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SPECIAL FEATURE

GATT SETS ITS NET ON ENVIRONMENTAL REGULATION: THE GATT PANEL RULING ON MEXICAN YELLOWFIN TUNA IMPORTS AND THE NEED FOR REFORM OF THE INTERNATIONAL TRADING SYSTEM

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I. INTRODUCTION

On August 16, 1991, a dispute resolution panel, assembled under the General Agreement on Tariffs and Trade (GATT),[1] ruled that a United States ban on Mexican tuna imports violates GATT rules.[2] The U.S. restrictions were instituted under the

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948)[hereinafter GATT]. GATT is the institution that sets the rules for liberalizing international trade. About 120 countries are now members of GATT or observe GATT rules.

2. *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991)(report of the panel)[hereinafter GATT Panel Ruling]. The ruling was released to

Marine Mammal Protection Act (MMPA)[3] and were designed to end the annual destruction of hundreds of thousands of dolphins in the nets of tuna fishermen. The panel's decision is in many respects poorly reasoned and inconsistent with the language of GATT. More importantly, because of its extremely broad wording, the ruling poses a serious threat not only to international efforts to protect marine mammals, but also to a whole range of initiatives safeguarding international environmental resources such as the ozone layer, ocean fisheries, tropical forests, and endangered species. The decision starkly illustrates the pressing need for GATT reforms that integrate environmental values into the international trade system.

II. BACKGROUND: THE SLAUGHTER OF DOLPHINS IN TUNA NETS, THE MARINE MAMMAL PROTECTION ACT, AND THE CHALLENGE OF PROTECTING THE GLOBAL COMMONS

A. Dolphin Deaths and the Marine Mammal Protection Act

Throughout the Eastern Tropical Pacific Ocean (ETP),[4] for reasons that scientists do not yet understand, herds of dolphins swim directly over schools of yellowfin tuna. For about the last thirty years, tuna fishermen have taken advantage of this association by locating dolphins as they surface to breathe and setting purse seine nets[5] on the dolphin herds in order to capture the yel-

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Mexico and the United States on August 16, 1991. It was released to the remaining GATT Contracting Parties on September 3, 1991.

3. 16 U.S.C. §§ 1361-1407 (1990). For a discussion of the relevant portions of the Act, see *infra* text accompanying notes 12-23.

4. The ETP is the area of the Pacific bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of the Americas. 16 U.S.C. § 1385(c)(2) (Supp. 1991). It contains an area of five to seven million square miles, stretching from Southern California to Chile and extending west for nearly three thousand miles. Earth Island Institute v. Mosbacher, 746 F. Supp 964, 966 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

5. The purse seine, a net usually about one mile long and several hundred feet deep, is held by a motor boat while the fishing vessel unfurls the net to enclose a dolphin herd. The bottom of the net is closed by tightening a cable, then the top of the net is drawn into the fishing vessel to capture its contents. GATT Panel Ruling, *supra* note 2, at 2. Several techniques have been developed to prevent dolphins from being killed, such as "backing down" the net, where the fishing vessel backs toward the closing purse seine, causing the top to sink and allowing dolphins an escape route. Caroline E. Coulston, Comment, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and Its Effect on Dolphin*, 11 J. ENERGY NAT. RESOURCES & ENVTL L. 97, 104-05 (1990). Despite these techniques, U.S. tuna fishermen continue to kill an average of eight dolphins each time they set their nets upon a dolphin herd. Jamie Murphy, *A Deadly Roundup at*

lowfin swimming below. Fishermen sometimes use explosives and chase boats to drive the dolphins into the center of their nets so that the nets can be closed more quickly.[6]

Millions of dolphins have been killed as a result of this practice. Dolphins are frequently entangled in the nets and, unable to reach the surface to breathe, drown. Others are crushed in the tuna vessel's power block, a mechanism that draws the net into the vessel. Dolphins are also frequently injured while struggling in the nets. As a result, they later die or, exhausted from struggling in the tuna net, are attacked by sharks. In the last twenty years the dolphin population in the ETP has fallen significantly; the population of at least one species has fallen below the level needed to sustain itself.[7]

Over the last twenty years, Congress responded to this crisis by enacting increasingly restrictive regulations on tuna fishing practices. In 1972 Congress passed the MMPA, which sought to limit the numbers of dolphins killed by American tuna fishermen.[8] As a result, the number of dolphins killed by the U.S. tuna fleet declined markedly.[9] Unfortunately, foreign fleets quickly took up the slack, increasing their kill to as many as 80,000 dolphins per

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Sea: Pressure Mounts to Save the Dolphin By Restricting Tuna Fishing, TIME, Aug. 4, 1986, at 46.

6. *See, e.g.*, Coulston, *supra* note 5, at 102. For a discussion of the various tuna fishing methods that result in dolphin deaths, see Kenneth Brower, *The Destruction of Dolphins*, ATLANTIC MONTHLY, July 1989, at 35; *Setting on Dolphin*, OCEANS, Sept./Oct. 1988, at 69; Todd Steiner, *The Senseless Slaughter of Marine Mammals*, BUS. & SOC'Y REV., Spring 1987, at 18.

7. Sean Kelly, *Dolphins: Still Casualties of Tuna Catch*, WASH. POST, Nov. 18, 1991, at A8. (environmentalists petition for listing of spotted dolphin under U.S. endangered species act); Coulston, *supra* note 5, at 102-03; John Godges, *Dolphins Hit Rough Seas Again*, SIERRA, May/June 1988, at 25.

8. Congress proclaimed an "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2). To attain this goal, the MMPA prohibits the killing or injuring of marine mammals such as dolphins, except where specifically authorized. 16 U.S.C. § 1371. Currently, U.S. tuna fishermen may kill up to 20,500 dolphins per year. No more than 250 may be coastal spotted dolphins and no more than 2,750 may be eastern spinner dolphins. 50 C.F.R. § 216.24(d)(2) (1990).

9. Under the MMPA, according to research compiled by the National Oceanic & Atmospheric Administration, "the annual incidental mortality in the U.S.-flag purse seine fishing fleet decreased from an estimated 400,000 per year in the early 1970s to less than 20,500 dolphins per year in the 1980s, which is the maximum mortality now allowed under the MMPA." Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 55 Fed. Reg. 11,921 (1990) (to be codified at 50 C.F.R. § 216).

year,[10] often in order to supply tuna to the U.S. market. American boats, in order to avoid MMPA restrictions, simply reflagged under foreign ship registries.[11] To address this problem, Congress in the 1980s twice amended the MMPA, requiring that nations whose fleets harvest tuna in the ETP have a dolphin protection plan comparable to the U.S. program[12] and that the dolphin mortality rate for these nations be comparable to that of the U.S. fleet.[13] Through 1989, foreign fleets were not allowed to kill more than 2.0 times the number of dolphins killed by the U.S. fleet during the same period.[14] By the end of 1990, average dolphin mortality of each nation's fleet could not exceed 1.25 times the U.S. fleet during the same period.[15]

Under the MMPA, these restrictions are enforced two ways. First, if a nation fails to certify that its tuna fleet has met the comparability requirements for dolphin kills, the Secretary of the Treasury must place an embargo on that nations' imports of tuna into the United States.[16] Second, if an importer is still violating the MMPA requirements six months later,[17] an embargo may be imposed under the Pelly Amendment to the Fishermen's Protective Act of 1967,[18] which authorizes trade sanctions against countries that do not abide by international fisheries or wildlife conservation agreements.[19]

In addition, to ensure that the dolphin-unsafe tuna embargoed from the United States is not simply transshipped through other

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10. *Id.*

11. Brower, *supra* note 6, at 57-58; *see also* Coulston, *supra* note 5, at 121.

12. 16 U.S.C. § 1371(a)(2)(B)(i).

13. 16 U.S.C. § 1371(a)(2)(B)(ii).

14. 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (Supp. 1991).

15. *Id.*

16. 16 U.S.C. § 1371(a)(2).

17. Six months after a ban on imports of tuna products has been put in place under the MMPA, the Secretary of Commerce is required to certify this fact to the President. 16 U.S.C. § 1371(a)(2)(D) (Supp. 1991).

18. 22 U.S.C. § 1978 (1988 & Supp. 1991)(as amended).

19. 22 U.S.C. § 1978(a)(4). Once non-compliance is certified, the Pelly Amendment provides discretionary authority for the President to order a prohibition of imports of marine products "for such duration as the President determines appropriate and to the extent that such a prohibition is sanctioned by the [GATT]." *Id.* While sanctions under the Pelly Amendment have never actually been imposed, see Gene S. Martin & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293, 298 (1989), it has been used successfully as a bargaining chip to obtain compliance with such international conservation agreements as the International Whaling Convention and the Convention on Trade in Endangered Species. *Id.* at 314-15.

countries, Congress enacted an "intermediary nations" embargo.[20] This provision is designed to prevent a party from doing indirectly what it cannot do directly. It requires the government of any nation exporting yellowfin tuna or tuna products to the United States to certify that it has acted to prohibit importation of tuna from nations that are subject to a direct embargo under MMPA.[21]

Finally, in 1990, Congress enacted the Dolphin Protection Consumer Information Act (DPCIA).[22] DPCIA is modestly aimed only at ensuring that tuna is not falsely labelled as "dolphin-safe." In order for the tuna to bear the "dolphin-safe" label, tuna importers must certify that their tuna has not been caught in a manner dangerous to dolphins, which it defines as using either purse seine nets intentionally set on dolphins in the ETP or high-seas driftnets.[23]

Because of these laws, countries whose fishermen continued to set upon dolphins in the ETP faced losing access to the American tuna market. Consequently, many of these countries instituted dolphin-safe alternative fishing methods. For instance, after the embargo was enforced against them, Panama and Ecuador successfully reduced the number of dolphins that were killed by their tuna fleet by banning the setting of purse seine nets on dolphins by their nationals.[24] However, Mexico, Venezuela, and the Pacific island nation of Vanuatu did not. After a series of lawsuits by environmentalists, the Administration was forced to embargo tuna imports from these nations.[25]

B. Mexico's Challenge to Dolphin Protection Laws

Believing that U.S. restrictions on imports of dolphin-unsafe tuna violate GATT, Mexico sought consultations with the United States in November 1990 as provided for under GATT Article

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20. 16 U.S.C. § 1371(a)(2)(C) (Supp. 1991).

21. *Id.*

22. 16 U.S.C. § 1385 (Supp. 1991).

23. 16 U.S.C. § 1385(d)(1), (2).

24. *See* 55 Fed. Reg. 38125 (1990) (lifting the embargo on Ecuador); 55 Fed. Reg. 48887 (1990) (lifting the embargo on Panama).

25. *See* Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1990). The lawsuits were brought by Earth Island Institute and the Marine Mammal Fund, both San Francisco-based environmental groups, after lengthy delays by the Reagan and Bush Administrations in implementing the MMPA's restrictions on import of dolphin-unsafe tuna. The plaintiffs obtained court orders requiring the Secretary of the Treasury to enforce these provisions. *Id.*

XXII.[26] After the required sixty-day period of consultations failed to produce a satisfactory resolution, Mexico requested the formation of a GATT Panel to hear the dispute.[27]

The Panel received briefs from the United States and Mexico and heard arguments in May 1991. Ten other countries and the European Community also submitted briefs to the Panel. All criticized at least one aspect of the U.S. laws challenged by Mexico.[28] As usual, the dispute resolution process was conducted in almost complete secrecy:[29] the public was not allowed to attend the sessions when the Panel heard arguments from the countries involved; none of the information relied upon by the Panel was publicly available; and non-governmental organizations were not allowed to present evidence concerning the destruction of dolphins.[30] But for the extraordinary public outcry surrounding this

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26. Article XXII provides that any GATT party can seek consultations with another party concerning "all matters affecting the operation" of the Agreement. GATT, *supra* note 1, art. XXII.

27. Article XXIII of the GATT provides for matters that cannot be resolved by consultations to be investigated by the Contracting Parties. Article XXIII does not expressly provide for the creation of dispute resolution panels, but the formation of such panels has become customary practice. Ivo Van Bael, *The GATT Dispute Settlement Procedure*, 22 J. WORLD TRADE 67, 68 (1988). Dispute settlement procedures, and particularly procedures governing the formation of panels, were formalized (at least temporarily) as part of the mid-term agreement for the current Uruguay Round GATT negotiations. *See Mid-Term Review: Final Agreement at Geneva*, 61 GATT FOCUS 1, 9-12 (1989). It is likely that dispute resolution procedures will be substantially modified if the Uruguay Round comes to a successful conclusion.

The panel formed in response to Mexico's complaint was chaired by András Szepesi, Hungary's permanent representative to the GATT, and included Rudolph Ramsauer of Switzerland and Elbio Rosselli of Uruguay. GATT Panel Ruling, *supra* note 2, at 1, para. 1.2.

28. The submissions of these countries are described in the Panel's report. GATT Panel Ruling *supra* note 2, at 26-37, para. 4.1-4.29. Most submissions expressed opposition to the MMPA's intermediary nations embargo provision.

29. When a panel meets, the nature of its proceedings and the information given to it are kept strictly confidential. So confidential, in fact, that no official records are kept of its correspondence or working papers in the GATT registry. Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 29 SWISS REV. INT'L COMPETITION L. 81, 98 (1987).

30. To its credit, the Office of the United States Trade Representative took extraordinary steps to incorporate the viewpoints of environmental groups into its defense of the MMPA. It met with environmental groups while formulating its submissions, incorporating information provided by those groups, and provided briefings to interested observers in Geneva following its presentations to the GATT panel. *See* FIRST SUBMISSION OF THE UNITED STATES TO THE PANEL ON UNITED STATES MEASURES AFFECTING YELLOWFIN TUNA PRODUCED BY MEXICO IN THE EASTERN TROPICAL PACIFIC OCEAN (undated)[hereinafter FIRST SUBMISSION OF THE UNITED STATES]; Letter from Joshua R. Floum, Attorney for Earth Island Institute, to Jane Earley, Associate General Counsel, National Oceanic & Atmospheric Administra-

case, the Panel's report would not have been made public until it was adopted by the GATT Council. The Panel issued its report to Mexico and the United States on August 16, 1991, and to the remaining Contracting Parties on September 3, 1991.[31] The report now awaits formal approval by the full GATT Council.[32] Because of the intense public outcry generated by the decision, Congressional opposition to changing the MMPA, and the delicacy of negotiations between the United States and Mexico on a prospective North American Free Trade Agreement, it is unclear when or if the Panel will submit its ruling to the GATT Council for approval.[33]

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tion, U.S. Department of Commerce (Apr. 21, 1991) (offering arguments and evidence to support MMPA's restrictions on imports of dolphin-unsafe tuna) (on file with the authors).

31. Prior to releasing its final report to all Contracting Parties of the GATT, the panel releases its report to the parties directly. The parties are given two weeks to examine this report and discuss possible settlement. If the dispute is not settled within this time, the report is released to all Contracting Parties and is placed on the agenda for the next GATT Council meeting. Van Bael, *supra* note 27, at 62.

32. The Panel Ruling has no binding force on its own. It must be adopted by the GATT Council for it to acquire full force. However, the GATT Council routinely approves panel reports that are submitted to it. OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 77 (1985). For a concise overview of the operation of the GATT dispute settlement panels, see William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

33. *See* Stuart Auerbach, *Raising a Roar over a Ruling: Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991, at D1, D6 (Administration officials say Mexico is unlikely to pursue case in GATT); *see also* Charles Arden-Clarke, *The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development*, at 29 (Revised Nov. 1991); Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A21 (environmentalist's criticism of the panel decision); Paul Rauber, *Trading Away the Environment*, SIERRA, Jan./Feb. 1992, at 24 (predicting an additional 50,000 dolphin deaths per year as a result of the ruling). Current procedures allow parties to defer submission of a panel report to the GATT Council. *Mid-Term Review*, *supra* note 27, at 11-12. A Mexican trade official recently stated that Mexico may defer submission of the panel decision to the GATT Council in order to avoid undue friction in the negotiation of the North American Free Trade Agreement. *See Mexico May Concede on Tuna Issue Despite Belief in Correctness of Stand*, U.S.-MEXICO FREE TRADE REP., Nov. 4, 1991, at 1.

In addition, Mexico recently announced that it will institute a ten-point dolphin protection plan for its tuna fleet. Juanita Darling, *Tuna Turnabout: Mexico Announces a Dolphin Protection Plan*, L.A. TIMES, Sept. 25, 1991, at D6. Although these actions appear to be a positive step, many environmentalists criticized them as inadequate. *Id.* Administration officials have attempted to alter the MMPA in response to the panel ruling but these attempts appear unlikely to succeed. Key congressional leaders have made clear that there will be no action on the Administration's proposals. *See* Alva Senzek & John Maggs, *U.S., Mexico Defuse Tuna Trade Dispute*, J. COM., Sept. 13, 1991, at 1A; sources cited at *infra* note 139.

III. The Panel's Interpretation of GATT Significantly Undermines Efforts to Protect the Global Environment

A. *The MMPA Is Not a Protectionist Measure*

The dolphin protection provisions of the MMPA bear none of the normal earmarks of protectionist legislation. These provisions do not provide domestic industry with any significant economic advantage. In fact, U.S. tuna fishermen must meet standards that are *more* stringent than importers, thus putting Americans, if anything, at a competitive *disadvantage*.[34] As a result, the U.S. tuna industry bitterly opposed this legislation.[35] Clearly, the underlying purpose for the dolphin legislation is not to favor American industry, but to address a very real crisis demanding immediate action to stem the wanton slaughter of dolphins, to prevent the irreversible depletion of dolphin populations, and to preserve the integrity of marine ecosystems.[36]

Appropriately, the Panel did not find the MMPA to be protectionist. Nonetheless, focusing very narrowly upon the GATT text and upon trade-related values to the exclusion of other values, the Panel found that the MMPA violates GATT. Mexico argued that the MMPA is inconsistent with the general prohibition of quantitative restrictions under Article XI of GATT.[37] The United States responded that the MMPA is not an import quota covered by Article XI, but simply a regulation applied in accordance with the requirement of GATT Article III, Paragraph 4, which provides:

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34. See *infra* text accompanying note 67 (outlining comparability requirements in MMPA).

35. *See* Coulston, *supra* note 5, at 120. In fact, the American Tunaboat Association, intervening on the side of the government, sought to prevent imposition of the tuna embargo in *Earth Island Institute*, 746 F. Supp. 964. See *supra* note 25.

36. *See* 16 U.S.C. § 1361 (congressional statement of intent regarding the depletion of populations and danger of extinction for certain species of marine mammals and declaration of policy to protect and conserve marine mammals).

37. GATT Panel Ruling *supra* note 2, at 7, para. 3.1(a). Article XI, as presently written, potentially presents a serious obstacle to environmental protection. Eliza Patterson, *International Trade and the Environment: Institutional Solutions*, 21 Envtl L. Rep. (Envtl L. Inst.) 10,599, 10,601 (Oct. 1991). Article XI, paragraph 1 provides:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 1, art. XI, para. 1.

> 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.[38]

The GATT Panel determined that Article III allows regulation of "products" and that Article III "covers only measures affecting products as such."[39] The Panel concluded that the MMPA does not meet the requirements of Article III since "these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product."[40] Therefore, the Panel found, "Article III: 4 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.*"[41]

Under this ruling, a GATT party is prohibited from outlawing or limiting products based upon the manner in which they were produced, even where that method is banned because of its environmental destructiveness. This holding cuts a broad swath through environmental policy-making by prohibiting, for instance, distinctions between timber produced in a sustainable manner and timber produced in an unsustainable manner,[42] or fish caught with

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38. GATT, *supra* note 1, art. III, para. 2.

39. GATT Panel Ruling, *supra* note 2, at 41, para. 5.14.

40. *Id.* at 41, paras. 5.14-5.15.

41. *Id.* at 41-42, para. 5.15 (emphasis added). The GATT panel determined that, because the MMPA does not fall within Article III, it necessarily falls into Article XI, which prohibits quantitative restrictions on imports. The Panel concluded that the MMPA violates Article XI, a conclusion which the United States did not present any argument to refute. *Id.* at 42.

42. Tropical deforestation has emerged as one of the most critical environmental issues of the 1990s, not only for the nations in which those forests are found, but also for the world community. For instance, forests play a critical role in regulation of the global climate, *see* WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-91, at 109-10 (1990), and contain a storehouse of genetic resources which will be essential to maintain the productivity of current food crops, as well as to develop new medicines and other extremely important products. *See* OVERSEAS DEV. COUNCIL, TROPICAL FORESTS: CONSERVATION WITH DEVELOPMENT?, No. 4, at 3 (1990).

However, tropical forests are disappearing at an alarming rate. It is estimated that between one and two percent of the world's tropical forests are destroyed each year, although rates in certain countries are much higher. *See* Sandra Postel & John C. Ryan, *Reforming Forestry*, *in* WORLDWATCH INSTITUTE, STATE OF THE WORLD 1991, at 74 (Linda Starke ed., 1991); JUDITH GRADWOHL & RUSSELL GREENBERG, SAVING THE TROPICAL FORESTS 33-37

dolphin-killing driftnets and fish caught through more humane methods.[43]

(1988). Recent evidence suggests that the rate of deforestation may be even higher than previously believed. *See* WORLD RESOURCES INSTITUTE, *supra* at 101-05. If these trends continue, all but the most remote tropical forests will be gone within the next several decades. *See* Postel & Ryan, *supra* at 80; *see also* Richard L. Williamson, *Building the International Environmental Regime: A Status Report*, 21 U. MIAMI INTER-AM L. REV. 679, 709-14 (1990); *Timber Import Ban Sought for Countries Destroying Forests*, The Reuter Library Report, Nov. 29, 1988, *available in* LEXIS, Nexis Library. Deforestation in the tropics is driven by many causes, including impoverished farmers seeking their own land, cutting of firewood, mining, and large-scale export-oriented agriculture. *See* Williamson, *supra* at 711-12; WORLD RESOURCES INSTITUTE, *supra* at 106-07; PUBLIC POLICIES AND THE MISUSE OF FOREST RESOURCES 15-16 (Robert Repetto & Malcolm Gillis eds., 1988). However, in many areas, such as Southeast Asia, deforestation is driven primarily by timber companies feeding the market for tropical hardwoods in the developed countries. *See id.*; Postel & Ryan, *supra* at 76-77; *see generally* George Marshall, *The Political Economy of Logging: The Barnett Inquiry into Corruption in the Papua New Guinea Timber Industry*, 20 THE ECOLOGIST 174 (1990). Only a tiny proportion, far less than one percent, of logging in the tropics is performed on a sustained-yield basis. Postel & Ryan, *supra* at 79. Further, timber operations often open the floodgates to other kinds of deforestation by punching roads into virgin forests that are followed by colonists who strip the forest for farmland or pasture. *See id.* at 79-80; GRADWOHL & GREENBERG, *supra* at 39.

Conservationists have begun to respond to the deforestation crisis. For instance, the International Tropical Timber Organization has attempted to define guidelines for sustainable production of tropical timber. Postel & Ryan, *supra* at 91-92. In order to stem the flow of unsustainably produced timber into developed country markets, conservationists have begun to examine measures that will encourage sustainable production of timber for export. For instance, the European Parliament, recognizing that both consumers and producers of tropical timber must respond to the threats created by tropical deforestation, has announced plans to restrict unsustainably produced tropical timber imports from Southeast Asian Nations, with the possibility of a total ban on imports by 1994. *Southeast Asia: ASEAN and EC Foreign Ministers to Talk Timber*, Inter Press Service, Feb. 9, 1990, *available in* LEXIS, Nexis Library. These efforts have apparently been stymied by the Commission of the European Community, which fears that such limits would violate GATT. *EC Politician Says GATT Is Blocking Environmental Policy*, Kyodo News Service, July 1, 1991, *available in* LEXIS, Nexis Library. Less ambitious legislation has been introduced in the United States that would require labels on tropical timber indicating the country where this timber was produced. S. 1159, 102nd Cong., 1st Sess. (1991). The Panel's interpretation of GATT appears to doom such efforts to prevent export-driven destruction of tropical forests.

43. Driftnets are huge nets, often 20 or more miles long, that are set in the open ocean and allowed to drift, entangling all but the smallest creatures with which they come in contact. They are favored by the squid fleets of Japan, Taiwan, and South Korea. Colin James & Lincoln Kaye, *A Catch-All Dilemma*, FAR EASTERN ECON. REV., Sept. 1989, at 139, 139-40. In recent years, as many as 30,000 miles of driftnets have been set each night. Scott McCredie, *Controversy Travels with Driftnet Fleets*, SEA FRONTIERS, Jan.-Feb. 1990, at 13. These nets are indiscriminate, catching not only squids, but large numbers of non-target species, including marine mammals, tuna, salmon, and other kinds of economically important fish. *See* Douglas M. Johnston, *The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options*, 21 OCEAN DEV. & INT'L L. 5, 8-9 (1990); *Driftnets: The Killing Goes On*, SEA FRONTIERS, Dec. 1990, at 5.

Driftnets have had a drastic effect on the marine environment. Recent evidence sug-

The end result is that products whose environmental costs are externalized will be favored because they are, as a rule, cheaper than products where the environmental costs of production are internalized. That is, the Panel interprets GATT so that it systematically favors products produced in an environmentally destructive manner.

The Panel's legal reasoning reads into Article III a new requirement—that regulations fall within the Article only if they are directed at products themselves—that is simply not supported by the language of that Article. The regulations covered by Article III include "all laws . . . affecting . . . [the] internal sale, offering for sale [or] purchase" of products.[44] The MMPA falls into this category because it affects the internal sale of yellowfin tuna by limiting the sale and distribution of tuna caught by setting upon dolphins.[45] The Panel's reading of Article III, limiting its application to laws that regulate "the product as such,"[46] narrowly constricts the scope of the Article. Further, there is no question that the MMPA meets the national treatment requirement of Article III because U.S. tuna producers are subject to more stringent requirements than foreign producers.

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gests that driftnets have nearly wiped out the albacore tuna fishery in the South Pacific and, along with it, the economies of many South Pacific islands. James & Kaye, *supra* at 139-40.

In response, the United Nations adopted a resolution calling for the end of driftnet fishing by July 1992 unless scientific evidence can be developed demonstrating that driftnets can be used in a sustainable fishery. *Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas*, U.N. Doc. A/C.2/44/L.81 (Dec. 11, 1987). In 1987, the U.S. Congress passed legislation requiring the President to certify any nation under the Pelly Amendment that does not adopt a monitoring program to determine the extent of environmental damage caused by driftnets. Driftnet Impact Monitoring, Assessment and Control Act of 1987, 16 U.S.C. § 1822 (Supp. 1991). Congress recently amended this act, instructing the Secretary of Commerce to certify to the President information showing any nation under the Pelly Amendment that does not comply with the United Nations resolution. 16 U.S.C. § 1826(f) (Supp. 1991).

Japan initially threatened to seek redress through GATT if any trade sanctions were imposed upon it because of its driftnetting practices. *Japan Prepares to Fight to Retain Driftnet Fleet Against US Opposition*, J. COM., Nov. 5, 1991, at 5A. However, Japan has now agreed to end driftnetting by the end of 1992. Tom Kenworthy, *Japan to End Drift Net Fishing in Bow to Worldwide Pressure*, WASH. POST, Nov. 27, 1991, at A3. It is hoped that other driftnetting nations will follow suit. *Id.*

44. GATT, *supra* note 1, art. III, para. 2.

45. 16 U.S.C. § 1371; 50 C.F.R. Part 216 (1990).

46. GATT Panel Ruling, *supra* note 2, at 41, para. 5.14.

B. The Pelly Amendment

The Panel declined to decide the legality of the Pelly Amendment under GATT on the grounds that it had not been implemented administratively and that it was possible for the Amendment to be implemented in a manner consistent with GATT.[47] However, given the Panel's very narrow reading of Article XX, as discussed below, it is difficult to conceive of any reasonable administrative interpretation of the Pelly Amendment that would not run afoul of the Panel's ruling.

C. GATT Article XX Exceptions

If a particular trade restriction violates the general principles of GATT, it may nonetheless be valid if it falls within one of the exceptions contained in Article XX.[48] For instance, the United States prohibits imports of fresh beef from tropical countries where hoof-and-mouth disease occurs in order to prevent the spread of the disease into previously-uninfected American cattle.[49] This import restriction, although in conflict with GATT's general prohibition against import bans, is nonetheless allowable because, under Article XX(b), a nation may impose trade restrictions designed to protect the life and health of animals such as beef cattle.[50] Other Article XX exceptions allow trade restrictions in order to attain specific objectives ranging from protection of national

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47. *Id.* at 42-43, paras. 5.20-5.21.

48. The relevant provisions of Article XX provide:

> 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:
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> . . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . . .
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . .;
>
> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

GATT, *supra* note 1, art. XX.

49. 9 C.F.R. § 94.1 (1991).

50. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 40 (1991).

treasures to prevention of prison labor.[51] The United States defended the MMPA from Mexico's attacks by arguing that it falls within two Article XX exceptions: Article XX(b), which allows trade restrictions "necessary to protect human, animal or plant life or health,"[52] and Article XX(g), excepting trade restrictions "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[53]

1. Article XX(b)

The GATT Panel premised its conclusion that the MMPA does not fall within Article XX(b) on three major propositions. First, the Panel reasoned that Article XX(b) applies *only* to measures taken to protect human, animal or plant life or health *within* the jurisdiction of a particular GATT party. Thus, the MMPA, which aims to protect dolphins *outside* the jurisdiction of the United States, does not fall within Article XX(b).[54]

Nothing in the language of Article XX(b) requires or even implies such a limitation. Article XX(b) allows trade restrictions for the protection of human, animal or plant life with no stated limitation that those living beings must be within the boundaries of the country enacting the restrictions.

In a break from the rigid textualists approach, on which it relies for most of its decision, the Panel conclusion relied not upon the language of XX(b) but upon a cursory examination of the drafting history of that Article. However, in so doing, the Panel clearly misreads the history of Article XX(b). An examination of the circumstances surrounding the original GATT negotiations in the late 1940s, when Article XX(b) was agreed upon, reveals the extent of the Panel's error. Many of the countries that negotiated the GATT at that time had in place laws designed to protect human health and conserve wildlife beyond their borders. These included such multilateral efforts as an international ban on trade in matches made with white phosphorus, a chemical that causes a

51. GATT, *supra* note 1, art. XX. If Article XX exceptions such as these are read as narrowly as the Panel has read Articles XX(b) and (g), the ability of the GATT Contracting Parties to take measures in support of these non-environmental objectives could be severely undermined.

52. *Id.* art. XX(b).

53. *Id.* art. XX(g).

54. GATT Panel Ruling, *supra* note 2, at 44-45, paras. 5.24-5.25.

severe occupational disease,[55] and international conventions to protect, seals, sea otters,[56] and migratory birds.[57] Similarly, many countries unilaterally enacted trade measures to protect ocean fisheries,[58] wildlife,[59] and wild birds.[60] The United States, the drafter of the language that ultimately became Article XX(b), believed that these conservation measures would be included within the scope of Article XX(b).[61]

Precisely because the meaning of Article XX(b) had already been agreed upon, there was very little discussion of that section at the GATT negotiations. In fact, the language finally incorporated into Article XX(b) had been discussed at length in previous trade negotiations, particularly in connection with the first comprehensive multilateral trade negotiations in 1927.[62] These earlier negotiations clearly established that laws to "protect human, animal or plant life or health" included measures to prevent the "degeneration or extinction" of animals, as well as to protect animals and plants from imported pests and diseases.[63]

The Panel's conclusion is based upon changes made by the drafters in the proposed language for Article XX(b). Although the

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55. Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, Sept. 26, 1906, 203 Consol. T.S. 12.

56. Convention between the United States and other Powers providing for the preservation and protection of fur seals, July 7, 1911, 37 Stat. 1542.

57. Convention for the protection of migratory birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702. GATT was originally conceived at the Bretton Woods conference, just after World War II, as the working mandate of the proposed International Trade Organization (ITO), which would have been part of the United Nations system. Dennis Thompson, *GATT's Fortieth Birthday*, 22 J. WORLD TRADE 5 (1988). The GATT was intended to codify the tariff reductions that were expected to be produced by the ITO when it came into existence. However, the U.S. Congress refused to approve American membership in the ITO. The GATT is an executive agreement, and not a treaty. William J. Davey, *An Overview of the General Agreement on Tariffs and Trade*, *in* HANDBOOK OF GATT DISPUTE SETTLEMENT 7, 8-9 (1991).

58. Act of June 6, 1924, ch. 621, 44 Stat. 752-53.

59. Act of May 25, 1900, ch. 553, 31 Stat. 187 (prohibits interstate transportation of game).

60. Act to reduce tariff duties and to provide revenue for the government and for other purposes, § 347, 38 Stat. 114, 148 (1913).

61. Charnovitz, *supra* note 50, at 44-45.

62. *See* International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, art. IV(4), 97 L.N.T.S. 393, 405 (1927) [hereinafter International Convention]. This Convention, although ratified by a number of countries, ultimately failed. Charnovitz, *supra* note 50, at 41. The language from previous negotiations such as these was incorporated in Article XX(b). The GATT negotiators considered it "almost boilerplate." *Id.* at 44.

63. *See* International Convention, *supra* note 62, at 427.

original U.S.-British proposal for Article XX(b) was the same as the current language, at one point during the negotiations it was proposed that the language be tightened to allow trade restrictions "[f]or the purpose of protecting human, animal or plant life or health, *if corresponding domestic safeguards under similar conditions exist in the importing country.*"[64] However, the proposal was rejected and the underscored phrase was not included in the final version of Article XX(b). From this, the Panel concluded that "the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard the life or health of humans, animals or plants within the jurisdiction of the importing country."[65]

The drafters deleted the underlined phrase not because Article XX(b) was intended to be limited to domestic jurisdiction. Rather, that language was dropped because it was considered confusing and, when read in conjunction with the preamble of Article XX, redundant.[66] Further, nothing in the deleted phrase necessarily limits the scope of the Article XX(b) exception to domestic resources. Instead, the excluded language would have required only that foreign producers be subject to safeguards "corresponding to" the regulations imposed on domestic producers. Had this language remained in the final version, the MMPA would satisfy this requirement because the safeguards for dolphins imposed upon foreign producers under the MMPA not only correspond to the safeguards imposed on domestic producers but also hold U.S. fishermen to even more stringent restrictions than foreign fleets with regard to the average rate of incidental takings of marine mammals.[67] So, the Panel's reliance on the drafting history is

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64. *See* GATT Panel Ruling, *supra* note 2, at 45, para. 5.26.

65. GATT Panel Ruling, *supra* note 2, at 45.

66. Charnovitz, *supra* note 50, at 44. The Preamble is reproduced, in pertinent part, at note 48, *supra*.

67. *See supra* note 34 and accompanying text. The MMPA requires that the dolphin conservation programs adopted by foreign fishing fleets include "such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities *as are made applicable to United States vessels.*" 16 U.S.C. § 1371(c)(2)(B)(ii)(I) (emphasis added); *see also* Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 55 Fed. Reg. 11,921 (to be codified at 50 C.F.R. Part 216) (National Oceanic and Atmospheric Administration's defense and explanation of comparability standards for foreign fleets)[hereinafter Taking of Marine Mammals].

Even if the Panel correctly divined the intent of Article XX(b)'s drafters, the Panel assumes that those drafters intended the Article to be static, unable to change over time with changes in the perceived need for and appropriateness of measures to protect living things. However, the relatively open-ended language of Article XX(b) suggests that GATT's

misplaced.

Even if the clause included in the earlier draft of Article XX(b) could be interpreted to restrict that section to domestic concerns, the fact that the language was dropped from the final version of Article XX(b) suggests that the drafters did not intend the Article to be so limited. The Panel, however, improperly drew precisely the opposite inference.

Nor is the Panel's conclusion that Article XX(b) was intended to be limited to sanitary measures supported by the plain language of the Article. If the drafters of Article XX(b) had intended it to apply only to sanitary rules, they could have referred specifically to "sanitary" measures, a term having been used in many treaties and with a well understood meaning within international trade parlance at the time of the initial GATT negotiations.[68]

The second proposition upon which the Panel based its conclusion regarding Article XX(b) was the policy argument that a broader interpretation of the Article could undermine the international trade system:

> 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 protection 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.[69]

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original drafters intended it to be flexible in order to cover a variety of situations that they could not foresee.

68. *See* Charnovitz, *supra* note 50, at 40. Under the current Uruguay Round of GATT negotiations, the GATT parties are nearing agreement on a code governing the use of sanitary regulations. "Sanitary and phytosanitary measures" is precisely defined in the most recent draft agreement and deals with such issues as the spread of disease, pests, and disease-carrying organisms as well as contaminants and toxins in food. *See Draft Text on Sanitary and Phytosanitary Measures*, MTN.GNG/NG5/WGSP/7, Nov. 20, 1990, at 12 [hereinafter *Text on Measures*]. It is apparent from the agreement that the Uruguay Round negotiators consider sanitary and phytosanitary measures to be only a subset of the measures covered under Article XX(b). *See* Letter from Eric Christensen, Attorney for Community Nutrition Institute, to James T. Grueff, Uruguay Round Group for Health-Related Barriers to Agricultural Trade, Foreign Agriculture Service, U.S. Department of Agriculture 2 (May 23, 1991)(on file with the authors).

69. GATT Panel Ruling, *supra* note 2, at 45, para. 5.27.

Notably, the Panel gave great weight to *trade* policy arguments while giving short shrift to other important international values including protection of the global commons. In any event, this parade of horribles is tremendously farfetched. First, even if Article XX(b) is read to allow protection of extraterritorial resources, a party enacting such protections must meet the requirements of Article XX's preamble, which states that the trade measures must not "constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade . . . ."[70] Thus, a country cannot use Article XX measures for protectionist purposes, even if the measures are intended to protect resources outside that country. The focus, instead, should be on whether the trade measure is protectionist or serves a legitimate government purpose (such as conservation), not on whether the trade measure meets the kind of mechanical legal tests employed by the Panel.

Second, laws such as the MMPA, through which the United States imposes the same or similar environmental requirements on importers and domestic producers, do not dictate domestic U.S. environmental standards to other countries. They merely set standards for access to U.S. markets that all producers must meet, whether foreign or domestic when engaging in an activity that strongly impacts the global commons. Exporters and other importers remain free to follow whatever standards they desire for their domestic production, which is still the vast majority of production even in countries highly dependent upon exports to the United States.[71] These standards are not unlike thousands of other regulatory, technical, and social standards and norms that importers must meet when manufacturing items for the U.S. market or any

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70. GATT, *supra* note 1, art. XX. While the language concerning "disguised restrictions on international trade" was intended as a check on abuses of sanitary regulations, it has been interpreted extremely narrowly by recent GATT Panels, so that a measure is considered "disguised" only if it has never been publicly announced. *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc. L/5198 (Feb. 22, 1982) *in* BASIC INSTRUMENTS AND SELECTED DOCUMENTS [Hereinafter BISD] 29th Supp. 91, 108, para. 4.8 (1982); *United States—Imports of Certain Automotive Spring Assemblies*, GATT Doc. L/5333 (May 26, 1983) *in* BISD 30th Supp. 107, 125, para. 56 (1983). This phrase should be reinterpreted so that protectionist measures that are falsely justified by a purpose permissible under Article XX are considered to be disguised restrictions, even if they are publicly announced. *See* Charnovitz, *supra* note 50, at 47-48.

71. In 1989, Mexico's tuna exports to the United States comprised only 17.1% of the total, while 20.5% of exports went to Japan and 48.8% went to Italy. In 1990, Mexico's tuna exports to the U.S. comprised only 3% of its sales. David Clark Scott, *US Tuna Ban May Snag Trade Talks with Mexico*, CHRISTIAN SCI. MONITOR, Nov. 7, 1990, at 6.

other market.[72] For instance, countries importing cars into the United States must conform their products to the American market through measures including printing instructions and labels in English, calibrating instruments and gauges in English rather than metric units, installing devices required by American consumer protection laws, and, in some cases, moving the controls from the right to the left side of the car. There is no reason to believe that a few additional changes in the manufacturing process to meet environmental requirements would doom the exporter. The fact that American producers have to meet the same standards, and thus bear the associated costs, belies any claim that such standards would hinder foreign production or exports.

Third, the Panel's conclusion suggests that the United States should have little or no control over imports into its markets, even if those imports are resulting in environmental devastation all over the world. In fact, the demand for imports in the industrialized countries contributes heavily to a variety of global environmental problems, ranging from destruction of tropical forests[73] to obliteration of species such as elephants for luxury items like ivory[74] to over-fishing of a wide variety of ocean species.[75] The Panel decision hamstrings U.S. environmental policy and that of other environmentally-minded importing countries by severely restricting the ability of those governments to control the flow of environmentally destructive products into their domestic markets. Thus, the sovereignty of GATT parties to regulate their markets is fundamentally eroded.

The third proposition upon which the Panel based its inter-

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72. The United States has about 89,000 distinct technical standards. Presentation of Maureen Breitenberg, National Institute of Technical Standards, U.S. Department of Commerce, to U.S. Environmental Prectection Agency, International Environment Advisory Committee, (Wash. D.C., Oct. 23, 1990). Other industrialized nations have between 6,000 and 88,000 standards. *Id.*

73. *See* George Marshall, *The Political Economy of Logging: The Barnett Inquiry into Corruption in the Papua New Guinea Timber Industry*, 20 THE ECOLOGIST 174 (1990) (Papua New Guinea government inquiry documenting fraud, corruption and massive deforestation driven by timber companies from industrialized nations).

74. *See* J. COM., Sept. 16, 1991, at 5A (concerning ban on trade in ivory aimed at saving African elephants from extinction).

75. *See* Lawrence Ingrassia, *Dead in the Water: Overfishing Threatens to Wipe Out Species and Crush Industry*, WALL ST. J., July 16, 1991, at A1 (concerning depletion of ocean fisheries by high-seas driftnets); Richard Palmer & Andrew Yates, *Seas Turn to Marine Deserts as Fishermen Cast a 'Wall of Death'*, SUNDAY TIMES, June 2, 1991, at Home News section (same); *Commercial Fisheries Showed Gains in 1990*, N.Y. TIMES, July 16, 1991, at A16 (concerning depletion of ocean fisheries).

pretation of Article XX(b) is that, even if that section were interpreted to allow the protection of resources outside national boundaries, the MMPA still does not fall within this exception. It reasoned that the MMPA provisions are not "necessary," as required under Article XX(b), because the United States could have negotiated "international cooperative arrangements" with Mexico to protect dolphins.[76] This reasoning demonstrates the danger of the very narrow interpretation that the term "necessary" has been given in previous GATT rulings. One panel held that a law is "necessary" under Article XX(b) only if no other alternative measures are available to achieve the same result.[77] In the present case, the Panel, relying on this reasoning, suggested that the United States could have pursued multilateral arrangements to preserve dolphins without examining the practicality of this strategy. Apparently unknown to the Panel, the United States has pursued dolphin conservation through the Inter-American Tropical Tuna Convention (IATTC),[78] but, at least partly because of Mexico's refusal to participate, this effort has largely failed to curtail the continuing slaughter of dolphins.[79] So, if GATT Panels continue to define "necessary" in this very restrictive way, it will be difficult or impossible for contracting parties to justify any particular environmental measure on the grounds that plausible alternative measures will, arguably, always be available. This is particularly true if GATT Panels like this one fail to examine whether those alternatives are practicable or effective.[80]

The Panel further noted that even if the import restriction were the only option reasonably available to the United States, the particular measure chosen could not be considered to be "necessary" within the meaning of Article XX(b).[81] The MMPA sets the

76. GATT Panel Ruling, *supra* note 2, at 46.

77. *Thailand—Restrictions on Importation and Internal Taxes on Cigarettes*, GATT Doc. DS10/R, paras. 74, 81 (1990). *See also* Charnovitz, *supra* note 50, at 48-49.

78. Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (entered into force Mar. 3, 1950)[hereinafter IATTC Convention].

79. Contrary to the Panel's view, "in this case, the United States is not taking a maverick, unilateral action opposed by the rest of the world." Editorial, *Tuna Trade Troubles*, J. Com., Sept. 11, 1991, at 8A. *See also infra* text accompanying notes 113-18 (concerning attempts by the IATTC, at the urging of the United States, to adopt a dolphin conservation program).

80. For a critique of the GATT panel's interpretation of "necessary," see Charnovitz, *supra* note 50, at 49-50.

81. GATT Panel Ruling, *supra* note 2, at 46, para. 5.28.

maximum incidental dolphin taking rate that foreign fleets must meet during a particular period to export tuna to the U.S. to the taking rate actually recorded for U.S. fishing vessels during the same period.[82] According to the Panel, Mexican fleets could not know whether, at any given time, their harvesting conformed to MMPA standards, so the U.S. could not claim that this limitation on trade was necessary.[83] The Panel's logic is tenuous at best. While the MMPA standards should be more accessible to exporters,[84] this does not mean that the law is unnecessary. It simply means that it is difficult for importers to determine whether they comply with the MMPA.[85] Changes in the law would quickly remedy these relatively minor flaws.

2. Article XX(g)

The United States also defended the MMPA as a conservation measure falling within Article XX(g), which allows import restrictions aimed at "conservation of exhaustible natural resources."[86] The Panel concluded that Article XX(g)'s requirement that import restrictions be taken " 'in conjunction with restrictions on domestic production or consumption' " does not allow restrictions to protect resources, like dolphins, that lie outside the jurisdiction of the country enacting those restrictions.[87]

This conclusion belies the plain language of Article XX(g), which allows conservation restrictions if they are coupled with "re-

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82. 16 U.S.C. § 1371(a)(2)(B)(ii) (1985 & Supp. 1991).

83. GATT Panel Ruling, *supra* note 2, at 46, para. 5.28.

84. In the National Oceanic and Atmospheric Administration's (NOAA) discussion of comments received in response to its proposed regulations implementing the comparability requirements, it admitted that the ability of a foreign nation "to achieve a comparable mortality rate on the schedule required remains questionable." Taking of Marine Mammals, *supra* note 67, at 11,923. If the GATT panel had limited its holding to this narrow ground, it is unlikely that it would have raised a crisis in confidence in the capacity of GATT panels to handle environmental issues and would almost certainly have been quickly settled. Further, only minor modification of the MMPA would have brought it in compliance with such a ruling.

85. GATT imposes transparency standards on Contracting Parties through measures such as GATT Article X and the GATT "Standards Code." *See Technical Barriers to Trade*, MTN.GNC/RM/W/7, Oct. 31, 1991 (containing draft Uruguay Round agreement on technical barriers to trade). These measures require that a government publish proposed trade regulations and allow comments on those regulations by importers. *Id.* art. 2.9.

While technically not violating these requirements, the MMPA does seem to come up short in being accessible and easily understood by importers.

86. GATT Panel Ruling, *supra* note 2, at 46, para. 5.31.

87. *Id.* at 46-47, para. 5.31.

strictions on domestic production *or consumption*."[88] The presence of the disjunctive "or" suggests that limits on consumption alone are sufficient to protect a conservation program under Article XX(g). The language of this section in no way suggests that these restrictions need be limited to domestic resources. To the contrary, because domestic consumption restrictions alone are sufficient to invoke the Article, this language implies that production need not be in the control of the country enacting the conservation program. In other words, consumption restrictions may be placed on resources produced at home or abroad. This reading comports with not only the plain language of Article XX(g) but also with the need to conserve critical international resources ranging from ocean fisheries to forests. Plainly, the MMPA contains restrictions on domestic *consumption* of dolphin-unsafe tuna and the Act's tuna embargo provisions are designed primarily to ensure that these restrictions effectively protect and conserve dolphins. Thus, the MMPA falls squarely within Article XX(g)'s requirement that domestic controls on production *or consumption* be enacted.

The Panel's conclusion is also at odds with the drafting history of Article XX(g). At the time the original GATT negotiators agreed to Article XX(g), many measures aimed at the conservation of biological resources, including international resources like fisheries, had been enacted.[89] It was understood that Article XX(g) included such international resources.[90] For instance, considerable debate existed over whether to include specific wording related to fisheries conservation in Article XX(g), but this language was not used because the negotiators believed that the "conservation of exhaustible natural resources" language implicitly contained such measures.[91]

As with its analysis of Article XX(b), the Panel concluded that reading Article XX(g) to include extraterritorial resources would allow nations to "unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."[92] This argument is even more inexplicable in the context of Article XX(g) than in the context of Article XX(b). Article XX(g) re-

88. GATT, *supra* note 1, art. XX(g) (emphasis added).
89. U.N. Doc. E/PC/T/147, at 29-30.
90. U.N. Doc. E/PC/T/B/SR/27, at 14.
91. Charnovitz, *supra* note 50, at 46-47.
92. GATT Panel Ruling, *supra* note 2, at 47.

quires that a domestic conservation program be in place for the imposition of conservation-oriented trade restrictions. This requirement, along with the limits prescribed in the preamble of Article XX requiring that the trade measures not be discriminatory or a disguised trade barrier, effectively prevents protectionism in the guise of conservation measures.

By contrast, under the Panel Ruling, a country can prevent its own consumers from buying products that endanger environmental resources outside its jurisdiction. This holding severely restricts the ability of industrialized countries to prevent potentially disastrous phenomena such as global warming, ozone depletion, and destruction of ocean fisheries, all of which are caused at least in part by consumer demand in these countries.[93]

Finally, quoting a previous Panel's decision, the Panel found that the MMPA does not "relat[e] to the conservation of exhaustible natural resources" under the terms of Article XX(g) because importers will find it difficult to determine if they comply with the MMPA's restrictions on dolphin destruction.[94] As with its reasoning under Article XX(b), the Panel's ruling here is misapplied. A law's lack of transparency to importers is no basis on which to conclude that it is not related to a goal as legitimate as conservation.

D. MMPA's Intermediary Embargo

The Panel also struck down the intermediary nations embargo of the MMPA, which prevents third countries that buy dolphin-unsafe tuna from producers like Mexico from selling tuna in the United States.[95] The Panel concluded that, even though American fishermen must meet more restrictive requirements than intermediary tuna shippers, the intermediary embargo does not meet the national treatment requirements of Article III because it is "not

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93. *See, e.g.*, ANN DAVISON, INTERNATIONAL ORGANIZATION OF CONSUMER UNIONS, BUYING THE EARTH 1-2 (1991); Christopher Flavin, *Slowing Global Warming*, *in* WORLDWATCH INSTITUTE, STATE OF THE WORLD 1990, at 17-22 (Linda Starke ed., 1990); *see also supra* notes 73-75 and accompanying text.

94. GATT Panel Ruling, *supra* note 2, at 47. The Panel relied upon a previous panel's findings that a measure "would be considered as 'relating to the conservation of exhaustible natural resources' within the meaning of Article XX(g) only if it was primarily aimed at such conservation." *Id.* (citing Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. 46,268 (Mar. 22, 1988) *in* BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 35 Supp. 98 (1988)). This interpretation of the "relating to" language may severely impair efforts to preserve the environment. *See* Charnovitz, *supra* note 50, at 50-51.

95. GATT Panel Ruling, *supra* note 2, at 48-49, paras. 5.35-5.40.

applied to tuna as a product."[96] Because the embargo did not fall within the scope of Article III, the Panel found that it was a quantitative restriction inconsistent with Article XI.[97] As with its previous discussion of Article III, the Panel's reasoning is intrinsically flawed.

The United States argued that the intermediary embargo was exempt from GATT under Article XX(d). That section allows trade restrictions that are "necessary to secure compliance with laws or regulations which are not inconsistent with" GATT.[98] The Panel held that, because the primary boycott of Mexican tuna was illegal under GATT, the intermediary embargo could not be justified under Article XX(d).[99] As discussed above, however, the embargo of Mexican tuna can properly be seen as consistent with GATT because it is necessary to ensure that the primary embargo is not circumvented by fishermen who simply transship dolphin-unsafe tuna through countries that are not directly embargoed under the MMPA.

E. Dolphin-Safe Labelling Requirements

With respect to the dolphin-safe labelling provisions of DPCIA,[100] Mexico argued that both Article IX, which regulates the use of marks of origin, and Article I, which prohibits discrimination against imports, violate GATT. The Panel rejected these contentions and rightly determined that the DPCIA does not violate these provisions.[101]

However, its reasoning provides some basis for concern. The Panel reasoned that the dolphin-safe labelling provisions are not discriminatory because they "did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the

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96. *Id.* at 48, para. 5.35.

97. *Id.* Article XI disallows any prohibitions or restrictions other than "duties, taxes or other charges" to be instituted or maintained by a contracting party on the importation of any product from the territory of another contracting party. GATT, *supra* note 1, art. XI.

98. GATT, *supra* note 1, art. XX(d).

99. GATT Panel Ruling, *supra* note 2, at 48-49, paras. 5.39-5.40. The Panel also concluded that the intermediate embargo is not justified under Article XX(b) or XX(g), relying on its previous reasoning for both sections. *Id.* at 48, para 5.38. As discussed above, its reasoning with respect to these provisions is seriously flawed.

100. 16 U.S.C. § 1385 (Supp. 1991). *See supra* text accompanying notes 22-23.

101. *See* GATT Panel Ruling, *supra* note 2, at 49-50, paras. 5.41-5.44.

use of tuna harvesting methods."[102] This language illustrates the Panel's previous conclusion that a government cannot establish any measure that would confer an advantage upon producers using environmentally sensitive production methods.[103] For instance, if the United States imposed an excise tax upon dolphin-unsafe tuna in order to prevent this tuna from undercutting dolphin-safe producers through lower prices, the tax would provide "a government-conferred advantage" to dolphin-safe producers in violation of GATT as interpreted by the Panel.[104] This example underscores the shackles that the Panel decision places upon governments attempting to devise policies that encourage internalization of environmental costs and support environmentally sustainable production methods.

F. The Panel's Decision Could Seriously Undermine International Environmental Protection

In an effort to limit the impact of its decision, the Panel stated that:

> [A]doption of [the Panel's] report would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies, nor the right of the CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement.[105]

It is evident, however, that the Panel's decision has serious implications for both domestic and international environmental policy.

1. Unilateral Actions to Protect the Environment

A continuing theme of the Panel's decision is that GATT does not allow unilateral imposition of trade measures to protect the environment.[106] While cooperative, multilateral environmental ef-

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102. *Id.* para. 5.42.

103. *See supra* text accompanying notes 41-46.

104. *Cf.* GATT Panel Ruling, *supra* note 2, at 49-50, para. 5.42. The Panel elsewhere suggests that a country can use tax policies to support environmental regulations. GATT Panel Ruling, *supra* note 2, at 50, para. 6.2. This suggestion runs directly contrary to its analysis of national treatment requirements in connection with the DPCIA.

105. *Id.* at 51, para. 6.4.

106. The Panel's conclusion that GATT may sanction only international environmental

forts are certainly desirable, by themselves they may be insufficient to prevent the destruction of critical environmental resources.[107] Besides, a number of factors work against the success of multilateral actions. For instance, parties often have an economic incentive not to cooperate with others to preserve common resources such as fisheries.[108] Diplomatic considerations can stand in the way of mutual cooperation.[109] The shear number of parties involved can make progress slow or impossible.[110] Finally, the long delays incident to creating the necessary consensus for multilateral cooperation may prevent an effective response to a rapidly developing environmental crisis.[111] Often, "[u]nilateral action may be the only feasible alternative to inaction."[112]

The dolphin case itself demonstrates the difficulty of achieving international consensus in order to conserve common resources. Since 1976, the Inter-American Tropical Tuna Commission (IATTC),[113] largely at the behest of the United States, has attempted to address dolphin mortality due to tuna fishing.[114] Despite these efforts, the IATTC is struggling to achieve the goals of its dolphin conservation program.[115] It was not until 1986 that all

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agreements is clearly at odds with the drafting history of GATT, especially Article XX(g). *See* Charnovitz, *supra* note 50, at 54.

107. *See, e.g.*, Mathews, *supra* note 33, at A21 ("Trade measures are often the only means short of a multilateral treaty to influence the behavior of other countries. Even within a broad treaty, trade sanctions are an effective tool to discourage free riders, countries that would like to enjoy a treaty's benefits without conforming to its requirements.").

108. *See, e.g., Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1569-70 (1991); Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421, 429-30 (1989); Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51, 80 (1981).

109. Hahn & Richards, *supra* note 108, at 435. Such problems have occurred with the enforcement of international whaling agreements. The friction that can develop over what many leaders view as a minor issue is often seen more as an irritant than anything else. Consequently, nations are reluctant to criticize one another's violations of such conventions. *See* Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DENV. J. INT'L L. & POL'Y 271, 286 (1989).

110. Hahn & Richards, *supra* note 108, at 437.

111. *See* Bilder, *supra* note 108, at 90-91.

112. *Id.* at 95.

113. The IATTC was created in 1949 under an agreement between the United States and Costa Rica. *See* IATTC Convention, *supra* note 78. Current members are Costa Rica, France, Japan, Nicaragua, Panama, the United States, and Vanuatu. Mexico withdrew from the IATTC in 1980. FIRST SUBMISSION OF THE UNITED STATES, *supra* note 30, at 10-11 & nn. 21-23.

114. Steiner, *supra* note 6, at 20-21.

115. Telephone Interview with David Phillips, Executive Director, Earth Island Institute (Nov. 15, 1991). Congress has instructed the Administration to continue to seek multi-

nations involved in the purse seine fishery on the ETP participated in the program.[116] In 1990, the IATTC governments agreed to establish a program aimed at significantly reducing dolphin mortality in the purse seine fishery, with the ultimate aim of eliminating dolphin mortality. While all the other member nations of the IATTC have joined in this program, Mexico refuses to participate.[117] As a result of the inability to reach a cooperative international solution, there seems little choice but for the United States to pursue unilateral actions to prevent dolphin deaths, particularly since the populations of certain species of dolphins are dangerously depleted.[118]

Unilateral actions have been essential for success in many other areas of environmental protection. For instance, it is doubtful that the International Whaling Convention (IWC)[119] would ever have succeeded if the United States had not threatened to apply trade sanctions to countries that refused to comply with IWC conservation restrictions.[120] Yet the interpretation of the Panel in the present case implies that the threatened U.S. embargo was clearly illegal under GATT. The embargo would have applied to fisheries products rather than to whaling products, since whaling products have not been imported into the United States for many years.

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lateral solutions to the problem of dolphin deaths in the ETP fishery. DPCIA, 16 U.S.C. § 1385(h) (Supp. 1991).

116. FIRST SUBMISSION OF THE UNITED STATES, *supra* note 30, at 11. Until 1986, Mexico refused to participate in the IATTC's observer program. Therefore, 1986 was the first year when IATTC observers were placed on all purse seine vessels and, consequently, the first year that reliable estimates of dolphin mortality in the Eastern Tropical Pacific tuna fishery were available. These figures were extremely disturbing, revealing that more than 133,000 dolphins died in this fishery in 1986, more than three times the average estimated for the years 1979-85. *Id.* at 11-12.

117. FIRST SUBMISSION OF THE UNITED STATES, *supra* note 30, at 12 n.25.

118. Three dolphin species are primarily affected by the tuna fishery in the Eastern Tropical Pacific, the common dolphin (*Delphinus delphus*), the spotted dolphin (*Stenella attenueta*), and the spinner dolphin (*Stenella longirostris*). All are listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which includes species that may be threatened if trade is not restricted. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 [hereinafter CITES]. For a detailed discussion of CITES, see *infra* notes 131-135 and accompanying text. The MMPA includes specific restrictions designed to protect the spotted and spinner dolphins, the two most threatened species. 16 U.S.C. § 1371(a)(2)(B)(ii)(III) (Supp. 1991).

119. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No., 1849, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948).

120. *See* Arden-Clarke, *supra* note 33, at 18; *see also* Martin & Brennan, *supra* note 19, at 314-15; Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 409 n.76 (1989).

Under the Panel's ruling, the embargo would have been illegal because it both treated like products differently and was aimed at protecting resources outside of U.S. jurisdiction. This is particularly disturbing because the enforcement mechanisms of the IWC are very similar to many other international environmental agreements.[121]

Further, unilateral action is also an important catalyst for international action. Such actions taken by the United States have helped force cooperative action in many other areas, such as the international protection of endangered species protection and the international regulation of oil spills.[122]

2. Multilateral Environmental Protection Measures

It is difficult to square the Panel's narrow readings of Article XX with many international environmental agreements that regulate environmentally destructive products or impose trade sanctions against violators of agreements that protect common resources like ocean fisheries. Without effective trade measures, it will be difficult, if not impossible, for those treaties to achieve meaningful results. The following examples illustrate the problem.

a. The Montreal Protocol on Substances That Deplete the Ozone Layer

The Montreal Protocol on Substances That Deplete the Ozone Layer[123] represents a concerted international effort to stop depletion of the earth's protective ozone layer by chlorine-based indus-

121. *See* Wilkinson, *supra* note 109, at 275-77.

122. Bilder, *supra* note 108, at 82. The European Community recently announced new unilateral measures to restrict trade in endangered species products. *EC Proposes Controls on Wildlife Trade*, J. COM., Nov. 15, 1991 at 5A.

123. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]. The Montreal Protocol seeks to protect the ozone layer by calling for global regulation of substances that deplete it. *Id.* at 1551. Forty-seven countries signed the Final Act of the Protocol. *Id.* at 1541. For in-depth analysis of the Montreal Protocol, see Elizabeth P. Barrett-Brown, Comment, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519 (1991); Dale S. Bryk, Comment, *The Montreal Protocol and Recent Developments to Protect the Ozone Layer*, 15 HARV. ENVTL. L. REV. 275 (1991); Annette M. Capretta, Comment, *The Future's So Bright, I Gotta Wear Shades: Future Impacts of the Montreal Protocol on Substances That Deplete the Ozone Layer*, 29 VA. J. INT'L L. 211 (1988).

trial chemicals such as chlorofluorocarbons (CFCs).[124] Under the Protocol, the international community has agreed to completely phase out ozone-depleting chemicals by controlling their production and consumption.[125]

The GATT Panel ruling threatens at least two key aspects of the Montreal Protocol. First, it undermines the critical provisions of the Protocol authorizing trade embargoes against non-parties to prevent them from obtaining ozone-depleting technologies and from exporting ozone-depleting chemicals into countries that have agreed to phase such chemicals out under the treaty.[126] These sanctions are essential to the success of the treaty because they prevent "free riders," countries which would have an increased incentive to produce ozone-depleting chemicals for sale in member countries where the phase-out of such chemicals is likely to create a tight market and therefore increase prices for these chemicals.[127] Yet these provisions are illegal under the Panel's reasoning because they are aimed at protecting the ozone layer, which falls outside of the jurisdiction of any country. Further, non-parties to

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124. The ozone layer, located in the stratosphere, shields the earth from harmful solar ultraviolet radiation that can cause skin cancer, eye cataracts, and crop damage. CFCs and related chlorine-based substances act as catalysts, causing the decomposition of ozone molecules, thinning the ozone layer, and thereby allowing more ultraviolet radiation to reach the earth's surface. *See* Michael David Ehrenstein, Comment, *A Moralistic Approach to the Ozone Depletion Crisis*, 21 U. MIAMI INTER-AM. L. REV. 611, 615-17 (1990). Recent studies have demonstrated that the ozone layer is disappearing more rapidly than previously believed and that ozone depletion is now occurring over populated areas of the northern hemisphere. Kathy Sawyer, *Ozone-Hole Conditions Spreading: High Concentrations of Key Pollutants Discovered Over U.S.*, WASH. POST, Feb. 4, 1992, at A1; William K. Stevens, *Summertime Harm to Shield of Ozone Detected over U.S.*, N.Y. TIMES, Oct. 23, 1991, at 1A. These studies suggest the need for even more drastic action than currently provided for under the Montreal Protocol. *See* Bob Davis & Barbara Rosewicz, *Panel Sees Ozone Thinning, Intensifying Political Heat*, WALL ST. J., Oct. 23, 1991, at B1. Recently, the Bush administration supported action to speed up the phase out of ozone-depleting chemicals. In an amendment to the energy bill, the U.S. Senate declared that ozone depletion is occurring at twice the rate previously believed and proposed to cease production of the chemicals as fast as possible. Philip J. Hilts, *Senate Backs Faster Protection of Ozone Layer as Bush Relents*, N.Y. TIMES, Feb. 7, 1992, at A1.

125. Parties are required to freeze and eventually phase out their production of CFCs and related chemicals. Montreal Protocol, *supra* note 123, art. 2.

126. *Id.* art. 4, para. 1.

127. If non-parties increase their production of ozone-depleting chemicals, the significant investment of many firms in alternative technologies could be severely undercut. In Florida, Petroferm, a privately held specialty chemical company developed a solvent to clean printed circuitboards which is produced from extractions from citrus fruit rinds. Also, DuPont has its company scientists searching for substitute solvents in the electronics industry which are less destructive to the stratospheric ozone. *See* Stuart Gannes, *A Down-to-Earth Job: Saving the Sky*, FORTUNE, Mar. 14, 1988, at 133.

the Montreal Protocol could not reasonably be said to have waived their rights under GATT because they are not parties to the Montreal Protocol. Thus, the Panel's attempt to exclude multilateral environmental agreements where the parties have agreed to waive their GATT rights from the scope of its opinion[128] does not save this provision and represents a serious threat to the Montreal Protocol. If non-party nations cannot be stopped from exporting ozone-depleting chemicals, the Protocol is, for all intents and purposes, unworkable.

A second critical feature of the Montreal Protocol is also threatened by the Panel Ruling. The Protocol considers banning trade in products produced with ozone-depleting chemicals but not directly containing such chemicals.[129] Under the Panel's reasoning, this provision may violate GATT because it would require governments to distinguish between otherwise identical products based upon the production method used to create them—that is, whether or not ozone-depleting chemicals were used.[130] The Panel interprets Article III so that it prohibits such distinctions based upon methods of production.

b. The Convention on International Trade in Endangered Species of Wild Flora and Fauna

The Panel ruling also undermines efforts to restrict international trade in endangered species and endangered species products. The cornerstone of international efforts to preserve endangered species is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[131] CITES

128. GATT Panel Ruling, *supra* note 2, at 51, para. 6.3. In fact, GATT rights are almost never explicitly mentioned in international environmental agreements, suggesting that the Panel's attempt to limit the scope of its ruling with respect to such agreements may have little meaning.

129. Montreal Protocol, *supra* note 123, art. 4, para. 4. For instance, CFCs are used extensively in the production of electronic goods to clean debris and excess solder off silicon chips and printed circuitboards which go into computers, telephones, and hundreds of other consumer products. Gannes, *supra* note 127, at 133.

130. *See* Arden-Clarke, *supra* note 33, at 29 ("Yet the ability to differentiate between traded products on the basis of production methods is crucial if sustainable, environmentally sound production techniques are to be introduced around the world.").

131. CITES, *supra* note 118. Over a hundred countries are signatories to CITES.

CITES regulates the international trade of wild animals and plants which are listed in the three appendices to the Convention. The treaty prohibits the commercial trade of species listed in Appendix I, those that are threatened with extinction. It also provides for controlled international trade of Appendix II species, those whose survival is not yet

contains severe restrictions on trade in endangered species products, including import and export restrictions and requirements that the importing country, as with the MMPA, satisfy itself that an effective program to prevent extinction of the species in question is in place in the exporting country.[132] Just like the Montreal Protocol, CITES imposes restrictions on trade with non-party states.[133] Because CITES generally protects wildlife resources that are outside the jurisdiction of the nation restricting the trade of those resources, it runs contrary to the Panel's interpretation of GATT.[134] Further, because many CITES restrictions are aimed at ensuring that any harvest of wildlife species takes place only in a manner which will allow for the preservation of the species such CITES-based restrictions would run afoul of the Panel ruling because they differentiate between like wildlife products based upon their method of production.[135]

IV. Reforming the GATT

The World Commission on Environment and Development called for environmental reforms of GATT, stating that GATT will have to "reflect concern for the impacts of trading patterns on the environment, and the need for more effective instruments to integrate environment and development concerns into international trading arrangements."[136] This statement underscores the need to

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threatened but may become so without intervention and monitoring. Species in Appendix III, those whose trade must be controlled in order to support domestic conservation programs, are subject to export permits and export restrictions under CITES. Simon Lyster, International Wildlife Law 240-41 (1985). An elaborate and detailed discussion of CITES is provided in David S. Favre, International Trade in Endangered Species: A Guide to CITES (1989).

132. CITES, *supra* note 118, arts. III-V.

133. *Id.* art. X.

134. *See supra* text accompanying note 128. Moreover, as with the Montreal Protocol, CITES contains no language expressing an intention to reconcile GATT provisions.

135. For example, CITES often will allow international commerce in animals or animal products from endangered species if the species is raised domestically but not taken from the wild, as is the case with animals bred in captivity. CITES, *supra* note 118, art. VII(4), (5).

136. World Commission on Environment and Development, Our Common Future (1987), *quoted in*, Arden-Clarke, *supra* note 33, at 4. The Panel Ruling also called for reform of GATT, at least by implication:

> It seemed evident to the Panel that, if the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the CONTRACTING PARTIES were to decide to permit trade

reform GATT so that it meets environmental objectives.[137] The

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> measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder.

GATT Panel Ruling, *supra* note 2, at 51, para. 6.3.

137. Several organizations have already begun to work on environmental reforms of GATT, opening up several avenues for the implementation of such reforms. These include: the GATT Working Group on Environmental Measures and International Trade, *see* William Dullforce, *GATT Revives Its Working Group on Environment*, FIN. TIMES, Oct. 9, 1991, at 3; a project sponsored by the Organization for Economic Cooperation and Development, *see Joint Report on Trade and Environment*, Organization for Economic Cooperation and Development [OECD], Doc. COM/ENV/EC/TD(91)14/REV2 (May 14, 1991); a study by the U.N. Conference on Trade and Development, *see Informal Encounter on International Trade and the Environment*, U.N. Conference on Trade and Development [UNCTAD], (Feb. 28-Mar. 1, 1991); and recent calls for a GATT Environmental Code to be developed as part of a future "Green Round" of GATT negotiations. 137 CONG. REC. S13169, 13169-70 (daily ed. Sept. 17, 1991)(statement of Sen. Baucus) [hereinafter *Baucus speech*].

An examination of the history of the GATT Working Group illustrates both the reluctance of GATT to deal with environmental problems and the perils that may await negotiators attempting to enact the kind of reforms to GATT proposed here. The working group was formed in response to Recommendation Number 103 of the Stockholm Conference on Human Environment, which suggested that GATT examine the problems of countries invoking " 'environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets'. . . ." Initially set up in 1971, the GATT Working Group was established "to examine, upon request, any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment, especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of developing countries." *GATT and the Environment: A Chronology*, 78 GATT FOCUS 3, 5 (1991). However, in the twenty years since it was chartered, the Group has never met. Patterson, *supra* note 37, at 10,603-04 n.44.

Recently, in connection with the ongoing Uruguay Round of GATT negotiations, the European Free Trade Association (which comprises Austria, Finland, Iceland, Norway, Sweden, and Switzerland) strongly endorsed reactivation of the working group. On October 8, 1991, provisional terms of reference were drawn up directing the group to examine existing multilateral environmental agreements and their consistency with GATT rules, the international trade consequences and transparency effects of individual national environment regulations and the trade effects of new packaging and labelling rules designed to protect the environment. Dullforce, *supra* at 3.

Two factors suggest that the Working Group may not succeed in implementing significant environmental reforms. First, the Group's terms of reference appear to be aimed at examining how environmental regulation may impinge upon free trade. Recommendation Number 103 of the Stockholm Conference suggested that the GATT group on the environment be used to examine problems of countries "[invoking] environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets. . . ." *GATT and the Environment: A Chronology*, *supra* at 5. While this is an important issue, it does not address the reforms called for here, which would examine the inverse question, how free trade rules hamper legitimate efforts to protect the environment. Second, developing countries, who fear environmental rules will be used to exclude their products from the markets of the industrialized countries, are reluctant to endorse environmentally-related trade measures. Chakravarthi Raghavan, *Environment: Twenty Year Wait for First GATT Working Group Meet*, Inter Press Service, Oct. 8, 1991, *available in* LEXIS, Nexis Library.

following discussion is meant to illustrate the need for adoption of both procedural and substantive reforms.

A. Rejecting the GATT Panel Ruling

The GATT dispute resolution system, at least as currently conceived, is based upon the concept of consensus among the Contracting Parties.[138] Because of the potential effects discussed above, it seems unlikely that a consensus will develop that adheres to the Panel's interpretation. Affirmative rejection of the Panel's interpretation of GATT is growing in the U.S. Congress, which refuses to implement any changes to the MMPA[139] and has begun to develop legislation that would limit or reverse the Panel's interpretation.[140] A similar consensus seems to be developing in other countries as well.[141]

Although it is an extremely unusual step, the GATT Council should reject the Panel's decision on the grounds that it was wrongly decided.[142] If it is to retain its credibility, the GATT

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138. *See* LONG, *supra* note 32, at 76; *Mid-Term Review*, *supra* note 27, at 11-12 ("The practice of adopting panel reports by consensus shall be continued.").

139. Letter from Senator Bob Packwood, et al., to President George Bush (Oct. 3, 1991) (letter signed by 63 Senators expressing "serious misgivings" about Panel Ruling); Letter from Rep. Barbara Boxer, et al., to President George Bush (Sept. 18, 1991) (letter from 100 members of the House of Representatives criticizing Panel Ruling and pledging "we will not support any attempt to repeal legislation called into question by the recent ruling").

140. *See Baucus speech*, *supra* note 137, at 13169-70; *Merchant Marine Panel Develops Bill on GATT Changes to Protect Environment*, Daily Rep. for Executives, (BNA) No. 189, at A-11 (Sept. 30, 1991). The decision has also been sharply criticized by environmental groups from around the world. *See, e.g.*, Arden-Clarke, *supra* note 33, at 29 (European critique of decision); Homero Aridjis, *Defending Dolphins*, N.Y. TIMES, Oct. 7, 1991, at A17 (Mexican critique); *Environmental Group Says GATT Tuna Report Could Have Disastrous Conservation Impact*, Int'l Trade Daily (BNA) (Sept. 13, 1991), *available in* LEXIS, Nexis Library ; *Groups Call for Environmental Clauses in North American Free Trade Agreement*, Int'l Env't. Rep. (BNA) No. 18, at 497 (Sept. 11, 1991); Mathews, *supra* note 33, at A21. There is a danger that, unless GATT responds to these criticisms, its legitimacy as an institution will be undermined.

141. The European Free Trade Association, for example, has called for GATT to address environmental issues. *See supra* note 137. Similarly, Sweden has stated that trade implications of environmental issues are a "fairly urgent" issue and that trade-policy considerations must be introduced into environmental discussion. *Environment and Trade*, 77 GATT FOCUS 6 (1990). Austria, the European Community, Chile, the ASEAN countries, and Nigeria all agree that environmental protection is a global issue which should be acknowledged in the GATT. *Several Countries Urge Quick Start to GATT Environment Work*, 80 GATT FOCUS 9, 9-10 (1991).

142. No panel report has ever been rejected by the GATT Council. LONG, *supra* note 32, at 77. However, in several cases, the Council has failed to adopt reports. Personal Communication with Steve Charnovitz, International Trade Consultant (Nov. 20, 1991). Addi-

Council should reject panel rulings, like the one considered here, that reach improper conclusions or that do not reflect a consensus among the Contracting Parties.[143] One business publication recently editorialized, "If the GATT panel's finding is adopted, amid international and domestic uproar over dolphin safety, the GATT's reputation as an out-of-step, bureaucratic organization with trade blinders on, justified or not, will grow. . . . Neither [President] Bush nor GATT officials can afford to ignore these political realities."[144]

B. Procedural Reforms of GATT

1. Limiting GATT's Jurisdiction over Environmental Disputes

The General Agreement on Tariffs and Trade is the principal international agreement which regulates trade.[145] Its historical role and institutional expertise are confined to identifying and reducing barriers to trade.[146] GATT lacks both the expertise and the institutional strength to become an arbiter of international environmental disputes.[147] Therefore, in environmental disputes, GATT

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tionally, there remains considerable doubt about whether the United States and Mexico will bring the Panel Ruling before the GATT Council. *See supra* note 33 and accompanying text. The Panel Ruling will have no legal effect if it is not adopted by the GATT Council. Davey, *supra* note 32, at 60. Even if the Panel Report is not adopted, two reasons suggest that the problems described here will remain. First, even unadopted reports still influence GATT policy. Secondly, the report reflects fundamental deficiencies in the GATT system. Arden-Clarke, *supra* note 33, at 30.

143. Davey, *supra* note 32, at 76 n. 99. This is particularly true if, as expected, the Uruguay Round negotiations result in GATT moving toward a system based upon the concept of legally binding panel decisions rather than upon consensus adoption of decisions. *See* William J. Davey, *Remarks*, 84 AM. SOC. INT'L L. PROCEEDINGS 135, 136 (1990) (concerning trends in Uruguay Round negotiations with respect to dispute settlement).

144. Editorial, *supra* note 79, at 8A; *see also* Charnovitz, *supra* note 50, at 55.

145. Davey, *supra* note 57, at 7.

146. *Id.*

147. "GATT does not have the scientific expertise to judge what ecological measures are appropriate. . . . [E]nvironmental policy would be too divisive for GATT's current decision-making structure." Charnovitz, *supra* note 50, at 55. In order for an individual to be eligible for membership on a GATT panel, the country proposing his membership must demonstrate only that he has "knowledge of international trade and of the GATT." *Mid-Term Review*, *supra* note 27, at 10 (specifying the dispute settlement procedures under which the Contracting Parties now operate). There is no requirement that panel members demonstrate any expertise related to environmental policy or expertise concerning any other issues that might be collaterally involved in a trade dispute. As a result, "Dispute Panels have interest primarily, and expertise only, in the objective of liberalizing trade. Disputes are settled on GATT technicalities, rather than on a close examination of the implications for environment and natural resource conservation issues." Arden-Clarke, *supra* note 33, at

should strictly limit its role to determining whether a challenged trade measure is in fact a disguised protectionist measure.[148]

There are several ways to ensure that GATT does not overreach with respect to environmental questions. First, where a trade restriction is challenged as a GATT violation, the burden of proof to demonstrate that the measure is a disguised barrier to trade should be placed on the challenging party. Otherwise, legitimate environmental protections may be ruled illegal, because, for instance, the scientific evidence supporting a measure is not free from scientific controversy, as is often the case with environmental and human health matters.[149] Second, governments enacting environmental regulations should be entitled to reject alternative measures if they are too impractical, too costly, or unlikely to be effective.[150]

Third, where decisions involve scientific or environmental expertise—such as whether a particular trade measure is well-tailored to address a given environmental problem—GATT should defer to established institutions with environmental expertise.[151] For example, where an issue involves trade in endangered species products, the CITES Secretariat should be consulted. If a trade dispute involves an issue not previously addressed by a specialized

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In this dispute, the panelists apparently lacked any environmental expertise. The GATT Secretariat stated only that "the panelists were chosen for their good judgment and familiarity with GATT polices." Telephone Interview with Amelia Porges, Legal Advisor's Office, General Agreement on Tariffs and Trade (Nov. 1, 1991).

Further, because panel members often are government officials in the employ of particular countries, they are likely to be concerned about how a particular dispute could affect their country. Therefore, there is significant doubt that they can be neutral arbiters of disputes. Davey, *supra* note 32, at 88-89. This is likely to be particularly true with environmental disputes because environmental problems are ubiquitous and nearly every government is therefore likely to have an economic stake in the outcome of disputes involving these issues.

148. Charnovitz, *supra* note 50, at 55.

149. *See* David A. Wirth, *American Environmental Law and the International Legal System*, 42-46 (1991) (manuscript to be published in VIRGINIA J. INT'L L.).

150. The current interpretation of the term "necessary" in Article XX(b) has been criticized because it severely restricts the choices governments can make among various alternative policies when seeking to attain a given environmental objective. *See supra* notes 77-83 and accompanying text.

151. This suggestion is not alien to the GATT framework. A similar process has been incorporated into the current draft of the proposed GATT code on sanitary and phytosanitary measures. In disputes involving such measures, the draft code provides that the scientific basis of a trade measure must be examined to determine if a legitimate basis for government concern exists. In order to address these scientific questions, a panel of scientific experts is incorporated into the dispute resolution process. *Text on Measures*, *supra* note 68, para. 37.

international body such as CITES, GATT should consult organizations like the United Nations Environmental Programme,[152] which has more generalized expertise in environmental issues.

Another body that could judge the validity of claims concerning environmental issues in trade disputes is the International Court for the Environment. An international conference recently proposed such a court within the United Nations system in order to efficiently settle international environmental disputes.[153] The proponents of this court envision it as a permanent, international authority that will support compulsory and efficient resolution of conflicts concerning environmental policy.[154]

2. Increasing Public Involvement in GATT Decisions

As the Mexican tuna dispute illustrates, GATT operates in a near-total vacuum, with participation limited primarily to the governments of the Contracting Parties.[155] Especially where important issues of public policy are concerned, the exclusion of interested non-governmental parties (such as environmental organizations) seriously undermines GATT's perceived legitimacy.[156] The exclusion of non-governmental organizations (NGOs) also frustrates ef-

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152. *See generally* Lynton Keith Caldwell, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS 63-75 (1984)(discussing UNEP). If a less formal procedure is required, the parties to a dispute might also refer environmental questions to Environmental Mediation International (EMI) which was established in 1978 to facilitate the use of mediation and related techniques in settling environmental and natural resource disputes. *See generally* Robert E. Stein, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement*, 12 SYRACUSE J. INT'L L. & COM. 283 (1985).

153. *See generally* The Honorable Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL. L. 321 (1990). Twenty-seven countries participated in the international Congress that called for creation of an International Court for the Environment in April 1989. *Id.* at 321 (Editor's note). The Court would specialize in environmental issues and would be formed "in order to make individuals and States respect prevention rules, as well as to force repair of ecological damage . . . ." *Id.* at 325.

154. *Id.* at 323.

155. *See generally* Thompson, *supra* note 57, at 7-9. The current rules concerning dispute resolution specify that only the governments of the Contracting Parties involved in a dispute and governments of Contracting Parties with a "substantial interest" in the dispute can present their views to a dispute resolution panel. *Mid-Term Review*, *supra* note 27, at 10-11. Thus, GATT operates on the traditional theory that only national governments have standing in international law and that the interests of individuals can adequately be represented by their governments. This theory is both questionable and largely outdated. *Developments in the Law* , *supra* note 108, at 1588; T. SUBRAMANYA, RIGHTS AND STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW, at 27-32 (1984).

156. *See Developments in the Law*, *supra* note 108, at 1601.

forts to ensure that GATT will not stand in the way of the developing international law of environmental protection.[157]

By contrast, increasing public participation in the GATT dispute resolution process could significantly improve the quality of GATT decision-making. Non-government actors can: provide critical information and unique expertise to GATT decision-makers; make new information available to policy-makers as it develops; protect the rights and interests of environmental, consumer, minority, and other groups that will otherwise be underrepresented in the GATT process; and help support GATT decisions by a consensus of Contracting Parties.[158]

Minor modifications to GATT procedures could greatly improve its record of public participation. For instance, GATT currently allows interested Contracting Parties to intervene as third parties in dispute resolution panel proceedings.[159] Public involve-

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157. *See* Sands, *supra* note 120, at 401 ("In excluding these non-governmental organizations from fuller participation in the affairs of international society, the international legal system establishes a notion of community and participant which fails to reflect an important reality and which lacks effectiveness. One consequence of this flawed structure is the inability of traditional international law to give effect to a large number of peoples' expressed desire for environmental protection.").

158. *See, e.g.*, Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 222, 222-23 (1972); *Developments in the Law*, *supra* note 108, at 1601-02; Richard A. Frank, *Public Participation in the Foreign Policy Process*, *in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY, at 66, 71 (Francis O. Wilcox & Richard A. Frank eds., 1976); Sands, *supra* note 120, at 411-12; William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L. J. 669, 682-84 (1989) (discussing advantages of public involvement in process of making U.S. government trade policy). In addition, participation by NGOs representing consumer interests could add legitimacy and political impetus to GATT's mission of reducing tariffs and other trade barriers. *See* DAVISON, *supra* note 93, at 17 (International Organization of Consumers Unions urges completion of Uruguay Round).

159. The current rules for participation of Contracting Parties as third parties in the resolution panels provide:

> (e) **Third Contracting Parties**
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> 1. The interests of the parties to a dispute and those of other contracting parties shall be fully taken into account during the panel process.
>
> 2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
>
> 3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submissions to the third contracting party.

Mid-Term Review, *supra* note 27, at 11.

ment in the panel process could be achieved simply by allowing interested non-governmental organizations to make written submissions to the panel.[160] Further, GATT could grant NGOs the right to participate directly in dispute panels, provided that some mechanism is created to ensure that the panel is not overwhelmed by multiple presentations.[161] In the broader context of GATT negotiations, it is feasible that public participation in the GATT process would increase by, for example, granting NGOs status as observers, which would allow them to participate and comment on GATT proceedings.[162]

GATT already recognizes, in a limited way, the value of administrative procedures that are open to parties interested in a particular matter. For example, the draft Standards Code now being considered in the Uruguay Round would require a Contracting

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160. *See Developments in the Law*, *supra* note 108, at 1602-03. To make this effective, GATT would have to institute a system whereby NGOs could receive notice of impending panel hearings. *See id.* at 1603-04. Such a system could be implemented easily by GATT's existing public relations machinery which, for instance, publishes a monthly newsletter called *GATT Focus*.

161. *See, e.g., id.* at 1588-89 (discussing ECOSOC system as an example of how NGOs are classified and given participatory rights). However, the concern that public participation will bog down the administrative process is generally overblown:

> Some have suggested that allowing the public . . . to partake in the mechanisms of government opens floodgates and creates an unmanageable process. This is simply not so. Virtually all public segments or viewpoints do or can have representatives or spokesmen, thus limiting the numbers who will ask to be heard. Since the public now participates in analogous domestic issues without rendering inefficient the decision-making process, it should be able to be similarly involved in foreign affairs.

Frank, *supra* note 158, at 67.

162. *See* Sands, *supra* note 120, at 415. The concept of public participation in international organizations is not a new one. NGOs play an important role in a number of international environmental organizations, including the Montreal Protocol, CITES, and UNEP. *See Developments in the Law*, *supra* note 108, at 1577, 1602. In both the European Community and the Nordic Community, NGOs have standing to challenge activities that violate Community environmental standards and to seek redress against member governments. Sands, *supra* note 120, at 413-15. Similarly, a number of international human rights organizations allow individuals and NGOs to challenge government activities that violate human rights norms. *See, e.g.*, David Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 403, 403-06 (Theodor Meron ed., 1985); Sands, *supra* note 120, at 416-17. Through these procedures NGOs have successfully raised public consciousness of human rights violations around the world and helped remedy these violations. *Id.* Also, the International Labor Organisation institutionalizes NGO involvement in its tripartite structure by requiring each member country's delegation to include representatives of workers organizations, employers organizations, and governments. Wirth, *supra* note 149, at 8, n.19. *See also* LEONARD J. CALHOUN, THE INTERNATIONAL LABOR ORGANIZATION AND UNITED STATES DOMESTIC LAW 14 (1953)(discussing ILO).

Party adopting a technical regulation to provide notice and an opportunity for comment to other Contracting Parties.[163] There is no principled reason to limit such procedural rights to governments or to refuse to grant similar procedural rights in the GATT process itself.[164]

3. Increasing Public Access to Information

Presently, access to information in the GATT system is stringently controlled. This is demonstrated in that country submissions to GATT panels are not revealed even to other GATT Contracting Parties unless the country responsible for the submission grants access to the submission.[165] If public participation in GATT is to be effective, members of the public must have access to such documents. GATT should therefore substantially modify its information policy so that all documents are presumed to be publicly available except for limited and clearly defined categories of information where confidentiality is essential, including, for instance, proprietary information, personnel records containing private information and information revealing a party's negotiating strategy

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163. *Technical Barriers to Trade*, *supra* note 85, art. 2.9.4 (requiring Contracting Parties to "allow reasonable time for other Parties to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.").

164. NGOs and members of the public also enjoy rights to participate in formulating domestic processes for making international trade policy. Section 301 of the Trade Act of 1974 authorizes the President to retaliate against U.S. trading partners engaged in unfair trading practices. 19 U.S.C. § 2411 (Supp. 1991). It further allows affected members of the public to bring complaints against foreign producers engaged in unfair practice and provides for notice-and-comment rulemaking once a section 301 proceeding is underway. 19 U.S.C. § 2412(a)(1), (4) (Supp. 1991). One of the practices that may result in sanctions under section 301 is the persistent denial of worker rights such as the right of association. 19 U.S.C. § 2411(d)(3)(B)(iii)(I). This may be a useful model to enforce internationally recognized environmental standards or norms.

Similarly, the Caribbean Basin Economic Recovery Act gives preferential trade status to underdeveloped Caribbean nations. 19 U.S.C. §§ 2701-2706 (Supp. 1991). That Act also provides that interested members of the public may file petitions seeking to revoke preferences that are injuring domestic concerns. 19 U.S.C. § 2703(f) (Supp. 1991). Once a revocation procedure is instituted, the public is entitled to participate in notice-and-comment rulemaking procedures. 19 U.S.C. § 2702(e)(2)(B) (Supp. 1991). One of the grounds that may justify revocation of preferences is the failure of the recipient country to follow "internationally recognized worker rights." 19 U.S.C. § 2702(c)(8) (Supp. 1991). Other examples of trade policy that call for public participation include measures to prevent dumping, 19 U.S.C. § 2252 (Supp. 1991), and initiatives to open negotiations for trade agreements. 19 U.S.C. §§ 2153, 2155 (Supp. 1991).

165. *See Mid-Term Review*, *supra* note 27, at 11.

before the negotiation has been completed.[166]

C. Substantive Reforms of the GATT to Achieve Environmental Protection

1. Reforms to Allow Governments to Impose Measures to Protect the Environment

Before the GATT Panel Ruling, some commentators believed that Articles XX(b) and XX(g) would allow Contracting Parties to impose trade measures aimed at protecting global resources like the ozone layer and ocean fisheries.[167] The GATT Panel Ruling, because it interprets Article XX so narrowly, seems to darken any hope that the Article will allow such protective measures. Therefore, Article XX, as well as several other GATT articles, must be amended, either directly or through agreements such as the GATT Standard on Technical Barriers to Trade, which promulgate rules ensuring compliance with GATT requirements.

a. A New Article XX(k)[168]

A new exception must be added to Article XX which would allow trade sanctions "imposed for the protection of the environment, ecological or biological resources, consumers or animal welfare, whether within or outside the jurisdiction of the Contracting

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166. The Freedom of Information Reform Act of 1986, 5 U.S.C. § 552 (Supp. 1991), is an apt model. *See* Frank, *supra* note 158, at 73-74. Other international institutions such as the World Bank have recently revised information disclosure policies in an effort to become more open to public involvement. The Bank's most recent policy, for instance, states that "it is the Bank's policy to be open about its activities, and to welcome, and to seek out, opportunities to explain its work to the widest audience possible." THE WORLD BANK AND INTERNATIONAL FINANCE CORPORATION, DIRECTIVE ON DISCLOSURE OF INFORMATION at 1 (July 1989). Nonetheless, the Bank has been sharply criticized for failing to live up to its stated goal of openness. *See, e.g.*, Michael Prowse, *IMF-World Bank's Culture of Secrecy Attacked*, FIN. TIMES, Oct. 29, 1991, at 4 (World Bank's former chief economist, Professor Stanley Fischer, attacks Bank's "culture of secrecy" in a public speech).

167. *See, e.g.*, JEANNE J. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, ENVIRONMENTAL REGULATION AND THE GATT 14-15, 21-24 (1991); Arden-Clarke, *supra* note 33, at 16 (suggesting Article XX(b) "is *potentially* effective as an environmental safeguard, depending on its interpretation.").

168. The GATT Contracting Parties could achieve the results of the new Article XX(k) proposed here by modifying agreements currently under negotiation in the Uruguay Round to reflect the concerns expressed herein. For instance, the Agreement on Sanitary and Phytosanitary Measures is intended to elaborate requirements for complying with Article XX(b). *See generally Text on Measures*, *supra* note 68.

Party enacting the measure."[169] This language would unequivocally protect governmental efforts to impose trade restrictions designed to prevent the destruction of the environment, provided they are not disguised trade restrictions imposed in violation of the preamble of Article XX. The exception would not be confined to protecting resources within the jurisdiction of the country imposing the restrictions, but would allow protection of such resources regardless of whether they are within or without a given country's borders.

b. Article XX(h)

Article XX(h) permits the enforcement of measures "undertaken in pursuance of obligations under [any] intergovernmental commodity agreement."[170] New language should be added to the end of this Article to allow trade measures undertaken in compliance with or to enforce international conservation or environmental protection agreements.[171] This language would protect the trade sanctions provided for under international agreements like the Montreal Protocol and conservation agreements such as CITES. Within the international community, ensuring the implementation and enforcement of a treaty is a significant concern.[172] Where nations reach a consensus regarding regulation of national conduct in order to achieve agreed-upon environmental objectives, trade restrictions should be available to enforce compliance and prevent free riders from undermining the effectiveness of the agreed-upon system.[173] The amendment to Article XX(h) proposed here would ensure that such international agreements can be carried out consistently with GATT.

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169. Charles Arden-Clarke proposes a slightly different formulation for the new Article XX(k): "(k) designed, whether by way of precaution or remedial measures, to encourage or ensure protection of environment and promote sustainable development." Arden-Clarke, *supra* note 33, at 7; *see also* Patterson, *supra* note 37, at 10,602-03.

170. GATT, *supra* note 1, art. XX(h).

171. Article XX(h) would then read:

> (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved, or in pursuance of any intergovernmental environmental or resource conservation agreement provided that the Contracting Parties are provided notice of such agreement.

172. Ved P. Nanda, *Trends in International Environmental Law*, 20 CAL. W. INT'L. L.J. 187, 193 (1989-90).

173. *Id.*

c. Article XI

Article XI outlaws quantitative restrictions on either imports or exports. A limited exception allows restrictions preventing critical shortages of food or other products essential to a particular country. A second exception should be added permitting quantitative restrictions to prevent depletion of critical global or national natural resources. This new exception would allow, for instance, tropical countries to impose restrictions on the export of unprocessed timber in order to encourage domestic value-added timber processing, thereby reducing demand for tropical timber production.[174] Similarly, countries that import tropical timber could take measures to promote the sustainable development of tropical forests by limiting or phasing out imports of unsustainably produced timber.[175]

2. Allowing Measures to Encourage Sustainable Development

The reforms proposed above merely eliminate the unacceptable restrictions imposed upon environmental policy by the Panel's strained interpretation of GATT. In addition, GATT should, be reformed to affirmatively encourage sustainable development by providing incentives for industries to reduce the environmental impacts of their operations to the greatest extent possible. Unfortunately, as currently carried out, international trade promotes exactly the opposite result: those industries that invest in pollution control are placed at a competitive disadvantage compared to industries that are allowed to externalize environmental costs because GATT does not allow governments to distinguish between like products of these industries.[176] GATT reforms to encourage

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174. Several tropical countries, such as Indonesia and the Philippines, have imposed bans or quotas on the export of raw logs as a measure to conserve their rapidly-dwindling forest resources. Under GATT as currently interpreted, these restrictions would likely fall if challenged by tropical timber importing countries. Arden-Clarke, *supra* note 33, at 14-15. The United States has enacted similar restrictions on exports of raw timber in order to conserve its ancient forests. *See* Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. §§ 620-620j (Supp. 1991).

175. Arden-Clarke, *supra* note 33, at 15-16.

176. [A] country wishing to maintain stringent environmental standards without impairing the trade competitiveness of its domestic industry has two options:
   a. impose import tariffs to offset domestic pollution control costs [or]
   b. underwrite domestic pollution control with subsidies raised from general revenues.

In the absence of such trade measures, the higher *short-term* economic costs

environmental protection could take at least two forms.

First, GATT should create a mechanism that would advocate internalization of environmental costs. One possibility is for GATT to grant importing countries the right to impose a duty upon imported products equal to the costs avoided when the manufacturer failed to comply with pollution control laws.[177] Similarly, GATT could allow exporting countries the option to subsidize their industries to the extent that strict pollution control laws put those industries at a competitive disadvantage with uncontrolled industries in other countries.[178]

Second, GATT should authorize governments to offer preferential treatment to environmentally friendly products.[179] For example, GATT should provide preferences to products produced with the best available pollution control technology or resources (like timber) that are extracted in a sustainable manner. GATT already allows preferential treatment of the products of developing countries, a policy aimed at encouraging their development.[180] This policy could easily be extended to accord different and more favorable treatment to environmentally friendly products.[181] Thus, industrialized countries would be authorized to offer different and

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> associated with some environmentally clean and/or sustainable production processes, would place goods produced with such practices at a competitive disadvan-tage [sic]. This would discourage widespread introduction of these practices.
>
> Both options listed above are currently at odds with GATT, which explicitly limits the right of governments to impose tariffs or quantitative restrictions that discriminate on this basis, and prohibits the use of certain subsidies.

Arden-Clarke, *supra* note 33, at 12; *see also* Patterson, *supra* note 37, at 10600.

177. This duty would operate in much the same way as anti-dumping measures. GATT allows Contracting Parties to impose countervailing duties where their markets are flooded by subsidized imports. *See* Patterson, *supra* note 37, at 10602.

178. Such a provision could easily be included in the existing GATT Subsidies Code.

179. *See* Patterson, *supra* note 37, at 10603. Preference should be available only to businesses from developing countries. Industries from the industrialized world generally already are subject to regulations requiring the best available pollution control technology. Governments in the developed world should require industries based in their countries to comply with the same standards when investing overseas. *See Developments in the Law, supra* note 108, at 1609-12; *see generally* Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 ECOLOGY L.Q. 477 (1990).

180. *See* GATT, *supra* note 1, pt. IV, arts. XXXVI-XXXVIII; *see also* LONG, *supra* note 32, at 89-94.

181. Examples of different and more favorable treatment accorded to the products of developing countries by the United States include the Caribbean Basin Initiative, which offers reduced tariffs to the products of poor Caribbean countries, 19 U.S.C. §§ 2701-2706 (Supp. 1991), and the Generalized System of Preferences. 19 U.S.C. §§ 2461-2466 (Supp. 1991).

more favorable trade treatment to products that meet requirements for best available control technology or sustainable resource production, as defined by international organizations with environmental expertise such as UNEP or the International Tropical Timber Organization. Favorable treatment should be combined with a program to improve transfer of environmental protection technology, so that developing countries can readily attain the necessary standards.[182]

V. CONCLUSION

The GATT Panel decision on imports of tuna from Mexico narrowly limits the use of trade sanctions to enforce international environmental agreements. This decision seriously undermines efforts to protect not only marine mammals, but also critical resources such as the ozone layer, endangered species, and tropical forests. The Panel's narrow interpretations of GATT Articles, which permit the protection of biological resources and for the conservation of natural resources, are at odds with both the plain language of the Agreement and its drafting history. The GATT Council should reject the decision as wrongly decided by the dispute panel. In addition, GATT should immediately begin a process of reform so that environmental values are incorporated into the international trading system.

182. This proposal might augment a larger program of technology transfer, *see* Haig Simonian, *Gap Needs Bridging*, FIN. TIMES, Oct. 30, 1991, at 20 (plan for fund to help transfer environmental technology to the developing world), perhaps as part of a larger "grand bargain," in which the industrialized world assists the developing countries in achieving agreed-upon environmental goals. *See, e.g.*, Williamson, *supra* note 42, at 750-51.