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# The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts

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# The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts

## **Cover Page Footnote**

International Law; Commercial Law; Law

# **The 1991 U.S. - Mexico GATT Panel Report On Tuna And Dolphin: Implications For Trade And Environment Conflicts**

*Ted L. McDorman\**

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## **I. Introduction**

Few living creatures have the capacity to stir Americans like

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dolphin. What might cynically be referred to as the "Flipper factor," so named because of a 1960s American television program that starred a dolphin named Flipper, resulted in 1972 legislation that demands the use of trade embargoes against countries that do not protect dolphin in the same manner as the United States.<sup>1</sup>

A particular concern of the lawmakers in 1972 was the alleged high incidental taking of dolphin by yellowfin tuna fishers using purse seines in the eastern tropical Pacific Ocean.<sup>2</sup> In that region, dolphin and porpoises travel in close proximity to yellowfin tuna, usually sitting on top of the tuna.<sup>3</sup> Fishers, observing the dolphin, deploy purse seines to collect the tuna and in so doing may also entangle and capture the dolphin who frequently panic and drown.<sup>4</sup> Pursuant to the Marine Mammal Protection Act (MMPA), an import embargo must be levied against yellowfin tuna originating from the eastern tropical Pacific Ocean where the harvesting country does not meet the standards set in the MMPA.<sup>5</sup>

Despite attempts by fishers from Mexico to comply with the requirements of the MMPA,<sup>6</sup> in 1990, an embargo was placed upon yellowfin tuna and tuna products from Mexico.<sup>7</sup> Mexico complained that the tuna embargo was inconsistent with obligations owed to Mexico under the General Agreement on Tariffs and Trade (GATT).<sup>8</sup> The September 1991 report of a three-member panel of experts, established pursuant to the third-party dispute settlement procedures of the GATT, determined that the American embargo on Mexican tuna, even though designed to conserve dolphin, was inconsistent with the GATT.<sup>9</sup>

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<sup>1</sup> Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92-252, § 101(a)(2), 86 Stat. 1027, 1030 (codified at 16 U.S.C. § 1371(a)(2) (1988)). Dolphins are not considered an endangered species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* March 3, 1973, 87 Stat. 884, 993 U.N.T.S. 243 [hereinafter CITES]. Dolphins are listed within Appendix II, however, which indicates that while not endangered at this time they may become so unless trade is controlled. *Id.* App. II, 243 U.N.T.S. at 264-69. See SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 244 (1985).

<sup>2</sup> See H.R. REP. NO. 707, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148 [hereinafter 1972 MMPA REPORT].

<sup>3</sup> See *United States - Restrictions in Imports of Tuna*, Report of the GATT Panel, August 16, 1991, 30 I.L.M. 1594, 1598 (1991) [hereinafter *U.S.-Mexico GATT Panel*].

<sup>4</sup> The estimates on the number of dolphins killed varies considerably. In 1972 it was estimated that between 200 and 400 thousand dolphins were killed per year. 1972 MMPA REPORT, *supra* note 2, at 4148. In 1987, it was estimated that non-U.S. fleets killed over 103 thousand dolphins in the eastern tropical Pacific Ocean. H.R. REP. NO. 970, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 6154, 6156.

<sup>5</sup> 16 U.S.C. § 1371(a)(2) (1988).

<sup>6</sup> See *infra* note 17 and accompanying text.

<sup>7</sup> Taking and Importing of Marine Mammals, 55 Fed. Reg. 42,236 (1990). See *infra* notes 18 and 21 and accompanying text.

<sup>8</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter GATT]. The United States is an original member of GATT, while Mexico only became a member in 1986.

<sup>9</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1623.

The finding of the GATT Panel against the United States on the main issue, while correct as a matter of trade law and predicted by commentators,<sup>10</sup> raises questions about the manner in which international trade law can operate to constrain states by taking action to protect the environment and to conserve natural resources.<sup>11</sup> The GATT Panel was aware of this problem and specifically commented on the way in which states could rectify the conflict between trade and the environment.<sup>12</sup> The purpose of this Article is to examine the conclusions of the GATT Panel report, the implications of these conclusions, and the ways suggested by the Panel to resolve trade and environment conflicts. Despite the perceived negative impact of the GATT Panel report on conservation efforts, this Article concludes that the GATT Panel report has a positive message: what is necessary is not an overhaul of the GATT, but a greater international consensus on permissible conservation and environmental measures.

## II. Background

The Marine Mammal Protection Act *requires* an import embargo on yellowfin tuna and tuna products originating from the eastern tropical Pacific Ocean unless the harvesting country provides evidence that its regulatory program governing the incidental taking of dolphin is comparable to that of the United States and that the incidental taking of dolphin per vessel is comparable to that of the United States.<sup>13</sup> The type of regulatory program and the relevant catch-rates that a country must have are detailed in the legislation and regulations.<sup>14</sup>

Mexico's tuna fishing in the eastern tropical Pacific Ocean is conducted inside international waters, outside American waters, and within the Mexican 200-nautical mile zone.<sup>15</sup> No international treaty

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<sup>10</sup> See Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 490-95, 511-25 (1991).

<sup>11</sup> One commentator stated:

There is a latent conflict between international trade and environmental protection. A free world trade rests on the exploitation of comparative cost advantages and hence also of cost advantages that arise from different national environmental conditions and environmental policies; it requires free access of all producers to national markets. Environmental policy is interventionist policy which, in the case of national product requirements . . . creates non-tariff barriers to trade or, in the case of national production requirements . . . imposes additional costs on national industry.

Eckard Reh binder, *Environmental Protection and the Law of International Trade in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT* 357 (René-Jean Dupuy ed., 1985).

<sup>12</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1623.

<sup>13</sup> 16 U.S.C. § 1371(a)(2)(B) (1988). See McDorman, *supra* note 10, at 492-94 (outlining the evolution of the MMPA requirements).

<sup>14</sup> 16 U.S.C. § 1371(a)(2)(B) (1988); Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 50 C.F.R. 216.24(e)(5) (1991). The requirements are briefly described in *U.S.-Mexico GATT Panel*, *supra* note 3, at 1599.

<sup>15</sup> See Linda Lucas Hudgins, *The Development of the Mexican Tuna Industry, 1976-1986*, in

exists by which Mexico is bound to a particular standard regarding its tuna fishery and its incidental taking of dolphin.<sup>16</sup> Hence, Mexico is *not* in breach of any international treaties in its incidental taking of dolphin.

Mexico endeavoured to meet the U.S. requirements and to reduce the incidental taking of dolphin. Mexico submitted documentation to the United States in 1990 which was reviewed and *accepted* as meeting the standards of the MMPA.<sup>17</sup> Litigation commenced by an environmental group eventually led to an embargo being placed on yellowfin tuna and tuna products from Mexico on the grounds that the Department of Commerce could not allow imports from coun-

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THE DEVELOPMENT OF THE TUNA INDUSTRY IN THE PACIFIC ISLANDS REGION: AN ANALYSIS OF OPTIONS 153-68 (David J. Douman ed. 1987) (concerning the Mexican tuna fishery).

See also Biliama Cicin-Sain, Michael K. Orbach, Stephen J. Sellers, & Enrique Manzanilla, *Confictual Interdependence: United States-Mexican Relations in Fisheries Resources*, 26 NAT. RESOURCES J. 769 (1986) (providing a review of United States-Mexican fisheries relations). One of the most difficult issues between the United States and Mexico has been their differing views on tuna. When Mexico established its 200-n. mile zone in 1976, jurisdiction was claimed over all living resources in the zone, including tuna. *Id.* at 775. The American 200-n. mile fishing zone, also established in 1976, excluded tuna from U.S. jurisdiction. Fishery Conservation and Management Act, 16 U.S.C. §§ 1802(14), 1812 (1988 & Supp. II 1990). The U.S. view was that tuna was not subject to coastal state jurisdiction. See William T. Burke, *Highly Migratory Species in the New Law of the Sea*, 14 OCEAN DEV. & INT'L L.J. 273, 303-10 (1984). Under U.S. law, foreign states seizing U.S. tuna fishers had embargoes placed against tuna originating from those states. 16 U.S.C. § 1825 (1988 & Supp. II 1990). See McDorman, *supra* note 10, 501-04. This peculiar American view of tuna has recently been altered, and tuna is now included in the U.S. fisheries jurisdiction. Fishery Conservation Amendments of 1990, Pub.L. No. 101-627, § 103, 104 Stat. 4436, 4439 (codified at 16 U.S.C. § 1812 (Supp. II 1990)).

<sup>16</sup> Given the highly migratory nature of tuna, countries have frequently agreed to multilateral treaties to assist in the transboundary management of tuna. For the eastern tropical Pacific Ocean region, the Inter-American Tropical Tuna Commission (IATTC) was established in 1950. Convention for the Establishment of an Inter-America Tropical Tuna Commission, *opened for signature* May 31, 1949, 1 U.S.T. 230, 80 U.N.T.S. 3. The United States has been a member of the IATTC since the Commission's beginning. Mexico joined in 1964 but withdrew in 1978 following a disagreement on quotas for Mexican tuna fishers. Alberto Székely, *Yellow-Fin Tuna: A Transboundary Resource of the Eastern Pacific*, 29 NAT. RESOURCES J. 1051, 1060 (1989). With the establishment of 200-n. mile fishing zones in the late 1970s and early 1980s, the IATTC effectively fell into disarray. The tension was between coastal states, like Mexico, and distant-water fishing interests, like the United States, who could not agree on a new arrangement for dealing with tuna. See Gordon R. Munro, *Extended Jurisdiction and the Management of Pacific Highly Migratory Species*, 21 OCEAN DEV. & INT'L L.J. 289, 294-95 (1990). Both the United States and Mexico have been involved in efforts to develop a new tuna organization in the eastern Pacific Ocean. The American effort resulted in a 1983 convention which contained no conservation regime, did not include Mexico, and has not come into force. Székely, *supra*, at 1062; Munro, *supra*, at 295. Mexico's leadership resulted in 1989 in the Eastern Pacific Tuna Organization which is not yet functional and has not achieved a Latin American consensus. See Székely, *supra*, at 1062-65; Munro, *supra*, at 295-96. No multilateral treaties exist, however, regarding the conservation or management of dolphins. As one commentator noted: "[T]he lack of any serious effort to protect dolphins worldwide evinces the real priority given to this problem." John Warren Kindt, *A Summary of Issues Involving Marine Mammals and Highly Migratory Species*, 18 AKRON L. REV. 1, 8 (1984). Dolphins have largely remained a singular American concern.

<sup>17</sup> Taking and Importing of Marine Mammals, 55 Fed. Reg. 37,730 (1990) (emphasis added).

tries which do not strictly comply with the requirements of the MMPA.<sup>18</sup>

In late 1990, Mexico, through the GATT, consulted with the United States about the trade aspects of the embargo on tuna.<sup>19</sup> Following the consultations, Mexico requested that a GATT panel of experts be asked to look into the dispute, and in February of 1991, a panel was established.<sup>20</sup>

In March of 1991 another embargo under the MMPA was put in place against Mexican yellowfin tuna and tuna products.<sup>21</sup> Two months later, pursuant to the MMPA,<sup>22</sup> the United States imposed an embargo against intermediary countries (specifically Costa Rica, France, Italy, Japan and Panama) exporting to the United States yellowfin tuna or tuna products originating from Mexican harvests performed in a manner inconsistent with the dolphin-taking standards of the MMPA.<sup>23</sup>

If an embargo is still in place six months following its imposition, it has to be certified to the President of the United States,<sup>24</sup> and such certification is to be deemed a certification under the Pelly

<sup>18</sup> The litigation was commenced in August 1990 to obtain an injunction against the Department of Commerce prohibiting the entry of yellowfin tuna until foreign countries complied with the requirements of the MMPA. The injunction was granted. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 964 (N.D. Cal. 1990). In September 1990, it was determined that Mexico had complied with requirements of the MMPA. *Taking and Importing of Marine Mammals*, 55 Fed. Reg. 37,730 (1990).

In October 1990 another injunction was obtained specifically against the import of yellowfin tuna from Mexico on the grounds that insufficient information had been presented in order to comply with the MMPA. *See Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1451-52 (9th Cir. 1991). This injunction was stayed by an order of the Court of Appeals for the Ninth Circuit in November 1990. The stay issued by the Court of Appeals was lifted in February 1991. In April 1991, the Court of Appeals upheld the August 1990 lower court decision to issue the injunction. *Id.* at 1449; *see also U.S.-Mexico GATT Panel, supra* note 3, at 1599-1600 (further describing the proceedings).

<sup>19</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1598.

<sup>20</sup> *Id.* Panels cannot be established unless both countries to a dispute agree to have a panel investigate the dispute. Hence, the United States agreed to Mexico's request to establish the dispute settlement panel. The dispute settlement procedures of the GATT have evolved through practice, and the procedure utilized is not found in the GATT document itself. For a discussion of GATT dispute settlement procedures, *see Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc. L/4907, 26 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 210 (1980); *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc. L/6489, 36 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 61 (1990); Eric Canal-Forgues & Rudolf Ostrihansky, *New Developments in the GATT Dispute Settlement Procedures*, J. WORLD TRADE L., April 1990, at 67; William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 94-100 (1989).

<sup>21</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1600. *See also Taking and Importing of Marine Mammals*, 56 Fed. Reg. 21,096 (Dep't Comm. 1991) (notice of embargo).

<sup>22</sup> 16 U.S.C. § 1371(a)(2)(C) (1988).

<sup>23</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1600. *See also Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations*, 56 Fed. Reg. 37,606 (Dep't Comm. 1991), *correcting* 56 Fed. Reg. 26,995 (Dep't Comm. 1991) (notice to importers).

<sup>24</sup> 16 U.S.C. § 1371(a)(2)(D) (1988).

Amendment,<sup>25</sup> which could lead to an import ban on any or all fish and fish products originating from Mexico.<sup>26</sup> At the time of the Panel report, Mexico had not been certified under the Pelly Amendment.<sup>27</sup> The Pelly Amendment requires that any trade action taken by the U.S. President pursuant to it must be "sanctioned" by the GATT.<sup>28</sup>

Mexico was also concerned about the application of the labelling provisions of the United States Dolphin Protection Consumer Information Act (DPCIA) to tuna products from Mexico.<sup>29</sup> Under this legislation tuna products originating from the eastern tropical Pacific Ocean cannot be labelled as "dolphin safe" unless the harvesting vessels can show that they have minimized, in the appropriate manner, the incidental taking of dolphin.<sup>30</sup>

### III. The Report of the Panel

#### A. *The Import Embargo on Tuna From Mexico*

##### 1. *Article XI(1) or Article III(4)*

The principal Mexican argument against the U.S. embargoes was that they were inconsistent with Article XI(1) of the GATT.<sup>31</sup> Article XI(1) prohibits countries from imposing quantitative restrictions (quotas) or quantitative prohibitions on imports.<sup>32</sup> Such restrictions are inconsistent with the GATT objectives of the free flow of goods, the operation of comparative advantage, and the efficient allocation of world resources.<sup>33</sup>

The United States took the view that the appropriate provision was not Article XI(1) but the national treatment obligation, Article III(4), which allows countries to impose internal regulations on imported products provided that the regulation does not discriminate between foreign and domestic products and is not applied in a man-

<sup>25</sup> *Id.*; Pelly Amendment, Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified as amended at 22 U.S.C. § 1978 (1988)). The history and operation of the Pelly Amendment is discussed in detail in McDorman, *supra* note 10, at 482-90.

<sup>26</sup> 22 U.S.C. § 1978(a)(4) (1988).

<sup>27</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1618-19.

<sup>28</sup> 22 U.S.C. § 1978(a)(4) (1988).

<sup>29</sup> Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. § 1385 (Supp. II 1990).

<sup>30</sup> *Id.* §§ 1385(d)(1)(B), 1385(d)(2) (Supp. II 1990).

<sup>31</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1617-19.

<sup>32</sup> GATT Article XI(1) states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 8, art. XI, ¶ 1, at A32-A33, 55 U.N.T.S. at 224-26.

<sup>33</sup> See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 305-16 (1969).



ner affording protection to domestic production.<sup>34</sup> The essence of the American argument was that dolphin-taking standards on tuna fishing were internal measures applied to both American and non-American fishers equally, and hence, met the requirement of national treatment in Article III(4).<sup>35</sup> The fact that the regulation had effect at the border was argued as not being fatal to the U.S. position that the embargo was an internal measure because of the interpretative note to Article III (Note Ad Article III),<sup>36</sup> which provides that:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point

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<sup>34</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1602-04. The key paragraphs of GATT Article III are:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, 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 of any other contracting party 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

GATT, *supra* note 8, art. III, 61 Stat. at A18, 55 U.N.T.S. at 204-06, *as amended by* Protocol Modifying the General Agreement on Tariffs and Trade, Sept. 14, 1948, 62 Stat. 3679, 62 U.N.T.S. 80.

<sup>35</sup> A 1990 third party dispute settlement panel established pursuant to the United States-Canada Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., 102 Stat. 1851, accepted the U.S. argument that a size limitation on lobster imposed on both American and foreign (Canadian) lobster fell under the national treatment obligations of GATT Article III and not under Article XI(1) even though the regulation operated to exclude certain Canadian lobster from the U.S. market. *See UNITED STATES-CANADA BINATIONAL PANEL, LOBSTERS FROM CANADA-FINAL REPORT OF THE FTA PANEL, CASE NO. USA-84-1807-01, 3 Can. Trade & Commodity Tax Cases (CCH) 8182, 8182-83 (1990) [hereinafter LOBSTERS FROM CANADA].* Moreover, the U.S. regulation took effect at the border which raised questions as to whether the measure was truly an internal measure. *Id.* The Panel concluded on the basis of Note Ad Article III that merely because the regulation took effect at the border did not preclude the regulation from being an internal measure. *Id.* For jurisdictional reasons, the Panel did not reach a conclusion whether the American size requirement for all lobster complied with the national treatment obligation. *Id.* *See generally* Ted L. McDorman, *Dissecting the Free Trade Agreement Lobster Panel Decision*, 18 CAN. BUS. L.J. 445 (1991) (discussing the U.S.- Canadian lobster dispute).

<sup>36</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1603. *See supra* note 35 and accompanying text.

of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Based upon these provisions, the U.S. claimed that the direct import embargo constituted at the border enforcement of the MMPA requirement that all tuna from the eastern tropical Pacific Ocean be harvested in the appropriate dolphin-friendly manner.<sup>37</sup>

The GATT Panel noted that the MMPA did not regulate the tuna itself, nor did it regulate the sale of tuna in the United States.<sup>38</sup> In short, the U.S. measure was unrelated to the tuna but went to the manner in which the tuna was caught.

In examining Article III(1) and III(4) and Note Ad Article III, the GATT Panel determined that the provisions dealt only with measures affecting the *product* being traded.<sup>39</sup> This conclusion was based on the wording of the provisions, such as Article III(4), where it is stated that imported *products* are to be accorded no less favourable treatment than like domestic *products* are accorded by internal laws.<sup>40</sup> Article III(1), which contains the general principle of national treatment, refers to the application of internal laws affecting products and requires that such regulations on products are not to be applied to protect domestic production.<sup>41</sup> Similarly, Note Ad Article III covers only measures applying to imported products.<sup>42</sup> The Panel also considered two previous panel reports dealing with Article III(2) and III(4),<sup>43</sup> and concluded that the national treatment provisions envisioned a comparison "between the measures applied to imported products and the measures applied to like domestic products."<sup>44</sup> Finally, the Panel noted a 1970 Working Panel Report on Border Tax Adjustment<sup>45</sup> which concluded that border tax adjustments could be applied only for those taxes directly borne by the

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<sup>37</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1603.

<sup>38</sup> *Id.* at 1617.

<sup>39</sup> *Id.* at 1618 (emphasis added).

<sup>40</sup> *Id.* at 1616 (emphasis added).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The first panel report involved a differential internal tax imposed by the United States. In interpreting Article III(2), the panel concluded that the obligation was to establish "competitive conditions for imported products in relation to domestic products." *United States - Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175, 34 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 136, 158 (1988). The second report involved a U.S. law which created a special administrative process for dealing with foreign products alleged to infringe U.S. patent law. The panel examined Article III(4) and determined that the wording "treatment no less favourable" called for equality of opportunity for foreign products. *United States - Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439, 36 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 345, 386-87 (1990).

<sup>44</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1617-18.

<sup>45</sup> *Border Tax Adjustments*, GATT Doc. L/3464, 18 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 97 (1972).

product and not for those borne indirectly by the product.<sup>46</sup> Based upon this analysis the Panel concluded that the provisions of the MMPA dealing with imported Mexican tuna were not internal measures covered by Note Ad Article III, since the regulations did not affect the tuna as a product.<sup>47</sup> Moreover, for the same reasons, the U.S. regulations did not comply with Article III(4):

Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.<sup>48</sup>

Having rejected the U.S. argument with respect to the application of national treatment, the Panel determined that the U.S. embargo was inconsistent with Article XI(1), which prohibits quantitative restrictions.<sup>49</sup> The United States did not present any arguments to counter this position.<sup>50</sup> The United States, however, relied upon two exceptions to justify the breach of Article XI(1): Article XX(b), respecting the protection of animal life, and Article XX(g), respecting conservation of exhaustible natural resources.

## 2. Article XX(b) - Protection of Animal Life

The United States posited that its import embargo on Mexican tuna was justified under Article XX(b)<sup>51</sup> because the embargo served the purpose of protecting dolphin life and health and was "necessary" because the measure adopted was the only one reasonably available to protect dolphin life and health outside U.S. jurisdiction.<sup>52</sup> In reviewing the Article XX exceptions, the Panel indicated that previous panels placed the burden of showing compliance with the exceptions upon the party seeking their advantage and concluded that the exceptions were to be read narrowly.<sup>53</sup> The Panel noted that Article XX was "a limited and conditional exception" to

<sup>46</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1618.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> GATT Article XX(b) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures

. . . :

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

GATT, *supra* note 8, art. II(b), 61 Stat. at A14, 55 U.N.T.S. at 200. See McDorman, *supra* note 10, at 521-23.

<sup>52</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1606.

<sup>53</sup> *Id.* at 1619. See *Canada - Administration of the Foreign Investment Review Act*, GATT Doc. L/5504, 30 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 140, 164

the GATT obligations and that Article XX did not establish positive obligations on parties.<sup>54</sup> Given this background, the Panel proceeded to examine the central aspect of the U.S. argument with respect to the applicability of Article XX(b): whether it could be used to protect the life and health of animals *outside* the United States.<sup>55</sup>

The Panel concluded that Article XX(b) would not justify trade embargoes for the purpose of protecting the health and life of animals outside the jurisdiction of the country imposing the embargo.<sup>56</sup> The Panel conceded that nothing explicit in the wording of Article XX(b) provided this answer,<sup>57</sup> but when turning to the drafting history of the exception, the Panel found that the concern of the drafters was with the "life or health of humans, animals or plants within the jurisdiction of the importing country."<sup>58</sup> More importantly, the Panel concluded that if one country could dictate to others the health, safety and conservation laws that must be followed in order to conduct trade, then trade could take place only between states with identical internal regulations. This conclusion was described as follows:

The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.<sup>59</sup>

The Panel also noted the "necessary" criterion of Article XX(b) and commented that what must be necessary was the remedy of the trade embargo, and not the general protection of life or health.<sup>60</sup> Thus, the Panel concluded that even if the extrajurisdictional argument could be overcome, the U.S. measure was not necessary since other avenues, such as negotiating international cooperative arrangements, existed to pursue its dolphin protection objectives.<sup>61</sup>

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(1984); *United States - Section 337 of the Tariff Act of 1930*, *supra* note 43, at 393. In neither case was the reliance on an Article XX exception successful.

<sup>54</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1619.

<sup>55</sup> *Id.* at 1619-20 (emphasis added).

<sup>56</sup> *Id.* at 1620.

<sup>57</sup> *Id.* at 1619-20.

<sup>58</sup> *Id.* at 1620. For a contrary view of the drafting history and the meaning to be given Article XX(b) and (g) respecting extraterritorial application, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE L., Oct. 1991, at 37, 52-53.

<sup>59</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1620.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

### 3. Article XX(g) - Conservation of Scarce Natural Resources

As an alternative to Article XX(b), the United States sought to justify its import prohibition under Article XX(g), arguing that the embargo on tuna was primarily aimed at the conservation of dolphin and that the import embargo was primarily aimed at rendering effective the restrictions existing in the United States on the production and consumption of dolphin.<sup>62</sup> The Panel noted that Article XX(g) required that an import embargo had to be utilized in conjunction with restrictions on domestic production or consumption and that any embargo had to be "primarily aimed at" rendering the domestic restrictions effective.<sup>63</sup>

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that 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.<sup>64</sup>

Similar to its view of the extrajurisdictional interpretation of Article XX(b), the Panel concluded that a country could not use a trade embargo to conserve resources in another country and justify the action under Article XX(g).<sup>65</sup>

The Panel concluded that the U.S. embargo on tuna imposed pursuant to the MMPA was inconsistent with Article XI(1) of the GATT and not justified under either Article XX(b) or XX(g).<sup>66</sup>

#### B. The Import Embargo on Intermediary Nations

The U.S. argument regarding the tuna embargo under the MMPA against intermediary nations seeking to sell yellowfin tuna and tuna products harvested by Mexico with an incidental dolphin kill unacceptable to the United States, was the same as its argument with respect to the direct embargo.<sup>67</sup> The Panel handled the arguments respecting the applicability of Article III(4) and Note Ad Article III, Article XI(1), and the exceptions Article XX(b) and (g), by

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<sup>62</sup> *Id.* at 1607. See Charnovitz, *supra* note 58, at 50-51 (discussing Article XX(g)).

<sup>63</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1620-21. The interpretation that a measure has to be "primarily aimed at" rendering the domestic measures effective in order to be justified under Article XX(g) arose in *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268, 35 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 98, 114 (1989). See also McDorman, *supra* note 10, at 518-19 (discussion of Canada-U.S. tuna case involving Article XX(g)).

<sup>64</sup> *U.S.-Mexico GATT Panel, supra* note 3, at 1620-21.

<sup>65</sup> *Id.* at 1621. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. *Id.*

<sup>66</sup> *Id.* at 1623.

<sup>67</sup> *Id.* at 1602, 1621.

referring to its findings on the direct embargo issue.<sup>68</sup> The result, therefore, was that the import embargo on tuna from intermediary countries imposed under the MMPA was also inconsistent with the obligations of the United States under the GATT.<sup>69</sup>

### C. *The Pelly Amendment*

The Panel did not agree with the Mexican argument that the Pelly Amendment was also inconsistent with the GATT Article XI(1) inasmuch as it contained the possibility of the employment of import embargoes.<sup>70</sup> The Panel concluded, based upon previous panel reports,<sup>71</sup> that because the Pelly Amendment did not *require* trade measures to be taken, the provision was not inconsistent with the GATT.<sup>72</sup>

### D. *The "Dolphin Safe" Labelling Provision*

Mexico argued that the labelling provisions of the DPCIA were inconsistent with GATT Article IX(1) which requires an importing country to treat like products in the same manner respecting "marking requirements."<sup>73</sup> In the alternative, Mexico argued that the labelling provisions were inconsistent with Article I(1), the most-favoured-nation requirement, because Mexican tuna was discriminated against since it originated from the eastern tropical Pacific Ocean.<sup>74</sup> The Panel quickly dismissed the Mexican argument that the "Dolphin Safe" labelling provision of the DPCIA was inconsistent with GATT Article IX(1) by noting that the GATT obligation related only to labelling regarding the origin of the product and not to labelling regarding the product generally.<sup>75</sup>

The Mexican argument that the labelling provision was inconsistent with Article I(1), most-favoured-nation, was also rejected. The Panel took the view that the key question was whether "the right of access to the label" met the non-discriminatory principles of most-favoured-nation.<sup>76</sup> The Panel focused upon this issue since the labelling provision was voluntary in that tuna products could be sold

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1623.

<sup>70</sup> *Id.* at 1616, 1619.

<sup>71</sup> *United States - Taxes on Petroleum and Certain Imported Substances*, *supra* note 43, at 160, 163-64; *European Economic Community - Regulation on Imports of Parts and Components*, GATT Doc. L/6657, 37 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 132, 198-99 (1991).

<sup>72</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1619.

<sup>73</sup> *Id.* at 1622.

<sup>74</sup> *Id.* Mexico argued that, under GATT, like products had to be treated alike regardless of source. Therefore, the United States could not treat Mexican tuna less favourably than other tuna. Such non-discriminatory treatment of like products is recognized as the essence of the most-favoured-nation obligation. See JACKSON, *supra* note 20, at 133-38.

<sup>75</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1622.

<sup>76</sup> *Id.*

without the "Dolphin Safe" label, and that no benefit was obtained from the government by having or not having the "Dolphin Safe" label affixed to the product.<sup>77</sup> The Panel noted that: "Any advantage which might possibly result from access to this label depends on the free choice of consumers to give preference to tuna carrying the 'Dolphin Safe' label."<sup>78</sup>

#### IV. Implications of the Report

##### *A. Trade Measures Because Foreign Production is Environmentally-Unfriendly*

The principal implication of the *U.S.-Mexico GATT Panel* report is that measures taken against environmentally-friendly products (tuna) because they were produced in an environmentally-unfriendly manner (unacceptable taking of dolphin) are inconsistent with the GATT. Countries cannot look behind a good to determine if the production or manufacturing process was environmentally-friendly.<sup>79</sup>

The GATT Panel dealt with the two manners in which a country might try to restrict goods because of their production processes. The first situation is where a state requires that all goods (foreign or domestic) sold in the country be produced in an environmentally-friendly manner. The Panel concluded that the principle of national treatment in Article III was inappropriate since Article III covered only laws applying to the product itself and not to laws dealing with the manner of production.<sup>80</sup> The second situation involves a direct embargo on a good because of the manufacturing process. This is a *prima facie* violation of Article XI(1),<sup>81</sup> and can only be GATT-consistent if an exception can be utilized. The GATT Panel concluded that if the resource (or environment) being protected was *outside* the embargoing country then no exception existed to permit such an embargo.<sup>82</sup>

The conclusions of the Panel are consistent with the GATT's focus upon trade in goods and measures which directly affect the trade of goods.<sup>83</sup> National laws categorized as investment laws, of

<sup>77</sup> *Id.* at 1616, 1622.

<sup>78</sup> *Id.* at 1622.

<sup>79</sup> If the product itself is environmentally-unfriendly, then a country could utilize trade measures against the product. These protective trade measures could be justified under exception XX(b) as necessary to protect human, animal or plant life or health. JACKSON, *supra* note 20, at 208.

<sup>80</sup> See *supra* section III.A.1.

<sup>81</sup> The United States did not contest that its tuna embargo violated Article XI(1). *U.S.-Mexico GATT Panel*, *supra* note 3, at 1618.

<sup>82</sup> See *supra* sections III.A.2. and III.A.3.

<sup>83</sup> One commentator stated: "The primary subject matter of the GATT has always been recognized as trade in goods. . . ." EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* 13 (1986). Another leading authority noted: "GATT is a legal instrument primar-

which environmental regulation of manufacturing processes would be a part, are not subject to GATT discipline.<sup>84</sup> Moreover, the conclusions of the Panel are consistent with academic opinion. The leading American trade academic predicted the outcome of GATT's application to the manufacturing processes when he stated: "The GATT obligation [Article III] does not allow for differential treatment based on characteristics of the production process rather than of the product itself."<sup>85</sup> He also argued that the Article XX(b) exception was only applicable for protection of health and safety within the importing country.<sup>86</sup> He concluded that "to a certain extent, this is what comparative advantage is all about: differences in environments of production, including the environment of government regulation."<sup>87</sup> There is even a forty year old panel report, though not referred to by the GATT Panel in its findings, which determined a domestic tax applied to products from countries where employers did not pay family allowance taxes equivalent to those paid in the importing country was GATT-inconsistent.<sup>88</sup> While the decision was based on most-favoured nation, the underlying principle against discrimination based on national law and standards unrelated to the traded product is important. Finally, it should be noted that *not one* of the eleven countries making representations to the GATT Panel sided with the U.S. arguments.<sup>89</sup>

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ily concerned with products. . . ." JACKSON, *supra* note 33, at 259. This authority further noted that "it was desired to confine GATT to 'goods', leaving other problems to other agreements." *Id.* at 257.

<sup>84</sup> One can readily understand how this operates in the resources sector. No rule of GATT requires a country to develop its natural resources. Moreover, if a country wishes to develop its natural resources, it can make the resources available only to its own citizens. GATT does not prevent such discrimination. Only where the resources become goods to be sold does the GATT have effect. In the fisheries context, laws reserving quotas to domestic fishers are not challengeable under the GATT. But laws requiring the fishers to sell to domestic buyers and hence inhibiting goods available for export sale are challengeable under the GATT. See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, *supra* note 63, at 98. The current round of GATT negotiations, the Uruguay Round, is examining the possibility of expanding the GATT rules to trade related investment measures (TRIMs). However, this is still restricted in effect. See GATT ACTIVITIES 1990, 46-48 (1991); Paul R. Grahman & Edward M. Krugman, *Trade-Related Investment Measures* in COMPLETING THE URUGUAY ROUND 147-63 (Jeffrey J. Schott ed., 1990). It has been noted that GATT regulates only the trade of goods and not foreign direct investment policies. See *Canada - Administration of the Foreign Investment Review Act*, *supra* note 53, at 157.

<sup>85</sup> JACKSON, *supra* note 20, at 193.

<sup>86</sup> *Id.* at 209. See also J. Owen Saunders, *Legal Aspects of Trade and Sustainable Development*, in THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 370, 375 (J. Owen Saunders ed., 1990); McDorman, *supra* note 10, at 520.

<sup>87</sup> JACKSON, *supra* note 20, at 209.

<sup>88</sup> *Belgian Family Allowances*, GATT Doc. G/32 (Nov. 7, 1952), 1 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 59 (1953). For a discussion of the Belgian Family Allowances case, including the text of the Panel report itself, see ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 121-32 (1975).

<sup>89</sup> The intervening countries were Australia, Canada, the European Community, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand and Venezuela. See *U.S. - Mexico GATT Panel*, *supra* note 3, at 1610-16.



The GATT Panel stated that under the treaty "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."<sup>90</sup> It is this statement that has been seen as the biggest problem with the GATT Panel report from an environmentalist's point of view.<sup>91</sup> However, even the normally environmentally-sensitive Nordic countries indicated that a country is not free "to require that imported products [be] produced as cleanly abroad as at home."<sup>92</sup> Any other conclusion reached by the GATT Panel would allow certain countries to dictate to others what standards must exist, and this would clearly be an invasion of a country's sovereignty.<sup>93</sup> Moreover, as the Panel observed, any other conclusion would permit trade only between countries with identical regulations, and would amount to a dismantling of the GATT.<sup>94</sup>

### *B. Environmental Labelling*

The report of the Panel indicates that a government-established program for environmental labelling creates no problem under the GATT provided that (1) the program is voluntary, (2) that all like products, regardless of origin, have access to the program, and (3) that no government benefit is conferred by meeting the labelling requirements.<sup>95</sup>

### *C. American Unilateralism*

It has become a popular argument in the United States that unless the environmental standards, wage rates, industrial safety, anti-trust legislation, etc. in a foreign country are equivalent to those in the United States, a level playing field does not exist, and American unilateral trade action is permissible to equalize the competition. This concern was expressed in the MMPA tuna embargo litigation when the Northern District Court of California said that the embargo "would help to protect United States fishermen and women from unfair competition from the vessels of foreign nations which engage in fishing practices which may be less expensive, but which result in

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<sup>90</sup> *Id.* at 1622.

<sup>91</sup> See *Divine porpoise*, THE ECONOMIST, Oct. 5, 1991, at 31.

<sup>92</sup> *EFTA members press convening of working party*, 82 FOCUS: GATT NEWSL., July 1991, at 2, 3.

<sup>93</sup> The Venezuelan intervention in the Panel Report commented on this as follows: Potentially, any nation could thereby justify unilaterally imposing its own social, economic or employment standards as a criterion for accepting imports. Any influential contracting party could effectively regulate the internal environment of others simply by erecting trade barriers based on unilateral environment policies.

*U.S.-Mexico GATT Panel*, *supra* note 3, at 1615.

<sup>94</sup> *Id.* at 1620.

<sup>95</sup> See *supra* section III.D.

higher dolphin kill rates."<sup>96</sup>

When the emotion-laden dolphin factor is stripped away from the facts before the *U.S.-Mexico GATT Panel*, what the Panel had to deal with was an American trade measure unilaterally employed because a country did not meet standards defined by the U.S. The parallel between this situation and the potential utilization of embargoes under U.S. trade law section 301,<sup>97</sup> against countries where the United States determines that American exports are being treated unfairly,<sup>98</sup> would not have escaped the notice of the GATT Panel. The possible use of trade embargoes under section 301 has been denounced at the GATT,<sup>99</sup> and the GATT-consistency of such measures has been *strongly* doubted.<sup>100</sup> Without confronting section 301 directly, the GATT Panel made it clear that American trade measures unilaterally employed because another country has different laws and standards, although not facially inconsistent with GATT or other law, are inconsistent in application with the GATT.

<sup>96</sup> *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 968 (N.D. Cal. 1990). It may be argued that if a country has high environmental standards on processing, embargoes designed to keep products out which are not produced in an environmentally-friendly manner are measures designed to protect the environment. The effect of the embargo, however, is to protect the domestic producer. Given that the environment of the embargoing country will not be affected if the product is produced elsewhere, it is difficult for that country to assert a true environmental purpose for the embargo. A variation on this theme is the so-called "social tariff" designed to equalize costs of production where pollution (or other) standards are lower. See Duane Chapman, *Environmental Standards and International Trade in Automobiles and Copper: The Case for a Social Tariff*, 31 NAT. RESOURCES J. 449 (1991).

<sup>97</sup> Trade and Tariff Act of 1974, Pub. L. No. 93-618, 88 Stat. 2041 (codified as amended in 19 U.S.C. §§ 2411-20 (1988 and Supp. II 1990)) (commonly referred to as "section 301"). The potential for use of this section 301 sanction was significantly expanded by amendments made in 1988. For a comprehensive and unparalleled discussion of section 301 and its 1988 offspring, "Super 301" and "Special 301," see AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM].

<sup>98</sup> Pursuant to section 301, it is the task of the U.S. Trade Representative to examine whether U.S. exports are being burdened by unfair laws and practices of foreign countries. What the U.S. trade authorities are looking for is any act, policy or practice of a foreign government which is "unjustifiable," "unreasonable," or "discriminatory" and burdens or restricts U.S. commerce. 19 U.S.C. §§ 2411(a)(1)(B), 2411(b)(1), 2414(a)(1) (1988). It is the unreasonable criteria that has the broadest definition since it can include acts, policies or practices that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." 19 U.S.C. § 2411(d)(3)(A) (1988). The U.S. legislation explicitly indicates that an unreasonable act, policy or practice includes ones which constitute a denial of workers' rights and standards for minimum workers' wages, health and safety. 19 U.S.C. § 2411(d)(3)(B)(iii) (1988).

There is a degree of discretion in the use of trade sanctions authorized by section 301. See 19 U.S.C. §§ 2411(a), 2411(b) (1988). In only nine cases up to 1989 has trade retaliation been employed pursuant to section 301. Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM, *supra* note 97, at 121-22, 153-56.

<sup>99</sup> *Unilateral measures under fire*, 63 FOCUS: GATT NEWSL., July 1989, at 6, 7.

<sup>100</sup> Hudec, *supra* note 98, at 119-23, 144-51; Elizabeth J. King, Comment, *The Omnibus Trade Bill of 1988: "Super 301" and Its Effects on the Multilateral Trade System Under the GATT*, 12 U. PA. J. INT'L BUS. L. 245, 262-68 (1991).

#### IV. Solutions to Trade and Environment Conflicts

##### A. *The Problem*

The dispute before the *U.S.-Mexico GATT Panel* was a confrontation between a trade value, the unimpeded flow of goods, and an environmental value, the conservation of dolphin. It can be convincingly argued that the value of conserving a special resource should outweigh the economics and principles of free trade. The GATT Panel concluded, however, based on the wording of the GATT, that the trade value took precedence over the environmental value in the situation before it.

Environmental issues and concerns are *not* excluded from consideration under the GATT rules.<sup>101</sup> A balancing between trade and the environment is to take place. This is most clearly exemplified in Article XX(g) wherein measures primarily aimed at conservation of exhaustible natural resources are permitted, even if the measures are inconsistent with other GATT rules. Concerning the balance to be struck, a dispute settlement panel, established pursuant to the Canada-U.S. Free Trade Agreement, commented that Article XX(g) "exists to ensure that the provisions of the GATT do not prevent the governments from pursuing their conservation policies" but that "it is not necessary that Article XX(g) exempt from prohibition every measure that has a conservation-promoting effect."<sup>102</sup> The *U.S.-Mexico GATT Panel* concluded that the intent of Article XX(g) (and (b)), and its wording and underlying policy did not allow the Panel to permit an import embargo seeking to protect resources and the environment *outside* the jurisdiction of the embargoing country.<sup>103</sup> Clearly, the Panel did not feel that this was a situation in which balancing trade and environment concerns was appropriate because of the serious detriment to trade that would occur if the U.S. argument prevailed.

It can be suggested that the answer was predetermined because the forum of the dispute was trade-dominated.<sup>104</sup> This argument, while not without merit, is not particularly convincing in the situation of the U.S.-Mexico dolphin and tuna dispute. The GATT Panel, or for that matter any other international dispute settlement body, does not have the luxury of simply determining which *value*, trade or environment, should prevail. The Panel had to determine the existing obligations and the wording thereof and *no* international envi-

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<sup>101</sup> See Charnovitz, *supra* note 58, at 52-53.

<sup>102</sup> CANADA-UNITED STATES TRADE COMMISSION PANEL, FINAL REPORT, CANADA'S LANDING REQUIREMENT FOR PACIFIC COAST SALMON AND HERRING, 2 Can. Trade & Commodity Tax Cases (CCH) 7162, 7172 (1989) [hereinafter CANADA-UNITED STATES TRADE COMMISSION PANEL REPORT]. See *infra* note 117 and accompanying text.

<sup>103</sup> See *supra* sections III.A.2 and III.A.3.

<sup>104</sup> See *infra* notes 152-53 and accompanying text.

ronmental or conservation obligations existed on both countries regarding dolphins or the manner in which tuna was to be harvested.<sup>105</sup> Thus, in the conflict between trade and environment, there existed international trade law obligations, but no competing international environmental or conservation obligations. The Australian intervention in the Panel dealt with this point as follows: "[W]here a contracting party takes a [trade] measure with extraterritorial application *outside of any international framework for cooperation*, it is appropriate for the GATT to scrutinize the measure against that party's obligations under the General Agreement."<sup>106</sup>

The interaction between trade and environment is attracting considerable attention, and the *U.S.-Mexico GATT Panel* report can be expected to increase that attention. At the GATT, a working group on Environmental Measures and International Trade has recently been established.<sup>107</sup> The work of the group is to become a key focus of GATT activities following the conclusion of the Uruguay Round.<sup>108</sup> A three-point agenda has been agreed upon:

- the relationship between trade provisions in international environmental agreements and GATT obligations;
- multilateral transparency of national environmental regulations; and
- the trade effects of packaging and labelling requirements that affect trade.<sup>109</sup>

Trade and environment is on the agenda of the 1992 UN Conference on Environment and Development (UNCED) in both the statement of principles, referred to as either the Earth Charter or the Rio de Janeiro Declaration on Environment and Development, and the plan of action referred to as Agenda 21. The statement of principles is designed to guide people and nations in their conduct towards one another and towards the environment and is to build upon the 1972 Stockholm Declaration.<sup>110</sup> The Chair's Consolidated Draft of the Principles of General Rights and Obligations<sup>111</sup> indi-

<sup>105</sup> See *supra* note 16 and accompanying text.

<sup>106</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1610-11 (emphasis added).

<sup>107</sup> *GATT to focus on trade and environment link*, 85 FOCUS: GATT NEWSL., Oct. 1991, at 1.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> The Stockholm Declaration, which was a product of the 1972 United Nations Conference on the Human Environment, identified twenty-six principles for the protection and enhancement of the human environment. *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf. 48/14, reprinted in part in 11 I.L.M. 1416 (1972) (hereinafter 1972 Stockholm Declaration). Besides the Stockholm Declaration, the U.N. Conference also adopted an Action Plan containing over 100 recommendations for environmental action. *Id.* See Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L. J. 423 (1973) (discussing the Stockholm Declaration).

<sup>111</sup> *Principles of General Rights and Obligations, Chairman's Consolidated Draft*, Preparatory Committee for the United Nations Conference on Environment and Trade, 3d Sess., Agenda Item 4, at 1, Doc. No. A/Conf. 151/PC/WG. III/L.8/Rev. 1 (1991).

cates that Principle 9 will concern environment and world trade, but there is little consensus as to its content or even whether the principle will ultimately be accepted.<sup>112</sup> The structure and organization of the work plan (Agenda 21) clearly makes reference to the interrelationship of international trade and the environment as being necessary to consider,<sup>113</sup> but it is unclear as to the effect such consideration will ultimately have.

One cannot simply dismiss the obligations of the GATT where they conflict with environmental values. Over 100 countries are party to the General Agreement<sup>114</sup> and despite its shortcomings,<sup>115</sup> it is one of the most highly-developed of international regimes. Clearly, however, some accommodation between environmental concerns and the trade regime is necessary. The *U.S.-Mexico GATT Panel* has provided some insights as to how this accommodation might be achieved.

### B. Trade Measures and the Domestic Environment

The *U.S.-Mexico GATT Panel* noted that the treaty rules impose few constraints on policies designed to protect the *domestic* environment.<sup>116</sup> The only real qualification would appear to be that any

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<sup>112</sup> Several proposals have been made which clearly indicate that environmental regulation is not to unduly interfere with free trade. India's proposal states:

Global environmental considerations cannot justify restrictive trade practices, except when these are introduced in terms of specific provisions in a globally accepted environmental convention.

*Id.* at 12. The Republic of Korea's proposal states:

Environmental concerns may not be used as a disguised instrument for impeding the development needs of developing countries. Environmental regulations may not be used as non-tariff barriers or as protectionist measures against exports of developing countries.

*Id.* Singapore's contribution states:

The principle of free trade benefits the world economy and promotes the development of all countries, especially the developing countries. We should seek to eliminate existing barriers against free trade and resist attempts to build new barriers under the guise of protecting the environment.

*Id.* at 13.

<sup>113</sup> *Structure and organization of Agenda 21*, Preparatory Committee for the United Nations Conference on Environment and Development, 3d Sess., Agenda Item 2(a), at 2, Doc. No. A/Conf. 151/PC/L.49 (1991).

<sup>114</sup> As of January 1, 1991, there were 101 contracting parties. GATT ACTIVITIES 1990, *supra* note 84, at 129.

<sup>115</sup> See Colleen Hamilton & John Whalley, *The GATT System in the 1990s*, 17 J. LEGIS. 167 (1991); James M. Lutz, *GATT Reform or Regime Maintenance: Differing Solutions to World Trade Problems*, J. WORLD TRADE L., April 1991, at 107.

<sup>116</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1622. The GATT Panel stated:

(T)he provisions of the General Agreement impose few constraints on a contracting party's implementation of domestic environmental policies. . . . (A) contracting party [to the GATT] 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, and a contracting party is also free to tax or regulate domestic production for environmental purposes.

*Id.*

measure in question would have to be a bona fide environmental measure and not a disguised trade measure.<sup>117</sup> Drawing this distinction is not an easy task, but with increased environmental awareness, it is not unrealistic to suggest that the presumption should be in favour of a measure supporting a valid domestic environmental purpose. A 1988 decision of the Court of Justice of the European Community supports such an approach.<sup>118</sup> The Court found in favour of a recycling scheme despite an acknowledged trade effect because on balance, the restriction on the free movement of goods was not considered to be disproportionate to the environmental aim of the measure.<sup>119</sup> Similarly, in the recent *Lobster Panel Report* under the Canada-U.S. Free Trade Agreement, the outcome of the decision (although not the actual finding of the Panel) was that an American measure assisting the conservation of U.S. lobster was not determined to be GATT-inconsistent even though it did have a trade effect.<sup>120</sup>

### C. Trade Measures and Foreign Environments

A more difficult issue arose in the *U.S.-Mexico GATT Panel*, where a country attempted to deal with environmental issues beyond its borders. The obligations owed by the United States to Mexico under the GATT prohibited the use of trade measures to deal with such

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<sup>117</sup> The Article XX exception to the GATT rules has as one of its criterion that a measure must not be a disguised restriction on trade. See GATT, *supra* note 8, art. II, 61 Stat. at A14, 55 U.N.T.S. at 200. Few GATT panels have sought to deal with this criterion. See Charnovitz, *supra* note 58, at 47-48. However, in the CANADA-U.S. TRADE COMMISSION PANEL REPORT, *supra* note 102, the question of whether a measure was a disguised trade barrier was at the core of the dispute. *Id.* at 7171. The issue was whether a Canadian requirement that all salmon and herring caught in Canadian West Coast waters had to be landed before export was justified under GATT Article XX(g). *Id.* The Panel determined that the 100 per cent landing requirement would not have been adopted on the basis of conservation alone and therefore was a disguised trade barrier. *Id.* at 7178-79. The Panel attempted to objectively analyze the operation of the measure rather than subjectively evaluating the motives for its enactment. *Id.* at 7172.

<sup>118</sup> Case 302/86, *Re Disposable Beer Cans: E.C. Commission v. Denmark*, 1 C.M.L.R. 619-33 (1989).

<sup>119</sup> *Id.* The Danish law required not only that beer, soft drinks, etc. had to be marketed in approved returnable containers but there had to exist a system of collection and refilling of the containers such that a large proportion of containers would be refilled. The law in question went well beyond product standards. Denmark did not seriously contest that the measure was equivalent to a quantitative restriction under Article 30 of the Treaty of Rome since the law essentially required non-Danish producers to either set up a refilling plant in Denmark or ship the empties to the country of origin. Denmark argued, and the Court accepted, that protection of the environment was a mandatory requirement of EC law which justified certain restrictions on the principle of the free movement of goods. The Court, in examining the balance between trade and environment, found that the restrictions imposed by the Danish law on the free movement of goods was not disproportionate to the environmental aim of the measure. *Id.* For further discussion of the case, see Toni R. F. Sexton, Note, *Enacting National Environmental Laws More Stringent Than Other States' Laws in the European Community: Re Disposable Beer Cans: Commission v. Denmark*, 24 CORNELL INT'L L. J. 563 (1991).

<sup>120</sup> LOBSTERS FROM CANADA REPORT, *supra* note 35, at 8183.

environmental issues.<sup>121</sup> The *U.S.-Mexico GATT Panel* provides two possible responses to the problem of GATT obligations overriding environmental concerns in such a situation. The Panel noted that the GATT could be changed from within either by an amendment or through the suspension of obligations pursuant to the waiver procedure under Article XXV(5).<sup>122</sup> Another possibility was that GATT obligations could be modified by international agreement.<sup>123</sup>

### 1. Changing the GATT

With respect to changing the GATT from within, no amendments have been made to the basic text since 1965, principally because the increased number of countries party to the GATT has made utilizing the amendment procedures very difficult.<sup>124</sup> As a result, agreements and understandings which supplement or act as interpretations of specific GATT provisions have been utilized. This method was used, for example, for the various agreements reached during the Tokyo Round of Negotiation.<sup>125</sup> The agreements from the Tokyo Round are usually viewed as creating separate treaty obligations, while their precise legal effect is unclear.<sup>126</sup> During the Uruguay Round of negotiations, there has been little direct discussion of trade and environment issues that could result in significant amendments, supplemental agreements, or re-interpretations respecting trade and environment.<sup>127</sup>

Of more direct interest is the waiver provision (Article XXV(5)) under which the Contracting Parties to the GATT, through a two-thirds majority vote, can waive the application of particular obligations.<sup>128</sup> The waiver has been used to deal with individual country

<sup>121</sup> See *supra* section III.A.

<sup>122</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1622-23.

<sup>123</sup> *Id.*

<sup>124</sup> The amendment procedures are found in GATT Article XXX. See MCGOVERN, *supra* note 83, at 11-12; JACKSON, *supra* note 33, at 73-82.

<sup>125</sup> The agreements and understandings from the Tokyo Round are set out in *Geneva Protocol to the Agreement on Tariffs and Trade*, GATT Doc. L/4875, 26 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 3 (1980), and *Protocol Supplementary to the Geneva Protocol to the General Agreement on Tariffs and Trade*, GATT Doc. L/4812, 26 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 5 (1980).

<sup>126</sup> See JACKSON, *supra* note 20, at 56-57. See *infra* notes 137-40 and accompanying text (concerning international treaty law issues raised by the Tokyo Round Treaties).

The Contracting Parties to GATT, acting pursuant to Article XXV(1), can also take action having the effect of supplementing the GATT obligations. This provision has been little used in an explicit manner and, therefore, its extent is unclear. See MCGOVERN, *supra* note 83, at 29-30.

<sup>127</sup> See GATT, *the Uruguay Round and the environment*, 85 FOCUS: GATT NEWSL., Oct. 1991, at 3-5 (briefly reviewing the environmental issues that have been discussed at the Uruguay Round).

<sup>128</sup> For a discussion of the the operation of Article XXV(5), see MCGOVERN, *supra* note 83, at 30-31; JACKSON, *supra* note 20, at 43. Article XXV(5) states (in part):

In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a

exemptions rather than with broad subject matter exceptions.<sup>129</sup> The *U.S.-Mexico GATT Panel* explicitly pointed out that this provision might be used to overcome conservation and trade conflicts.<sup>130</sup> It should be noted, however, that during the Uruguay Round of negotiations there has been a developing consensus that tighter conditions should be applied to the granting of waivers under Article XXV(5).<sup>131</sup>

Without official GATT sanction, two product sectors, agriculture and textiles, are essentially beyond the discipline of GATT rules.<sup>132</sup> There is no simple explanation for this state of affairs except that countries including the United States and the countries of the European Community have found the GATT rules respecting these sectors unsatisfactory.<sup>133</sup> Environmental protection could similarly be viewed to be beyond the discipline of GATT rules. Admittedly, what is possible for a particular product sector may not be possible for environmental protection potentially affecting goods across all sectors. In addition, the exceptions to the GATT for agriculture and textiles have been much criticized as undermining the GATT, and the Uruguay Round attempted to bring GATT discipline to these sectors.<sup>134</sup>

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contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.

GATT, *supra* note 8, art. XXV, ¶ 5, 61 Stat. at A68-A69, 55 U.N.T.S. at 272, 274..

<sup>129</sup> MCGOVERN, *supra* note 83, at 31.

<sup>130</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1623.

<sup>131</sup> GATT ACTIVITIES 1990, *supra* note 83, at 38-39. Moreover, a recent GATT panel report noted that a waiver under Article XXV(5) was only to be granted in "exceptional circumstances" and had to be interpreted narrowly since the waiver affected GATT obligations. *United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions*, GATT Doc. L/6631, 37 GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS SUPP. 228, 256-57 (1991).

<sup>132</sup> JACKSON, *supra* note 20, at 44-45. *See also* MCGOVERN, *supra* note 83, at 447-52 (concerning GATT and agriculture). It is not accurate to say that the GATT does not apply to agricultural products. In recent years, a high percentage of trade disputes brought before the GATT have involved agricultural and food products. *See* Ingrid Nordgren, *The GATT Panels During the Uruguay Round: A Joker in the Negotiating Game*, J. WORLD TRADE L., Aug. 1991, at 57. However, GATT discipline on agriculture is not very strong. Respecting textiles, side agreements to avoid the GATT eventually led to the Multilateral Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, 930 U.N.T.S. 166 [hereinafter Multi-fiber Arrangement or MFA]. The effect of this arrangement is to create a separate regime for the trade in textiles for those countries party to the MFA. *See* MCGOVERN *supra* note 83, at 507-14.

<sup>133</sup> This is particularly true respecting agriculture. *See* MCGOVERN, *supra* note 83, at 452-59.

<sup>134</sup> Concerning agriculture, *see* Dale E. Hathaway, *Agriculture in COMPLETING THE URUGUAY ROUND*, at 51-61; Bernard M. Hoekman, *Agriculture and the Uruguay Round*, J. WORLD TRADE L., Feb. 1989, at 83; GATT ACTIVITIES 1990, *supra* note 84, at 33-36. Agricultural issues, particularly export subsidies, are the make-or-break issues at the Uruguay Round.

Concerning textiles, *see* William R. Cline, *Textiles and Apparel in COMPLETING THE URUGUAY ROUND*, *supra* note 84, at 63-78; Xiaobing Tang, *Textiles and the Uruguay Round of Multilateral Trade Negotiations*, J. WORLD TRADE, June 1989, at 51; GATT ACTIVITIES 1990, *supra*



The GATT is not an inflexible set of rules. Formal and informal means exist to suspend and alter the rules if a situation is accepted as warranting such treatment. However, to reconsider the application of GATT rules, the acceptance must be widespread and not confined to select countries with political aims and/or overtly protectionist goals in mind. While there is international acceptance of environmental and conservation goals, there is little global consensus that one nation or a group of countries can dictate how those goals are to be achieved and in the process undermine the GATT.

## 2. *International Agreement to Modify GATT*

It is unlikely that one can expect much change from within GATT since the purpose of the Uruguay Round is to extend and tighten GATT discipline. Undoubtedly, with this in mind, the *U.S.-Mexico GATT Panel* recognized that the GATT could be modified through international agreement.<sup>135</sup> This recognition of the potential for other international arrangements to influence the obligations under the GATT marks a change from the dismissive view adopted by a 1987 GATT Panel regarding the possible importance of the 1982 United Nations Convention on the Law of the Sea.<sup>136</sup> The Panel, however, did not articulate the nature of the international agreement necessary to modify the GATT.

An international treaty which *explicitly* states that it is modifying the GATT obligations would do so for those countries party to the newer treaty. International law requires, however, that the old treaty not prohibit such a modification, that the new agreement not relate to an obligation fundamental to the objects and purposes of the old treaty, and that the new agreement not affect parties to the old treaty who decide not to become parties to the new treaty.<sup>137</sup> The latter point is consistent with international treaty law, which directs that where one country is a party to an old and a new treaty, and another country is party to the old treaty, the treaty binding between the two countries is the one to which both are parties irrespective of the new treaty.<sup>138</sup> The situation of explicit modification of the GATT by a subsequent treaty occurs in the relationship between the GATT and

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note 84, at 32-33. For many developing countries, textiles is the crucial issue at the Uruguay Round.

<sup>135</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1623.

<sup>136</sup> *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, *supra* note 63, at 115. See Ted L. McDorman, *International Trade Law Meets International Fisheries Law: The Canada-U.S. Salmon and Herring Dispute*, J. INT'L ARB., Dec. 1990, at 107.

<sup>137</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 41, 1155 U.N.T.S. 331, 342. This article relates to subsequent agreements to modify a multilateral agreement and operates where it is clearly the intent of the parties to modify the earlier treaty since notice of the modification is to be given. *Id.*

<sup>138</sup> *Id.* art. 30, ¶ 4(b), 1155 U.N.T.S. at 338. See PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 101-03 (1989).

the Multi-fiber Arrangement (MFA),<sup>139</sup> with the latter only applicable to countries that are parties to it, and the GATT applying to non-MFA states.<sup>140</sup> Within the operation of the above, there is considerable scope for conservation and environmental agreements to modify the GATT where the modification is explicitly stated in the new treaty. The principal caveat is that the modification only applies to those states party to the conservation and environmental agreement.

In some situations, however, conservation and environmental agreements can modify the GATT without an explicit modification statement and, more importantly, can modify the GATT even with respect to non-parties to the conservation and environment agreement. This can be seen through an examination of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>141</sup> Each party to CITES has an obligation to control imports from parties and non-parties in the exact same manner.<sup>142</sup> An import embargo is *prima facie* inconsistent with Article XI(1) of the GATT<sup>143</sup> and since the resource being protected is outside the importing country, exceptions under Article XX would not apply.<sup>144</sup> Despite the silence in CITES of its relationship with the GATT, the import restriction requirement is unmistakably inconsistent with the GATT, and the clarity of the inconsistency indicates the intent to modify the GATT.<sup>145</sup>

The situation is more complicated, however, where two countries are party to the GATT and only one of them is party to CITES. Technical international treaty law directs that as between the two countries, the GATT would take precedence over CITES obligations.<sup>146</sup> However, technical international treaty law must yield to the will of states. As one leading treaty expert stated, where a new treaty is clearly and deliberately inconsistent with an old treaty "it is more than likely that the political considerations will prevail over

<sup>139</sup> Multi-fiber Arrangement, *supra* note 132, 25 U.S.T. at 1001, 930 U.N.T.S. at 166.

<sup>140</sup> See MCGOVERN, *supra* note 83, at 514-15.

<sup>141</sup> CITES, *supra* note 1, 87 Stat. at 884, 993 U.N.T.S. at 243.

<sup>142</sup> Article III(3) of CITES puts strict controls on the import of any specimen of species listed as endangered, irrespective of source. *Id.* art. III, ¶ 3, 27 U.S.T. at 1095-96. See Lyster, *supra* note 1, at 248. There are also export controls on endangered species but this may not create a problem under GATT since the export restriction might fit within exception Article XX(g) or (b).

<sup>143</sup> See *supra* note 32 and accompanying text.

<sup>144</sup> See *supra* sections III.A.2 and III.A.3.

<sup>145</sup> Although Article 41 of the Vienna Convention on the Law of Treaties requires notification of the intended modification, this formalistic consideration cannot undermine the principle that where the intent to modify is clear the subsequent treaty modifies the previous obligation. Vienna Convention on the Law of Treaties, *supra* note 137, art. 41, 1155 U.N.T.S. at 342. For a discussion of the revision (or modification) of treaties on a *de facto* basis, see GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 136-37 (6th ed. 1976).

<sup>146</sup> Vienna Convention on the Law of Treaties, *supra* note 137, art. 30, ¶ 4(b), 1155 U.N.T.S. at 339.

legal niceties, for a deliberate violation . . . will be a sign that the political basis for the earlier treaty no longer exists or that its elements have undergone fundamental change."<sup>147</sup> With respect to CITES, it can be argued that it is the will of states that respecting trade in endangered species, GATT obligations must be modified even for countries not a party to CITES.<sup>148</sup> This proposition is enhanced when it is realized that there is overwhelming international support for CITES, as indicated by the fact that more states are party to CITES than to the GATT.<sup>149</sup> It can also be argued that given the specificity of CITES, as compared to the generality of the GATT, that the latter treaty has been superseded by CITES with regard to endangered species.<sup>150</sup> The completeness of the CITES regime, its obvious inconsistency with GATT, and the narrowness of the exception to GATT being created, also enhance the proposition that CITES modifies the GATT. One can also add that conservation of endangered species is of global concern and can only be effectively dealt with by global action such as CITES. Approaching the question from a different angle, it can be suggested that the GATT must be interpreted in light of subsequent treaties and state practices<sup>151</sup> which support the view that CITES exists as an exception to the GATT.

The ultimate test is whether a country views a potential conflict between CITES and GATT as a conservation or trade issue. A country cannot be *forced* to submit to GATT dispute settlement.<sup>152</sup> Hence, if a dispute is not truly considered a trade matter, then the GATT cannot be forced into operation. It is unthinkable that meas-

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<sup>147</sup> SHABTAI ROSENNE, *BREACH OF TREATY* 95 (1985).

<sup>148</sup> It might even be possible to argue CITES is part of customary international law, which would take precedence over a treaty like GATT, because the customary law would be more recent than the treaty law. See MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 34-36 (1985).

<sup>149</sup> According to *TREATIES IN FORCE* 295 (1990), 106 states were party to CITES. Only 101 entities were GATT members. See *supra* note 114 and accompanying text. This degree of support issue is a crucial one since the GATT (or any multilateral treaty) cannot be determined by a bilateral agreement which would allow a state to impose GATT-inconsistent measures against all other states. A country cannot easily contract out of its multilateral treaty obligations.

<sup>150</sup> See C. Willfred Jenks, *The Conflict of Law-Making Treaties*, 30 *BRITISH Y.B. INT'L L.* 401, 446-47 (1953).

<sup>151</sup> Vienna Convention on the Law of Treaties, *supra* note 137, art. 31, ¶ 3, 1155 U.N.T.S. at 340. Use of subsequent treaties and state practice to interpret a treaty is only to be employed as a factor to be considered in interpreting the unclear wording of a treaty. See SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 135-38 (1984). However, this formalistic constraint does not undermine the principle that subsequent treaties and state practice are important in interpreting a treaty. See SCHWARZENBERGER & BROWN, *supra* note 145, at 136-37; *Air Transport Services Agreement Arbitration* (U.S. v. France), 38 *INT'L L. REP.* 182, 248-55 (E. Lauterpacht ed., 1964) (French practice following the conclusion of a bilateral treaty was determined to amount to a modification of the treaty).

<sup>152</sup> See *supra* note 20 and accompanying text.

ures consistent with CITES would be perceived by GATT members as being subject to GATT discipline such that GATT dispute settlement would be employed.<sup>153</sup>

Is it only through an international environmental or conservation treaty that the GATT can be modified? Given the flexibility within the GATT itself to tolerate exceptions, it would be inconsistent to take the view that only international treaty obligations can modify the GATT. The better view posits that any expression of broad international support for the modification of the GATT by environmental or conservation considerations would suffice to suspend the operation of the GATT rules. An example would be a consensus reached at the UN Conference on Environment and Development (UNCED) expressed through the proposed statement of principles.<sup>154</sup> It is unlikely that these principles will by themselves create international legal obligations, but it would be difficult to deny them any force or importance.<sup>155</sup> To modify GATT obligations, a principle emerging from UNCED would have to be explicit and clearly be intended to operate as a modification of the GATT. The requirements of intent and clarity are not unreasonable given that a treaty obligation would be superceded by something less than a treaty.

To ensure that a treaty like CITES or any consensus that emerges at UNCED modifies GATT obligations, a waiver under

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<sup>153</sup> Application of the analysis developed in the above paragraphs to the trade measures employed against non-parties pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989), and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, March 22, 1989, 28 I.L.M. 657, would probably lead to the same conclusion. A different conclusion would be reached regarding the conflict between the GATT and the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (1982). See generally McDorman, *supra* note 136, at 107.

<sup>154</sup> See *supra* note 110 and accompanying text.

<sup>155</sup> Until the principles are finalized, it is unclear what their legal status will be. The Brundtland Report recommended the consolidation of legal principles into a charter to guide state behavior and submitted a set of proposed legal principles to be included in such a document. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 332-33, 348-51 (1987). It is most likely that the legal position will be similar to that of the 1972 Stockholm Declaration, *supra* note 110, which is not on its own considered a source of legal obligation although some of the principles have greatly influenced the development of international environmental law. Alexandre Kiss, *The International Protection of the Environment*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1074 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983). One authority has commented about the Stockholm Declaration:

Taking the document as a whole, one is nevertheless surprised that despite the generality of some provisions and their uncertain phrasing the general tone is one of a strong sense of dedication to the idea of trying to establish the basic rules of international environmental law.

Sohn, *supra* note 110, at 513. Concerning the legal effect of declarations and U.N. resolutions, see Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 787-95 (R. St. J. Macdonald & Douglas Johnston eds., 1983). Respecting differing approaches to international environmental law more generally, see ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION, 31-61 (1983).

GATT Article XXV(5) should be obtained. Without this, however, the GATT can be said to be superseded where there exists a clearly identifiable will of states to modify the GATT. The GATT is flexible enough to accommodate exceptions and understandings even where a doctrinal legal approach leads to a contrary result.<sup>156</sup>

The difficulty with environmental treaties or other international agreements that might modify the GATT lies in concluding the treaties or procuring the necessary international agreement. Environmental and conservation advocates need to focus on the achievement of international consensus rather than on the failure of unilateralism because of currently overriding GATT obligations for which international agreement does exist.

## VI. Conclusion

A dispute settlement panel established under the GATT had to determine the consistency with international trade law of U.S. legislation which prohibited the import of tuna because the manner in which the tuna was harvested did not meet U.S. standards regarding the incidental taking of dolphin. The *U.S.-Mexico GATT Panel* concluded that the U.S. law was inconsistent with GATT primarily because the product being embargoed (tuna) was environmentally friendly, and that GATT only deals with trade in goods and does *not* look behind the product to examine if the production or manufacturing process was environmentally friendly. The Panel took the view that any other conclusion would result in the undermining of GATT by allowing countries to employ embargoes against any country not having the identical laws and standards as the importing country. The conclusions of the Panel are correct as they relate to the focus of GATT law upon goods and are important in that they clearly indicate that unilateralism is impermissible.

Regarding the conflict between trade and environment, the report of the GATT Panel does *not* signal that in all conflicts trade considerations will outweigh environmental considerations. While the GATT Panel determined that a country cannot utilize trade embargoes to impose its environmental standards on another country or use import embargoes against products from a country with different environmental laws, the GATT Panel did suggest that even in such a situation it would be possible to use trade measures provided there existed an international agreement which could be said to modify GATT obligations.

The ultimate message of the GATT Panel report, therefore, is

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<sup>156</sup> A GATT dispute settlement panel may lack this sophistication since it will be constrained by the GATT wording. However, the doctrinal legal approach will be superseded by political realities and a GATT panel would not be used. See *supra* notes 152-53 and accompanying text.

not a negative one; rather, it is a positive one. The manner in which to promote environmental and conservation measures that may conflict with trade law is not to decry GATT or to advocate the imposition of unilateral measures, but to obtain international agreement that environmental and conservation measures are to modify GATT.

As a technical matter, the findings of GATT panels only become binding on parties once they are adopted by the GATT Council.<sup>157</sup> Hence, the recommendation of the Panel that the United States alter the MMPA to bring it into conformity with the GATT<sup>158</sup> remains only a recommendation until the GATT Council adopts the report of the Panel. Panel reports once brought to the GATT Council are invariably adopted without change.<sup>159</sup>

Reaction to the GATT Panel's report in the United States has not been favourable.<sup>160</sup> One group of Congress members wrote the President protesting the GATT report.<sup>161</sup> Their press release stated: "This inhumane ruling would run roughshod not only over these hard-fought dolphin protection measures, but over our fundamental right to engage in worldwide conservation efforts."<sup>162</sup>

Mexico has agreed not to pursue adoption of the Panel report at the GATT Council.<sup>163</sup> The Mexican concern is the igniting of an adverse environmental campaign centered on dolphin during a time when a Canada-U.S.-Mexico North America Free Trade Area (NAFTA) is being negotiated.<sup>164</sup> Moreover, the Mexican President has announced the intention to put in place stricter controls on tuna purse seining to reduce the incidental taking of dolphin.<sup>165</sup> Hence, the *U.S.-Mexico GATT Panel* report will probably never become binding upon the United States.

<sup>157</sup> See *supra* note 20 and accompanying text (referring to GATT dispute settlement procedures).

<sup>158</sup> *U.S.-Mexico GATT Panel*, *supra* note 3, at 1623.

<sup>159</sup> It is not uncommon, however, for there to be a considerable delay between the time a panel report is brought before the GATT Council and its adoption. This occurs because reports must be adopted by consensus which includes the losing party. See *Davey*, *supra* note 20, at 85; *JACKSON*, *supra* note 20, at 96-97, 99.

<sup>160</sup> See *GATT: Environmental Group Says GATT Tuna Report Could Have Disastrous Conservation Impact*, 8 Int'l Trade Rep. (BNA) No. 36 at 1325 (1991).

<sup>161</sup> *Trade Policy: Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 Int'l Trade Rep. (BNA) No. 38 at 1399 (1991).

<sup>162</sup> *Id.* (emphasis added).

<sup>163</sup> *GATT: Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo*, 8 Int'l Trade Rep. (BNA) No. 37 at 1351 (Sept. 18, 1991); *Divine porpoise*, *supra* note 91, at 31.

<sup>164</sup> See *GATT: Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargoes*, *supra* note 163, at 1351; *Divine porpoise*, *supra* note 91, at 31. Mexico's alleged lower environmental standards have been a major concern for various groups seeking to either block or influence the NAFTA negotiations. See *Election-Year Politics in U.S. Likely to Complicate Trade Issues This Year*, 9 Int'l Trade Rep. (BNA) No. 2 at 77 (Jan. 8, 1992).

<sup>165</sup> *Mexico: Bowing to U.S. Pressure, Mexico to Have Observers on Tuna Boats, Delays GATT Action*, 8 Int'l Trade Rep. (BNA) No. 38 at 1411 (Sept. 25, 1991); *Divine porpoise*, *supra* note 91, at 31.