member States shall take the necessary measures to attain the following targets covering the whole of their territory;

(a) no later than five years from the date by which this Directive must be implemented in national law, between 50% as a minimum and 65% as a maximum by weight of the packaging waste will be recovered;

(b) within this general target, and with the same time limit, between 25% as a minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled with a minimum of 15% by weight for each packaging material;

(c) no later than 10 years from the date by which this Directive must be implemented in national law, a percentage of packaging waste will be recovered and recycled . . . .

Id.

267. *Id.* art. 22(1), O.J. L 365/10, at 17 (1994).

268. *Id.* art. 6(5)-(6), O.J. L 365/10, at 14 (1994).

269. *Id.* art. 6(5), O.J. L 365/10, at 14 (1994). Greece, Ireland, and Portugal were provided with more lenient regulations. *Id.*

Greece, Ireland, and Portugal may, because of their specific situation, i.e. respectively the large number of small islands, the presence of rural and mountain areas and the current low level of packaging consumption, decide to:

(a) attain, no later than five years from the date of implementation of this Directive, lower targets than fixed in paragraph 1(a) and (b), but shall at least attain 25% for recovery;

(b) postpone at the same time the attainment of the targets in paragraph 1(a) and (b) to a later deadline which, however, shall not exceed 31 December 2005.

Id.

270. Haig Simonian, *Packaging Issue Tied in Knots - An EU Directive is Proving Divi-*

which have stricter environmental standards than those mentioned in the Packaging Directive, can only implement stricter standards as long as they can prove they have adequate recycling capacity and their programs will have no adverse effect on the other Member States.[271]

Another important aspect of the Directive is Article 15, which contains an economic instruments clause.[272] This clause allows Member States use economic instruments to implement the Directive.[273] These economic instruments may take the form of taxes, deposits, industry collection fees, or a combination of the above.[274]

Specifically, Article 15 of the Directive allows Member States to use the polluter pays principle in implementing the Directive.[275] This principle states that those who pollute, or those who do not use pollution control devices, must pay for part of the cost incurred by recycling of their end product.[276] Under the polluter pays principle, failure to adopt pollution control is analogous to an export subsidy which creates unfair trade advan-

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sive, Explains Haig Simonian, FIN. TIMES, Jan. 11, 1995, at 18. Danish law requires industry to recover 80% of packaging and recycle 50% by the year 2000. *Id.*

271. Packaging Directive, *supra* note 9, art. 6(6), O.J. L 365/10, at 14 (1994). Article 6(6) states that

> Member States which have, or will, set programmes going beyond the targets of paragraph 1(a) and (b) and which provide to this effect appropriate capacities for recycling and recovery, are permitted to pursue those targets in the interest of a high level of environmental protection, on condition that these measures avoid distortions of the internal market and do not hinder compliance by other Member States with the Directive.

Id. This provision was intended to address other EC countries' charges that Germany is flooding EC markets with used packaging material. FISHBEIN, *supra* note 226, at 203.

272. Packaging Directive, *supra* note 9, art. 15, O.J. L 365/10, at 16 (1994). The Economic Instruments clause of the Directive states that

> [t]he Council adopts economic instruments to promote the implementation of the objectives set by this Directive. In the absence of such measures, the Member States may, in accordance with the principles governing Community environmental policy, *inter alia*, the polluter-pays principle, and the obligations arising out of the Treaty, adopt measures to implement those objectives.

Id.

273. *Id.* art. 15, O.J. L 365/10, at 16 (1994).

274. *Packaging Enforcement*, *supra* note 262, at 2.

275. Packaging Directive, *supra* note 9, art. 15, O.J. L 365/10, at 16 (1994).

276. *See* David A. Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?*, *in* TRADE AND THE ENVIRONMENT, LAW, ECONOMICS, AND POLICY 33, 40-42 (Durwood Zaelke et al. eds., 1993) (describing polluter pays principle).

tages for industries with less strict environmental standards.[277] The idea of the principle is to provide an economic incentive to the manufacturer to limit the disposal cost of the product.[278] A manufacturer would thereby factor disposal costs into product design, in the same way he would do for material, energy, and labor costs.[279] The approach of internalizing waste disposal costs, however, is difficult to put into practice[280] because of the problem in properly formulating the tax structure so that it truly reflects disposal costs.[281]

Another aspect of the Directive, which may trigger WTO oversight, is its limitation of heavy metals in packaging.[282] Many inks on packaging owe their bright colors to the presence of heavy metals such as cadmium and chromium.[283] Because of their toxicity, these metals must be eliminated from the waste stream.[284] In Article 11(1), the Directive provides a schedule for the reduction of heavy metal concentration levels in packag-

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277. *See id.* at 41 (explaining Polluter Pays Principle and reasoning behind it).

278. *Id.*

279. SELKE, *supra* note 56, at 157.

280. *Id.* "Calculation of the cost of disposal should take into account, at a minimum, both the type of material(s) and their amount, as well as expected lifetime of the object under consideration. It can be argued that the availability of alternatives should be considered." *Id.* One example of a question that may be considered in determining the cost is "[s]hould the cost of landfilling, . . . be based on current costs for existing landfills, or estimated costs for new landfills that will be required as we fill up those already in existence?" *Id.*

281. *Id.* at 164. A flat fee per package or article will not reflect the true cost of waste disposal. *Id.*

> [A] tax must reflect, at a minimum, both the type and the amount of material used in the product or package on which it is being assessed. For example, the tax on a high-density polyethylene bottle pigmented with cadmium should be much higher (assuming cadmium is not banned altogether in this use) that on a bottle of the same size and weight that did not contain heavy metals. The tax should also reflect the probability that the product will be recycled, and should also be lower for products made from recycled material. The tax on a material which has fuel value should be lower than that on material which must be landfilled. Obviously, formulating such a structure is a very complex procedure.

Id.

282. Packaging Directive, *supra* note 9, art. 11, O.J. L 365/10 at 15 (1994).

283. *See* THE MOSBY MEDICAL ENCYCLOPEDIA 364 (revised ed. 1992) (defining heavy metals). Heavy metals are metals with a high atomic weight in the chemical periodic table. *Id.* Poisoning can occur through breathing or absorption of various toxic heavy metals, such as mercury and lead. *Id.*

284. *Id.*

ing.[285] This limitation will trigger WTO oversight if a non-EU country is prevented from selling its products in the European Union.

III. *THE DIRECTIVE IS NOT A BARRIER TO TRADE*

The Packaging Directive has given EU Member States until June 30, 1996, to enact legislation that implements the provisions set by the Union.[286] Because the Member States have not promulgated their national legislation, packaging ordinances that were in place before the Directive will be assumed to be part of the new packaging legislation. Although the Packaging Directive is an example of legislation that presents the conflict between trade and the environment, a close analysis of a potential case brought in the WTO reveals that the Packaging Directive is not a barrier to trade.

A. *Article III: Like Product Analysis*

Article III of the GATT states that imported products cannot be discriminated from their domestic counterparts by higher taxes.[287] A dispute regarding the Directive may arise in which importers claim that they are being discriminated against because they are paying higher fees to sell their product in the European Union as opposed to their EU-based counterparts. The issue is whether a product with packaging chosen to conform to the Directive is considered a like product to one that does not conform to the Directive. Are toys packaged in recyclable and non-recyclable materials considered like products? Under the definition that products are like products if they have the same end use and the same performance characteristics,[288] these two toys may be considered like products. A toy is still a

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285. Packaging Directive, *supra* note 9, art. 11(1), O.J. L 365/10, at 15 (1994). Article 11(1) states that:

> Member States shall ensure that the sum of concentration levels of lead, cadmium, mercury and hexavalent chromium present in packaging or packaging components shall not exceed the following:
> - 600 ppm by weight two years after the date referred to in Article 22(1);
> - 250 ppm by weight three years after the date referred to in Article 22(1);
> - 100 ppm by weight three years after the date referred to in Article 22(1).

Id.; *see id.* art 22(1), O.J. L 365/10, at 17 (1994) (setting date as June 30, 1996).

286. *Id.* art. 22(1), O.J. L 365/10, at 17 (1994).

287. GATT 1947, *supra* note 2, art III, 61 Stat. at A18-A19, 55 U.N.T.S. at 205-09.

288. CAFE Dispute, *supra* note 77, ¶ 5.2, at 1447.

toy whether its outer packaging is recyclable or not, because the toy functions the same way.

Under the German Disposal Law, a product sealed in plastic blister wrap would be more expensive than one wrapped in paper.[289] Some manufacturers, however, use plastic wrapping because it protects the product from damage during transit and safeguards the product from breakage while on the store's shelves before the consumer buys the product. Lack of improper packaging has caused damage to products during transit.[290]

Another example of an increased cost might be a product packaged in a material containing a heavy metal, like chromium. Article 11 of the Packaging Directive restricts the concentration of heavy metals in packaging.[291] This restriction would require an importer to find a means to quantify the amount of heavy metals in its packaging and would incur unnecessary administrative costs. Further costs would be incurred due to the certification and inspection of imported products and its packaging.

1. European Union Arguments

For the moment, the Packaging Directive is uncontroversial with respect to GATT. The Directive is uncontroversial because the legislation implementing the Directive by the Member States is still unknown. At this point one can only speculate as to their content, but there will be disparate viewpoints between Member States.

a. Conscious Business Decision

The European Union will argue that importers made a conscious business decision to wrap their products in plastic or package their products in materials containing heavy metals. Importers might not have access to other alternatives, such as wrapping

289. FISHBEIN, *supra* note 226, at 227. In Germany, packaging fees are nine times higher for plastic ($0.82/lb) than for paper ($0.09/lb). *Id.*

290. *EC: Goods at Risk in Packaging Laws*, Reuter Textline, Sept. 21, 1993, *available in* LEXIS, World Library, Txtnws File. As noted by Dr. Gerhard Luttmer of the German insurer Gerling-Konz Allgemeine Versicherungs AG, "[packaging] laws [have] created an obligation . . . to minimize 'at any price' the packaging used for transport purposes. This obligation will necessarily lead to a significant increase in the frequency of transport damage due to inadequate packaging." *Id.*

291. Packaging Directive, *supra* note 9, art. 11, O.J. L 365/10, at 15 (1994).

a product in another material or using vegetable-based inks. This argument may seem reasonable in an arms-length discussion between one developed country to another, as seen in the CAFE dispute.[292] This may not be the case, however, in a developing country that does not have the resources or the physical plant to package a product to the Directive's requirements. In that hypothetical, there is no longer an arms-length argument.[293] Developing countries do not have the choice of alternative methods readily at their disposal. As a result, they may have to sell to the European Union and face the consequent fees.

b. Internal Regulations

In response, the European Union will argue that the regulations in the Packaging Directive are internal regulations and are valid under Article III of GATT.[294] In Article III, the General Agreement states that a member country cannot discriminate between its own products and another country's products regarding matters of internal regulations.[295] The European Union will argue that the Directive does treat products from the European Union and non-EU countries alike and that it merely regulates the internal sale of products. Although a tax is placed on the products, it is an allowed tax because it is an internal tax applied equally to imported and domestic products.[296] As the GATT

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292. *See generally* CAFE Dispute, *supra* note 77 (describing dispute between United States and European Union).

293. *See* GATT 1994, *supra* note 17, pmbl. ¶ 2 (noting that WTO provides more flexible guidelines for developing countries). In the preamble of the Agreement establishing the World Trade Organization, the Contracting Parties recognized the "need for positive efforts designed to ensure 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." *Id.* With regard to dispute settlement, the WTO requires the Dispute Settlement Body to consider the impact its ruling has on the economy of the developing country before publishing its decision. GATT DSB, *supra* note 20, arts. 21(2), 21(7), 21(8), at 1238. "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned." *Id.* art. 21(8), at 1238.

294. GATT 1947, *supra* note 2, art. III, 61 Stat. at A18-19, 55 U.N.T.S. at 205-09.

295. *See supra* note 84 and accompanying text (discussing validity of domestic regulations under Article III).

296. *See id.* (quoting Article III, which allows application of internal tax as long as it is equally applied to imported and domestic products).

panel stated in *Tuna Panel I*, nations may tax products as long as the treatment for imported and domestic products are the same and are non-discriminatory.[297]

c. Domestic Production Exemption

Cost arguments have been put forth every time environmental regulations are the cause of a trade dispute. In *Denmark*, the European Commission as well as the intervenor United Kingdom cited situations where the importer had to repackage its beverages from metal containers to approved glass containers and incur the extra cost.[298] In *Denmark*, the European Court of Justice held that cost arguments were insufficient in determining whether a Member State violated the quantitative restrictions in Article 30 of the EC Treaty.[299]

Similarly, in the CAFE dispute, the EU's arguments and statistics, indicating that the Member States, especially Germany, were paying a disproportionate amount of the fees incurred in selling a luxury car in the United States, were insufficient.[300] The GATT panel held that before one could have an Article III violation, where one could show discrimination between domestic and imported products, one has to show that the discrimination was for the purpose of protecting domestic production. As the United States argued in the CAFE dispute, if the policy purpose for the tax were unrelated to the protection of domestic production, then the tax was justified.[301] As its preamble states, the purpose of the Packaging Directive was to provide a high level of environmental protection. It was not meant to protect domestic production.

The Directive as it stands does not conflict with Article III of the GATT. The Directive is an internal regulation that will be applied equally on domestic and imported products. Its purpose is to reduce waste and conserve landfill space. Because the Directive bears no language providing for separate regulation for

297. Tuna Panel I, *supra* note 77, ¶ 6.2, at 1622.

298. *See supra* note 194 and accompanying text (describing importer complaints on increased costs in complying with onerous environmental regulations).

299. Commission v. Denmark, Case 302/86, [1988] E.C.R. 4607, 4615, [1989] 1 C.M.L.R. 619, 620.

300. CAFE Dispute, *supra* note 77, ¶ 5.2, at 1447.

301. *Id.* ¶ 5.3, at 1447.

products originating from EU countries and from non-EU countries, it will not conflict with GATT.

2. Article XX(g) Exception

Even if Article III were violated, however, the Packaging Directive would still be valid under Article XX(g). Article XX(g) provides an exception to Article III if the measure in question relates to conservation of an exhaustible natural resource. Given that the Directive sought to reduce waste and conserve landfill space, the Directive would qualify for an Article XX(g) exception.

CONCLUSION

Environmental protection and free trade must coexist. In the beginning of the next century, the World Trade Organization will be the stage for determining the appropriate balance between the environment and trade. Although environmental regulations are necessary to protect the environment, this protection should not inhibit trade. Of importance to the trade/environment dilemma will be the findings of the WTO's Committee on Trade and Environment, which will be making recommendations regarding environmental modifications to the multilateral trading system. The answer to finding a balance between free trade and environmental protection lies in some form of managed trade, with the promulgation of minimum international environmental standards that all signatories can agree upon by consensus. For the countries with higher environmental standards, insertion of a pre-emption clause in the stricter environmental statute will allow for its continuance. Legislation that incorporates environmental costs, such as the polluter pays principle, is a route to finding a compromise solution between free trade and environmental protection. Sound implementation of the EU Packaging Directive that balances these concerns is a step in the right direction.

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INDEX
VOLUME 18

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VOLUME 18 1994-1995 NUMBERS 1-5

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