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# PULLING PURSE STRINGS TO ELIMINATE PURSE SEINERS: UNITED STATES PROTECTION OF DOLPHINS THROUGH INTERNATIONAL TRADE SANCTIONS

## INTRODUCTION

On April 11, 1991, the Ninth Circuit Court of Appeals affirmed a district court decision ordering the Secretary of Commerce to enforce a ban on the importation of yellowfin tuna into the United States.<sup>1</sup> Mexico and other countries affected by the embargo complained to a General Agreement on Tariffs and Trade (GATT) panel claiming that such an embargo violates the terms of GATT.<sup>2</sup> The panel agreed with the complaining countries and recommended that the United States lift the ban.<sup>3</sup> While this decision was pending approval from members of GATT, Mexico announced that it would postpone calling for the approval.<sup>4</sup> Although the Bush Administration wished to comply with the terms of GATT, it also had to fulfill

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1. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

2. *GATT Panel Hears Arguments on U.S.-Mexico Tuna Dispute*, Int'l Trade Daily (BNA) (May 16, 1991); see Keith Bradsher, *U.S. Ban on Mexico Tuna Is Overruled*, N.Y. TIMES, Aug. 23, 1991, at D1. The countries involved besides Mexico included Venezuela and Vanuatu, as well as countries that imported tuna from those nations for export to the United States: Costa Rica, France, Italy, Japan, and Panama. *Id.* at D3; see *GATT: Implications on Environmental Laws, Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 44 (1991) [hereinafter *GATT: Implications on Environmental Laws*].

The term GATT refers to both the provisions of the set of multilateral agreements and to the institution which was created to administer those agreements.

3. *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restriction on Imports of Tuna*, 30 I.L.M. 1594 (1991) [hereinafter *Dispute Settlement Panel Report*]; see *U.S. Embargo on Mexican Tuna Violates GATT Rules, Panel Finds*, 8 Int'l Trade Rep. (BNA) No. 35, at 1288 (Aug. 28, 1991).

4. *Bowing to U.S. Pressure, Mexico to Have Observers on Tuna Boats, Delays GATT Action*, Int'l Trade Daily (BNA) (Sept. 26, 1991) [hereinafter *Bowing to U.S. Pressure*]. Mexico has suffered economically from the United States embargo. While direct exports to the United States comprise approximately 3% of Mexico's tuna export, the ban also applies to foreign canneries that import some 84,000 tons of tuna from Mexico. See David Clark Scott, *U.S. Tuna Ban May Snag Trade Talks with Mexico*, CHRISTIAN SCI. MONITOR, Nov. 7, 1990, at 6. Also, the United States and Mexico currently are negotiating the North American Free Trade Agreement. Furthermore, President Salinas of Mexico said that stricter rules concerning the fishing industry will be promulgated and trained observers will board Mexican fishing vessels. See *Bowing to U.S. Pressure, supra*.

its congressional mandate under the Marine Mammal Protection Act (MMPA).<sup>5</sup> The MMPA prohibits, among other things, the importation of tuna caught with technology that kills ocean mammals in excess of U.S. standards.<sup>6</sup>

Yellowfin tuna, the subject of the embargo, swim below herds of dolphins in the Eastern Tropical Pacific.<sup>7</sup> Dolphins are air-breathing mammals and must surface to breathe.<sup>8</sup> The surfacing dolphins alert tuna fishermen to the presence below of schools of yellowfin tuna.<sup>9</sup> In the past, fishermen would catch the tuna by locating the dolphins, chumming the water,<sup>10</sup> and then catching the tuna with unbaited hooks.<sup>11</sup> The dolphins would use their sonar, or echolocation, to avoid the hooks while feeding on the bait.<sup>12</sup> In the early 1960s, however, fishermen began using purse seine nets to catch the tuna.<sup>13</sup> Dolphins are caught in these nets and either drown or are crushed to death when the catch is hauled in.<sup>14</sup>

It is estimated that since 1960 purse seiners in the Eastern Tropi-

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5. Marine Mammal Protection Act, Pub. L. 92-522, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1407 (1988 & Supp. 1991)).

6. 16 U.S.C. § 1371(a)(2). For an in-depth discussion of the various MMPA provisions dealing with mammals other than dolphins, see Laura L. Lones, Note, *The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation*, 22 VAND. J. TRANSNAT'L L. 997 (1989).

7. Andrew Davis, *Caught in the Tuna Nets: The Slaughter of Dolphins*, NATION, Nov. 14, 1988, at 486. The Eastern Tropical Pacific consists of a six million square mile triangle of ocean running from Southern California to central Chile. *Id.* It is defined as an area in the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coasts of North, Central, and South America. 50 C.F.R. § 216.3 (1990). It therefore includes the coast of Mexico and its territorial waters.

8. Kenneth S. Norris, *Dolphins in Crisis*, NAT'L GEOGRAPHIC, Sept. 1992, at 2, 11. Dolphins have a lovable image due in part to the old "Flipper" television series and the fact that they appear to have a "benign smile." *Id.* They are some of the most intelligent animals on earth, with a memory capacity matching that of humans. *Id.* They can follow intricate visual and verbal commands and can remember strings of random numbers. *Id.* In addition, there are reports of dolphins saving the lives of people lost at sea by protecting them from Great White sharks. See Tom Dunkel, *The Dolphin Mystique*, NEWSDAY, Aug. 12, 1990, at 6.

9. Dunkel, *supra* note 8, at 6.

10. Todd Steiner, *The Senseless Slaughter of Marine Mammals*, BUS. & SOC. REV., Spring 1987, at 18. Chumming is a fishing method whereby fishermen dump ground-up bait in the water to attract fish. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* One observer witnessed a herd of about 1,000 northern spotted dolphins, mostly pregnant, nursing, or young, floating dead on the ocean surface after drowning in purse seine nets. See Sean Kelly, *Dolphins: Still Casualties of Tuna Catch; Protection Sought for Species in Pacific*, WASH. POST, Nov. 18, 1991, at A8.

cal Pacific have killed six million dolphins.<sup>15</sup> While the U.S. tuna fleet saw a thirty-six percent reduction in dolphin kills from 1988 to 1989,<sup>16</sup> estimates place the number of dolphin deaths caused by all fleets as high as 200,000 per year, endangering the survival of the dolphin.<sup>17</sup> As a result of tuna fishing in the Eastern Tropical Pacific, the northern spotted dolphin population has decreased to less than one-third of the population of thirty years ago.<sup>18</sup> In 1972, Congress reacted to this dolphin decimation and enacted the Marine Mammal Protection Act.<sup>19</sup> The GATT panel, however, determined that the MMPA conflicts with the terms of GATT. It recommended that the United States either not enforce the MMPA or amend the statute to render it consistent with GATT.

This Note addresses the controversy facing the U.S. government regarding the MMPA's conflict with GATT. Section A of the Background will trace the relevant obligations and provisions of GATT, focusing on its history and purpose in Subsection 1, eligibility for participation in GATT in Subsection 2, and structure in Subsection 3. Subsection 4 outlines the principles of most-favored-nation treatment, national treatment, and the prohibition against nontariff barriers. Exceptions to these principles are discussed in Subsection 5, while Subsection 6 discusses dispute resolution procedures under GATT. Subsection 7 outlines the status of GATT in U.S. domestic law.

Section B of the Background focuses on the Marine Mammal Protection Act. The purpose, history, and policy behind the statute are recounted in Subsections 1 and 2, and its relevant provisions are discussed in Subsection 3.

This Note discusses *Earth Island Institute v. Mosbacher*, the case that led to the enforcement of the embargo, in Section II. Next, the GATT panel report is outlined in Section III. Finally, in Section IV, this Note explores the relationship between the U.S. domestic environmental protection law and the country's obligations under

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15. Kenneth Brower, *The Destruction of Dolphins*, ATLANTIC MONTHLY, July 1989, at 35, 38; Scott, *supra* note 4, at 6.

16. Pamela A. MacLean, *Court Asked to Order Tuna Embargo on Mexico*, UPI, Feb. 14, 1991, available in LEXIS, Nexis Library, UPI File.

17. David Schriebera, *U.S., Mexico Engage in Tuna War*, SACRAMENTO BEE, Aug. 29, 1990, at A1. United States officials say that in 1989, domestic fishing fleets killed 12,643 dolphins compared to 84,336 dolphins killed by foreign fleets. *Id.*

18. Kelly, *supra* note 14, at A8.

19. See Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988 & Supp. 1991).

GATT. In conclusion, this Note argues that the GATT panel was correct in deciding that the tuna embargo was GATT-inconsistent. It further contends that this controversy illustrates the need for international cooperation in addressing environmental issues, either through supplementing or amending GATT, or developing international environmental treaties to protect threatened ecosystems.

## I. BACKGROUND

Initially, an understanding of the relevant portions of GATT and the MMPA is required.

### A. *The General Agreement on Tariffs and Trade (GATT)*

International business transactions are complex transactions involving several contracts.<sup>20</sup> Governments often require documents beyond those required by the parties involved in the transaction.<sup>21</sup> The transaction becomes even more complex as a result of government regulations controlling, among other things, import tariffs, currency exchange, and product quality or packaging requirements.<sup>22</sup> International regulation of international trade results from efforts to minimize self-interested national regulation of international trade that harms other nations.<sup>23</sup> GATT is an attempt by a group of nations to "bring some order into the chaos of international trade . . . ."<sup>24</sup>

#### 1. *History and Purpose of GATT*

Most of the world's international trade is governed by a set of multilateral treaties centered around GATT.<sup>25</sup> GATT grew out of a

20. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 5-7 (1969). These contracts include: (1) the underlying contract to sell; (2) the bill of lading or shipping contract; (3) the insurance contract; and (4) the letter of credit through issuing and corresponding banks. *Id.*

21. *Id.* Regulations on international trade vary from country to country, and it is not always easy to ascertain what individual governments require. There is a GATT obligation under Article X to publish governmental regulations. *General Agreement on Tariffs and Trade, opened for signature* Oct. 30, 1947, 61 STAT. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948) [hereinafter GATT]; see also JACKSON, *supra* note 20, at 6 n.2 (stating that it is difficult to determine with certainty all government regulations affecting international trade and listing sources of information on such government regulations).

22. JACKSON, *supra* note 20, at 6.

23. *Id.* at 9.

24. *Id.* at 2.

25. See John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207, 207 (1989). The four leading treatises dealing with GATT include: KENNETH W.

failed attempt at the end of World War II to create the International Trade Organization.<sup>26</sup> After World War II, the United States sought to create this organization and, together with its allies, initiated the International Trade Organization charter.<sup>27</sup> Originally, the United States and its allies did three things: 1) drafted the charter for the International Trade Organization; 2) negotiated a multilateral agreement to reciprocally reduce tariffs; and 3) drafted tariff obligations.<sup>28</sup> However, the planned organization never materialized, primarily because the U.S. Congress never approved it. Consequently, only the reciprocal reduction in tariffs and the tariff obligations, jointly referred to as GATT, were implemented under the Protocol of Provisional Application.<sup>29</sup> The GATT organization has since evolved into the principal international trade group.<sup>30</sup> It consists of several multilateral trade agreements and contains several obligations, some of which have been further elaborated by separate treaty instruments.<sup>31</sup>

## 2. Participation in GATT

The participants in this trade group are not referred to as "members," but rather as "contracting parties."<sup>32</sup> The term "contracting parties" refers to the individual members of GATT, whereas the

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DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); JACKSON, *supra* note 20; EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* (1986). One scholar estimates that more than half of the world's governments are contracting parties to GATT, accounting for more than four-fifths of the world's trade. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 *TEX. INT'L L.J.* 339, 340 (1988). Currently, there are 103 contracting parties. LEAH A. HAUS, *GLOBALIZING THE GATT* (1992).

26. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 32 (1990).

27. *Id.* at 31-32; DAM, *supra* note 25, at 10.

28. JACKSON, *supra* note 26, at 32.

29. GATT was drafted in 1947, and although it was subordinate to the International Trade Organization, the International Trade Organization draft was not completed until 1948. *Id.* at 32-34. The drafters wished to allow nations to submit parts of GATT and the ITO charter to their governments for approval but feared that as information spread about the thousands of various tariff reductions, world trade patterns would be disrupted. Therefore, under the Protocol of Provisional Application, the parties implemented the tariff agreements without the International Trade Organization charter. 55 *U.N.T.S.* 308 (1947); see JACKSON, *supra* note 26, at 32-36. At the time of drafting, United States representatives were negotiating pursuant to legislation which allowed them to undertake obligations on behalf of the United States without submitting GATT to Congress for approval. *Id.*

30. For a detailed discussion of GATT as an organization, see JACKSON, *supra* note 20, at 35-57.

31. See *id.* at 207.

32. JACKSON, *supra* note 26, at 45.

term "CONTRACTING PARTIES" refers to the group of governments acting collectively.<sup>33</sup> One-hundred three nations have become contracting parties to GATT.<sup>34</sup> A country becomes a contracting party in one of three ways: 1) original membership, 2) accession, or 3) sponsorship.<sup>35</sup>

Initially, twenty-three governments became contracting parties through original membership.<sup>36</sup> The eight nations that had signed the Protocol of Provisional Application and the fifteen signatories to the final enactment of GATT constitute the original contracting parties.<sup>37</sup> The United States is an original member by virtue of signing the Protocol of Provisional Application.

A second way to become a contracting party is through accession under Article XXXIII of GATT,<sup>38</sup> which requires acceptance of a nation by a two-thirds vote of approval by the existing contracting parties.<sup>39</sup> In determining approval, the contracting parties consider a number of factors including the candidate nation's willingness to adhere to tariff concessions already in force under GATT.<sup>40</sup> The existing contracting parties do not want the candidate nation to receive the benefit of forty years of trade negotiations without committing to equivalent obligations.<sup>41</sup> Mexico joined GATT via accession on July 18, 1986.<sup>42</sup>

Finally, a government can become a contracting party through

33. *Id.* at 48.

34. HAUS, *supra* note 25, at 2; see Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 479 n.1 (1990).

35. JACKSON, *supra* note 20, at 89.

36. JACKSON, *supra* note 26, at 45.

37. GATT, Final Act, Geneva, 55 U.N.T.S. 194 (1947), 55 U.N.T.S. 188 (1947); JACKSON, *supra* note 20, at 91. The agreement lists the fifteen signatures of countries which did not sign the Protocol of Provisional Application. 55 U.N.T.S. 312-15 (1947).

38. Article XXXIII of GATT provides that:

A government . . . or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations . . . may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

GATT, *supra* note 21, art. XXXIII. For an in-depth discussion of the issues concerning the integration into GATT of the Soviet Union's successor states and an argument that the CONTRACTING PARTIES should encourage their entry into GATT, see HAUS, *supra* note 25.

39. GATT, *supra* note 21, art. XXXIII; see JACKSON, *supra* note 26, at 45.

40. JACKSON, *supra* note 26, at 45.

41. *Id.* This is referred to as "negotiating the ticket of admission." *Id.*

42. Accession of Mexico [Decision], GATT Doc. L/6024, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD], Supp. No. 33, at 56 (1987). For an in-depth discussion of Mexico's accession, see English, *supra* note 25, at 369.

sponsorship upon obtaining independence from a member government.<sup>43</sup> Article XXVI 5(c) provides that a formerly dependent customs territory may become a contracting party to GATT simply through sponsorship by its former parent country.<sup>44</sup> Paragraphs 5(a) and 5(b) provide that a contracting party can make GATT effective as to any customs territories that it controls.<sup>45</sup> Over thirty nations have become contracting parties to GATT through this provision.<sup>46</sup> Additionally, pursuant to Article XXXV, any prior contracting party may opt out of a GATT relation with another member.<sup>47</sup> However, the already existing contracting party may opt out only at the time the other nation enters GATT as a new contracting party.<sup>48</sup> This option allows the non-application of rights and obligations between contracting parties.<sup>49</sup>

### 3. *Structure of GATT*

GATT is comprised of three parts: the general articles, the Annexes, and the Schedules.<sup>50</sup> The general articles, Articles I through XXXVIII, together with the Annexes, A through I, make up the general provisions that are intended to be applied by every contracting party to all other contracting parties.<sup>51</sup>

The Schedules, I through LXVII, enumerate the concessions and obligations that a specific contracting party owes to other contracting parties and do not constitute general provisions.<sup>52</sup> Rather, these schedules are annexed to GATT.<sup>53</sup> This Note is concerned primarily with the general provisions of GATT and not with the

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43. GATT, *supra* note 21, art. XXVI, para. 5(c); see JACKSON, *supra* note 26, at 45; JACKSON, *supra* note 20, at 89.

44. GATT, *supra* note 21, art. XXVI, para. 5(c).

45. *Id.* art. XXVI, para. 5(a)&(b). For general discussions of Article XXVI, see JACKSON, *supra* note 26, at 45-46; JACKSON, *supra* note 20, at 96-100.

46. JACKSON, *supra* note 26, at 46.

47. GATT, *supra* note 21, art. XXXV; see JACKSON, *supra* note 26, at 46 (outlining the use of the opt-out clause).

48. GATT, *supra* note 21, art. XXXV. This option was used extensively against Japan. In addition, it was used for political reasons against South Africa. JACKSON, *supra* note 26, at 46.

49. GATT, *supra* note 21, art. XXXV; see JACKSON, *supra* note 26, at 46.

50. JACKSON, *supra* note 20, at 66-67.

51. GATT, *supra* note 21, art. XXXVIII; *id.* Annex A-I; see JACKSON, *supra* note 20, at 67; MCGOVERN, *supra* note 25, at 175-77.

52. GATT, *supra* note 21, Schedules I-LXVII; see JACKSON, *supra* note 20, at 67.

53. MCGOVERN, *supra* note 25, at 176. These schedules are arranged by country with each country keeping the same schedule number even after new concessions and obligations are adopted. *Id.* The United States has schedule number XX. *Id.*



## Schedules.

The general provisions, to which the contracting parties are subject, are ratified in trading or negotiating rounds. Originally, these rounds primarily addressed tariff bindings,<sup>54</sup> but as the needs of the CONTRACTING PARTIES have changed, the rounds have addressed various other aspects of international trade.<sup>55</sup> GATT is currently in its eighth round, which began in September 1986.<sup>56</sup> During this round, the CONTRACTING PARTIES are negotiating agreements on services, intellectual property, and foreign investment, among other negotiations on trade barriers relating to goods.<sup>57</sup>

### 4. *Pertinent Principles and Obligations of GATT*

The goals of GATT, as enumerated in its preamble, are to: (a) raise worldwide standards of living; (b) ensure full employment and a large and steadily growing volume of real income and effective demand; (c) develop the full use of the world's resources; and (d) expand the production and exchange of goods.<sup>58</sup> These goals are to be achieved through the "substantial reduction of tariffs and other barriers to trade" and by the "elimination of discriminatory treatment in international commerce . . . ."<sup>59</sup> Therefore, GATT obligations are based on principles of nondiscrimination and tariff concessions.

To achieve its goals, GATT established rules regarding the way a contracting party can apply its own international trade regulations. There are three basic nondiscriminatory principles: 1) the most-favored-nation principle; 2) the national treatment principle; and 3) the principle against nontariff barriers.

54. A contracting party's schedule consists of a list of goods and the treatment that the contracting party accords to other contracting parties with respect to each good. *Id.* at 177. The treatment accorded is known as a "binding." *Id.* When the schedule refers to a tariff treatment, as opposed to a quota treatment, the obligation is known as a "tariff binding." *Id.*

55. See generally THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS (J. Michael Finger & Andrzej Olechowski eds., 1987) (summarizing the issues involved in the most recent round of GATT negotiations).

56. See GATT, BISD Supp. No. 33, at 19-52 (1987) (detailing the text of the Declaration and the decisions on the agenda).

57. See generally THE URUGUAY ROUND, *supra* note 55, at 89-225 (discussing the subjects for negotiation in the Uruguay Round).

58. GATT, *supra* note 21, pmb1.

59. *Id.*

a. Most-favored-nation principle

Under the general most-favored-nation treatment obligation, there is a policy of nondiscrimination among member states. Pursuant to Article I of GATT, each contracting party has an obligation to every other contracting party to grant the most favorable treatment, with respect to imports and exports of goods, that it grants to any other country.<sup>60</sup> This most-favored-nation treatment clause is at the heart of GATT.

Generally, the most-favored-nation treatment clause imposes unconditional obligations of equal treatment among contracting parties (i.e., if nation *A* grants most-favored-nation treatment to nation *B*, and subsequently grants to a third nation, nation *C*, a low tariff on imports, nation *A* must accord that same low tariff to nation *B*).<sup>61</sup> However, there is also conditional most-favored-nation treatment. For example, when nation *A* grants privileges to nation *C* while owing most-favored-nation treatment to nation *B*, *A* must grant the equivalent privilege to *B*, but only after *B* has given some reciprocal privilege to nation *A*.<sup>62</sup>

In one case arising under GATT, India granted excise tax rebates for products exported to some contracting parties but did not grant the rebates to Pakistan.<sup>63</sup> The parties negotiated a settlement after the practice was found to contravene Article I, paragraph 1.<sup>64</sup> The dispute between India and Pakistan concerning internal taxes illustrates the most-favored-nation principle.<sup>65</sup> India had levied a tax on certain domestic goods but granted rebates to producers who exported those goods.<sup>66</sup> The Indian government, however, excluded from the program goods exported to Pakistan, resulting in exports to Pakistan being taxed while goods exported to other countries were

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60. Article I provides that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 21, art. I. The obligations imposed by GATT are similar to the Uniform Commercial Code in that they apply to goods or products, but not services. See JACKSON, *supra* note 26, at 44-45. Negotiations for GATT rules concerning services are underway in the current Uruguay Round of GATT negotiations. *Id.*

61. JACKSON, *supra* note 26, at 136.

62. *Id.* at 137. For a general discussion of the most-favored nation obligations of GATT, see JACKSON, *supra* note 20, at 255-59.

63. GATT, 2 BISD 12 (1952).

64. *Id.*

65. *Id.*

66. *Id.*

not.<sup>67</sup> Pakistan claimed that the rebate program violated the most-favored-nation principle of Article I.<sup>68</sup> It was ruled that Article I did apply to rebates of internal taxes in connection with exports, and India was obligated to extend rebate privileges to goods exported to Pakistan.<sup>69</sup>

#### b. National treatment principle

Similar to the most-favored-nation treatment found in Article I of GATT, Article III, a ten-paragraph provision entitled "National Treatment on Internal Taxation and Regulation," sets forth a policy of nondiscrimination between imported goods and domestic goods.<sup>70</sup> Paragraph 1 prohibits internal action that "afford[s] protection to domestic production."<sup>71</sup> Paragraph 2 requires that internal taxes on imports not exceed those taxes directly or indirectly applied to "like domestic products."<sup>72</sup> The equal treatment obligation set forth in paragraph 2 is echoed in paragraph 4 with respect to laws, regulations, and requirements affecting the "internal sale" of imported goods.<sup>73</sup> Essentially, these provisions mandate that imported goods receive the same treatment as goods of local origin.

Because this obligation is so closely related to government measures that have legitimate purposes unrelated to the protection of domestic commerce or the restraint of foreign trade, it is often a

67. *Id.*

68. *Id.*

69. *Id.* For further discussion of this case, see HUDEC, *supra* note 25, at 100-09.

70. GATT, *supra* note 21, art. III.

71. Article III, paragraph 1, states:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT, *supra* note 21, art. III, para. 1.

72. Article III, paragraph 2 provides that the "products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject . . . to internal taxes . . . in excess of those applied . . . to like domestic products . . ." *Id.* art. III, para. 2.

73. Article III, paragraph 4, states that:

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.

*Id.* art. III, para. 4.

source of complaint.<sup>74</sup> However, a contracting party may adopt a nondiscriminatory regulation requiring certain standards provided that the regulation applies equally to domestic and imported goods.<sup>75</sup> This is easily applied to regulations dealing with health or pollution hazards created by the good or product *itself* because the harm to be avoided or prohibited occurs *inside* the importing country.<sup>76</sup>

A problem arises, however, when such a regulation applies to the method of manufacture of the good, rather than to the good itself. Governments often impose health, safety, or environmental regulations on domestic production that raise the cost of production and consequently the cost of the domestic product.<sup>77</sup> Imports of identical products from countries without such regulations may be priced more cheaply, which in turn distresses the domestic producer.<sup>78</sup>

Arguably, the importing nation may not: 1) impose a ban; 2) impose a border charge to compensate for the difference in price of the goods; or 3) impose a tax on all the goods and offer a rebate to domestic producers.<sup>79</sup> This is because the products may be considered "like" and Article III requires that "like products" be treated equally.<sup>80</sup> The goal of this provision is to prevent domestic taxes or regulatory policies from operating as protectionist measures.<sup>81</sup>

Whether imports were "like products" was an important issue in a dispute between Norway and Germany concerning tariff rates on sardines.<sup>82</sup> There are three types of sardines, one of which is the pilchard, from the family *Culpea pilchardus* and commonly known as a sardine.<sup>83</sup> This fish is harvested by Portugal off the northern coast of Africa. The two others are sprats, from the family *Culpea sprattus*, and herrings, from the family *Culpea harengus*, and are found in Scandinavian waters.

Norway and Germany had for many years negotiated agreements

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74. JACKSON, *supra* note 26, at 189, 367 n.4; see HUDEC, *supra* note 25, at 275-96 (listing some of the disputes based on Article III).

75. JACKSON, *supra* note 26, at 208.

76. *Id.* at 208-10.

77. *Id.*

78. *Id.*

79. *Id.*

80. GATT, *supra* note 21, art. III, paras. 2, 4. For further discussion of the concept of "like products," see JACKSON, *supra* note 26, at 208-10; JACKSON, *supra* note 20, at 259-64.

81. JACKSON, *supra* note 26, at 189.

82. BISD Supp. No. 1, at 53 (1953).

83. *Id.*

concerning the fish, but after World War II, Germany established separate tariff classifications for each of the three fish.<sup>84</sup> Norway wanted assurances that its sprats and herrings would receive equally favorable duty rates as the Portuguese sardines and brought its complaint before a GATT panel.<sup>85</sup> The GATT panel "was satisfied that it would be sufficient to consider whether in the conduct of the negotiations . . . [Norway and Germany] agreed expressly or tacitly to treat [the fish] as if they were 'like products' for the purposes of the General Agreement."<sup>86</sup> The panel concluded that Norway was entitled to assurances of equal treatment of its sprats and herrings.<sup>87</sup>

In a dispute between France and Brazil, a GATT panel found that Brazil complied with GATT even though that country imposed discriminatory internal taxes on imported and domestic cognac.<sup>88</sup> Brazil's tax scheme provided that the tax for foreign brandy was double the tax on domestic brandy, whatever the domestic tax rate might be.<sup>89</sup> Brazil explained that the discrimination was justified because the foreign and domestic cognacs contained quite different ingredients and were, therefore, not like products.<sup>90</sup> The GATT panel accepted this justification and permitted the disparate tax rates.<sup>91</sup>

### c. Principle against nontariff barriers

Although GATT deals primarily with tariffs, it has strong provisions for dealing with nontariff barriers.<sup>92</sup> Nontariff barriers include quantitative restrictions, such as quotas or embargoes. These quantitative restrictions have been the most debated nontariff barriers to international trade<sup>93</sup> and are subject to regulation by Article XI of GATT.<sup>94</sup>

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84. *Id.* at 55.

85. *Id.* at 53.

86. *Id.* at 57.

87. *Id.*

88. 2 BISD 181 (1952).

89. *Id.*

90. *Id.*

91. *Id.* at 183.

92. DAM, *supra* note 25, at 19-21.

93. JACKSON, *supra* note 20, at 305.

94. 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 contracting party or on the exportation or sale for export of any

Generally, with certain enumerated exceptions, Article XI of GATT prohibits the use of quotas or quantitative restrictions on both imports and exports. Through these prohibitions, the architects of GATT sought to eliminate nontariff barriers and to negotiate reduced tariff levels.<sup>95</sup> Therefore, contracting parties are prohibited from establishing new quantitative restrictions and are required to eliminate existing measures.<sup>96</sup>

With respect to import restrictions, however, paragraph 2(c) provides specific exceptions for restrictions on agricultural or fishery products under certain circumstances.<sup>97</sup> Most importantly, these exceptions allow governments to alleviate food shortages and remove surpluses, but they do not provide for restrictions based on production methods.

### 5. *Exceptions to GATT Principles and Obligations*

While there are specific exceptions to specific obligations under GATT,<sup>98</sup> Article XX provides several general exceptions. These general exceptions fall within the "police powers" or "health and welfare powers" of a government.<sup>99</sup> Thus, Article XX recognizes the important rights of a sovereign nation to exercise its police power and to protect the health and welfare of its citizens, even where such action conflicts with international trade obligations.<sup>100</sup>

Section (b) of Article XX allows measures "necessary to protect human, animal or plant life or health . . . ."<sup>101</sup> Additionally, sec-

product destined for the territory of any other contracting party.

GATT, *supra* note 21, art. XI, para. 1.

95. JACKSON, *supra* note 26, at 115.

96. DAM, *supra* note 25, at 19.

97. Article XI, paragraph 2(c) allows import restrictions on "any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product . . . ; or (ii) to remove a temporary surplus of the like domestic product . . . ." GATT, *supra* note 21, art. XI, para. 2(c).

98. Article XII allows exceptions for balance-of-payment reasons. GATT, *supra* note 21, art. XII. Article XIII requires that the most-favored-nation treatment be applied to any exceptions that are invoked. *Id.* However, Article XIV provides an exception to this nondiscrimination requirement for certain balance-of-payments applications. *Id.* art. XIV. Additionally, governments may take defensive measures by imposing antidumping or countervailing duties pursuant to Article VI. *Id.* art. VI.

99. JACKSON, *supra* note 26, at 206.

100. *Id.*

101. GATT, *supra* note 21, art. XX. This Article, entitled "General Exceptions," includes governmental action undertaken to promote or protect:

(a) public morals

(b) protection of human, animal or plant life or health

tion (g) of Article XX permits actions "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . ." <sup>102</sup>

However, because these exceptions could be used to justify practices that have as their actual goal protection against foreign competition, Article XX includes clauses to guard against abuse. These exceptions are subject to a requirement similar to the most-favored-nation treatment requirement of nondiscrimination.<sup>103</sup> Article XX allows exceptions to all GATT obligations provided that "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 . . . ." <sup>104</sup>

The most-favored-nation treatment requirement, added to prevent abuse of the exceptions, renders their application difficult. It appears that if imported goods and domestic goods are treated equally with respect to Article XX, then no breach of the terms of GATT has occurred.<sup>105</sup> Additionally, Article XX states that "nothing in this Agreement shall . . . prevent the adoption or enforcement" of the enumerated measures.<sup>106</sup> Therefore, obligations under GATT are subject to these exceptions.

The United States previously used Article XX (g) in a dispute

(c) gold or silver trade

(d) customs enforcement, monopoly laws, patents, trademarks, and copyrights

(e) banning products of prison labor

(f) protecting national treasures

(g) conserving national resources

(h) carrying out an approved commodity agreement

(i) export restrictions to implement a price-stabilization program.

GATT, *supra* note 21, art. XX; see JACKSON, *supra* note 26, at 206.

102. GATT, *supra* note 21, art. XX(g); see JACKSON, *supra* note 26, at 206.

103. Article XX, entitled "General Exceptions," allows that:

[subject to the] requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (b) necessary to protect human, animal or plant life or health . . . (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 21, art. XX.

104. *Id.*

105. JACKSON, *supra* note 20, at 743.

106. GATT, *supra* note 21, art. XX.

concerning an embargo against Canada of all tuna and tuna products caught off the west coast of Canada.<sup>107</sup> Canada complained that the embargo was a violation of U.S. obligations under Article XI, which prohibits the use of quotas or any measure other than tariffs to restrict imports or exports.<sup>108</sup> The United States claimed the embargo was a measure to ensure proper conservation of certain fish stocks and was, therefore, exempt under Article XX (g).<sup>109</sup> The GATT panel agreed with Canada, noting that the United States had no complementary domestic regulations as required by the exception.<sup>110</sup> The panel focused on the fact that the United States imposed no similar domestic conservation provision and concluded that the United States should lift the embargo.<sup>111</sup> Indeed, the history of the case suggested that the United States imposed the embargo in response to a boundary dispute with Canada.<sup>112</sup> Aside from the present dispute with Mexico, where the United States has applied MMPA provisions both domestically and against imported goods, the United States has never invoked Article XX (g) to defend an environmental measure that was applied equally to foreign and domestic goods.

## 6. *Dispute Resolution in GATT*

There are a variety of articles in GATT which provide techniques for resolving differences among trading partners.<sup>113</sup> One is a process whereby the CONTRACTING PARTIES as a group agree on new rules through tariff negotiation or trade liberalization.<sup>114</sup> There are other mechanisms, under Article XIX, that allow for retaliatory or reciprocal action between individual contracting parties.

A number of disputes, however, call for the interpretation of vari-

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107. *Prohibitions of Imports of Tuna Fish and Tuna Products from Canada*, GATT, BISD Supp. No. 29, at 91 (1983) [hereinafter *Tuna Products from Canada*].

108. *Id.*; see GATT, *supra* note 21, art. XI.

109. *Tuna Products from Canada*, *supra* note 107, at 97-99; see GATT, *supra* note 21, art. XX(g).

110. *Tuna Products from Canada*, *supra* note 107, at 109; see JACKSON, *supra* note 26, at 207 (discussing the dispute and the GATT panel ruling).

111. *Tuna Products from Canada*, *supra* note 107, at 109.

112. *Id.* at 105; JACKSON, *supra* note 26, at 207.

113. For in-depth discussions of GATT dispute settlements and their problems, see DAM, *supra* note 25, at 351-75; HUDEC, *supra* note 25; JACKSON, *supra* note 20, at 163-89; JACKSON, *supra* note 26, at 84-113; John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979).

114. Jackson, *supra* note 113, at 4.



ous provisions contained in GATT. These disputes are handled either under Article XXII, which calls for consultation between the disputing parties,<sup>115</sup> or under Article XXIII, which provides a procedure that could culminate in a vote by the CONTRACTING PARTIES.<sup>116</sup> Article XXII, entitled "Consultation," establishes the right of any contracting party to consult with another contracting party about matters related to GATT.<sup>117</sup> The Article requires that each contracting party accord to other contracting parties consideration and an adequate opportunity to discuss concerns affecting GATT.<sup>118</sup> However, if a contracting party seeks more than mere denunciation of a fault, as provided by the Consultation provision, Article XXIII goes a step further, emphasizing remedial measures for the injury.

Article XXIII provides for a panel of contracting parties who are not citizens of the disputing parties and who are acting in individual capacities rather than as representatives of particular GATT members to hear the dispute and make recommendations.<sup>119</sup> Third parties have been allowed to present their views to the panel, a process similar to filing an *amicus curiae* brief in court.<sup>120</sup> If the disputing parties are still unable to reach an agreement, the GATT panel writes a report for the CONTRACTING PARTIES as a group.<sup>121</sup> The CONTRACTING PARTIES then vote on the panel's recommendation. A consensus is required, and each disputing party is entitled to vote. A disputing party can block the adoption of a panel recommendation. However, a party rarely blocks a recommendation because it would then likely be subject to GATT-authorized retaliation, such as increased tariffs.<sup>122</sup>

If the panel agrees with the complaining party, and its recommendations are adopted by the vote of the CONTRACTING PARTIES, the panel will likely order the injuring party to cease its activity.<sup>123</sup> If the injuring party does not cease its activity, the complaining party

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115. GATT, *supra* note 21, art. XXII.

116. *Id.* art. XXIII.

117. *Id.* art. XXII.

118. *Id.*

119. *Id.* art. XXIII. Professor Jackson addresses Article XXIII in particular in JACKSON, *supra* note 20, at 178-87.

120. In the dispute settlement between Mexico and the United States, the panel accepted submissions from 11 contracting parties. *Dispute Settlement Panel Report*, *supra* note 3, at 1610-16.

121. GATT, *supra* note 21, art. XXIII.

122. JACKSON, *supra* note 20, at 176.

123. *Id.*

may be authorized to retaliate by suspending GATT concessions.<sup>124</sup> It has been suggested that GATT should require financial compensation for violations.<sup>125</sup> To date, however, recommendations and authorization for retaliation remain the sole remedies for injury resulting from a violation of GATT obligations.

There is considerable international pressure to adopt panel reports and to adhere to the recommendations. Therefore, the record of compliance with panel recommendations is respectable.<sup>126</sup> John Bolton, General Counsel for the Office of the U.S. Trade Representative, noted that if Mexico were to pursue adoption of the panel report, and the United States were to resist adoption, the international community would view the United States as an "international scofflaw."<sup>127</sup>

### 7. *GATT Status in United States Law*

According to the *Restatement (Third) of the Foreign Relations Law of the United States*, there are four ways in which an international agreement becomes law in the United States: 1) as a treaty, with the advice and consent of two-thirds of the Senate; 2) as an executive agreement, when the matter falls within the constitutional authority of Congress and Congress authorizes the agreement; 3) as an executive agreement pursuant to a treaty; or 4) as an executive agreement, based on the president's constitutional authority.<sup>128</sup>

While there is some disagreement among commentators as to how GATT became recognized as law in the United States,<sup>129</sup> all agree that Congress has recognized GATT by authorizing payment of the U.S. share of GATT expenses, by directing the president to conform to GATT restrictions, and by considering congressional actions in

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124. JACKSON, *supra* note 26, at 110.

125. See DAM, *supra* note 25, at 368.

126. JACKSON, *supra* note 26, at 101.

127. GATT: *Implications on Environmental Laws*, *supra* note 2, at 44.

128. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987).

129. On the one hand, Professor Jackson argues that GATT, at the time it was implemented, was a "valid executive agreement, entered into by the United States pursuant to authority of congressional legislation." John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 312 (1967). On the other hand, Professor Ronald Brand argues that GATT was a congressional-executive agreement that had no authorization when implemented, but has since gained legal status domestically. Brand, *supra* note 34, at 502.

light of GATT obligations.<sup>130</sup>

One leading GATT scholar, Professor John Jackson, argues that the president had statutory authority to enter into GATT.<sup>131</sup> While the Constitution grants Congress authority over foreign commerce,<sup>132</sup> Congress may delegate that authority to the executive branch for limited periods of time. Professor Jackson argues that by enacting the Reciprocal Trade Agreements Act, as amended and extended for three years in 1945,<sup>133</sup> Congress authorized the president to enter into GATT, subject to "existing legislation" under the Protocol of Provisional Application.<sup>134</sup> Jackson argues that the wording, legislative history, and known precedents of prior trade agreements at the time of the Act combine to show a delegation of authority to the executive to enter into GATT.<sup>135</sup> Jackson concludes that the president, pursuant to congressional authorization, gave GATT domestic legal effect in the United States by proclamation.<sup>136</sup>

Accordingly, as a valid executive agreement, GATT is law in the United States. However, its application is not unlimited. Where GATT rules conflict with legislation enacted by Congress after the United States entered into GATT, a later-in-time rule applies, and the subsequent legislation will prevail.<sup>137</sup> Thus, domestically, any legislation enacted by Congress subsequent to a GATT obligation will prevail over the GATT obligation where there is a conflict between the two. Therefore, the United States can find itself in a position where its international obligation directly conflicts with a domestic obligation and it cannot legally fulfill both.

This Note focuses on the interplay between GATT and U.S. legislation, in particular the Marine Mammal Protection Act. Therefore, a closer look at the provisions and history of the MMPA is needed.

## B. *The Marine Mammal Protection Act*

### 1. *General Purposes of the Act*

In 1972, Congress passed the Marine Mammal Protection Act,

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130. Jackson, *supra* note 129, at 268; Brand, *supra* note 34, at 485.

131. Jackson, *supra* note 129, at 273-74.

132. U.S. CONST. art. I, § 8.

133. *See* 59 STAT. 410 (1945).

134. *See* Jackson, *supra* note 129, at 273-74.

135. *Id.*

136. *Id.* at 292.

137. *See* Brand, *supra* note 34, at 508.

which regulates the direct taking and importation of ocean mammals as well as the taking of ocean mammals incidental to commercial fishing.<sup>138</sup> The goal of this federal statute is to lower the mortality of ocean mammals.<sup>139</sup> Congress granted the Secretary of Commerce broad powers to promulgate and enforce the MMPA.<sup>140</sup> The importation provisions are enforced by the U.S. Customs Service under the Department of the Treasury.<sup>141</sup>

To protect ocean mammals, Congress aimed the MMPA at commercial tuna fishing, in addition to the direct taking and importing of marine mammals. Schools of yellowfin tuna swim below herds of dolphins. This phenomenon takes place only in the Eastern Tropical Pacific Ocean. All dolphins are air-breathing mammals and must surface to breath.<sup>142</sup> When they surface, they are visible to fishermen who use the dolphins to track the tuna.<sup>143</sup> The fishermen "set on" the dolphins, chasing them and using explosives to expedite the catching of tuna.<sup>144</sup> The fishing fleets use purse seine nets to haul in the tuna catch. These nets do not discriminate between tuna and other sea creatures; rather, marine birds, marine mammals, and other ocean life are often caught in the nets in addition to the sought-after tuna.<sup>145</sup>

As a result of this method of "setting on" the dolphins and using the purse seine nets, many of the dolphins are maimed, drowned, or otherwise killed. Earth Island Institute, a not-for-profit environmental protection group, has documented that for every ten to twelve tuna caught, as many as two-hundred dolphins are killed.<sup>146</sup> The

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138. 16 U.S.C. §§ 1361-1407 (1988 & Supp. 1991).

139. *Id.* § 1361. Congress found that certain species were "in danger of extinction or depletion as a result of man's activities . . ." *Id.* § 1361(1); it stated that these mammals, their mating grounds, rookeries, "and areas of similar significance" should be protected to increase their stocks. *Id.* § 1361(2). Furthermore, Congress wanted to encourage international cooperation in rectifying the threat that man posed to marine mammals. *Id.* § 1361(4).

140. *Id.* §§ 1373, 1375.

141. *See* 50 C.F.R. § 216 (1991) (setting forth implementing regulations); 50 C.F.R. § 216.24 (1991) (setting forth regulations on fishing).

142. *See supra* notes 7-18 and accompanying text; *see also* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 966-67 (N.D. Cal. 1990) (detailing the methods and effects of purse seining), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

143. *See supra* notes 7-18 and accompanying text.

144. *See supra* notes 7-18 and accompanying text.

145. 134 CONG. REC. S16,336, S16,344-45 (daily ed. Oct. 14, 1988) (statements of Sen. Breaux and Sen. Kerry).

146. *Reauthorization of the Marine Mammal Protection Act, 1988: Hearings on S261 Before the Subcomm., 100th Cong., 1st Sess.* 101 (1988) (statement of Sam LaBudde, Earth Island Institute). Sam LaBudde testified at the Senate hearings on the reauthorization of the MMPA

dolphin population in the Eastern Tropical Pacific has dropped substantially, and the population of one subspecies has fallen below the level needed to sustain its population.<sup>147</sup>

## 2. *Legislative History and Policy of the MMPA*

Prior to the enactment of the MMPA, Congress was concerned about the effect of the foreign fishing fleets on the dolphin population. This concern was evident in discussions that centered on the protection of the dolphin rather than on the potentially harmful effect of the legislation on the domestic fishing fleets.<sup>148</sup> Senator John Kerry, in his opening statements at the Senate hearings for the reauthorization of the MMPA, stated that he found it "particularly troubling . . . that we see the killing of porpoises and an unwillingness by foreign fleets" to implement measures to protect the dolphin similar to those implemented by the United States.<sup>149</sup> He stated that "countries not interested in participating in conserving marine mammals should not have access to the tuna market of the United States."<sup>150</sup> Furthermore, he explicitly added that "the goal of the [MMPA] . . . [is] to maintain the health and stability of the

that as an observer aboard foreign tuna fishing vessels he witnessed such kills. *Id.* For a chilling account of LaBudde's experience aboard a Panamanian purse seiner, see Brower, *supra* note 15, at 35.

147. *Reauthorization of the Marine Mammal Protection Act, 1988: Hearings on S261 Before the Subcomm., supra* note 146, at 101. One reason for the sharp decline is the way dolphins reproduce. On the one hand, a female dolphin can live 35 years and give birth to a dozen offspring. Norris, *supra* note 8, at 8-10. On the other hand, a skipjack tuna will live approximately ten years but produces two million eggs in a ninety-day spawning season. *Id.* at 11. This allows the tuna to be more resilient to heavy harvesting. *Id.*

148. During Senate discussions on the 1988 amendment to the MMPA, Senator Kerry stated that it was:

estimated that over 100,000 porpoise are killed each year in the ETP by both the foreign and the domestic tuna fleet with the overwhelming majority being killed by the foreign fleet. Last year . . . 60 percent of the tuna caught and 80 percent of porpoise killed in the ETP were taken by foreign fishermen. *Clearly, the focus of the problem lies with the foreign fleet . . . .* Congress made . . . changes designed to make the foreign fleet more accountable and responsible . . . . These changes will force the foreign fleet to lower the number of dolphins they are killing . . . . [T]he legislation will require foreign fleets to cut in half their mortality rate of dolphin

134 CONG. REC. S12,946 (daily ed. Sept. 20, 1988) (emphasis added). Additionally, Representative Jones, in supporting the 1988 amendments, said, "It is important to remember that it is the greatly increased mortality caused by foreign tuna boats which is responsible for most of the porpoise deaths." 134 CONG. REC. H8237, 8243 (daily ed. Sept. 26, 1988).

149. *Reauthorization of the Marine Mammal Protection Act, 1988: Hearings on S261 Before the Subcomm., supra* note 146, at 2 (opening statement of Sen. Kerry).

150. *Id.* at 3.

marine ecosystem.”<sup>151</sup> Moreover, there is no evidence that lawmakers were concerned about international obligations when they enacted the MMPA, and no mention is made of potential conflicts with any international agreements or treaties.<sup>152</sup> Neither GATT, nor any other international agreement or treaty, was mentioned in the legislative history of the MMPA.

### 3. Provisions of the MMPA

In order to regulate and decrease the number of dolphins killed, the MMPA requires the American Tunaboat Association to obtain a permit for tuna fishing. This permit allows the American Tunaboat Association to “set on” dolphins.<sup>153</sup> However, the fishing fleet is limited as to the number of dolphins it may kill.<sup>154</sup> In 1980, an absolute ceiling, or “taking rate,” of 20,500 dolphins was set for the entire U.S. fishing fleet. To enforce this ceiling, the MMPA mandates that an observer be on board each tuna vessel. In 1989, pursuant to a court order enforcing the MMPA, all American tuna vessels in the Eastern Tropical Pacific were required to have a certified observer aboard.<sup>155</sup>

United States fishermen who violate the MMPA face civil penalties of not more than \$10,000.<sup>156</sup> Additionally, these fishermen face criminal fines up to \$20,000, imprisonment up to one year, or

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151. *Id.* at 7.

152. Senator Breaux did ask James E. Douglas, Jr., Acting Assistant Administrator for Fisheries, if there was any pressure from the State Department to “go easy” on Mexico, Panama, or Venezuela. *Id.* at 80-81. The Senator expressed impatience and “embarrassment” that the embargo regulations mandated by the 1984 MMPA had not been implemented. *Id.* Douglas responded that there had been no such pressure. *Id.* There was no further discussion about any State Department involvement or any possible agreement violation.

153. 16 U.S.C. § 1374(h).

154. *Id.*

155. *Id.*

156. *Id.* § 1375(a)(1). This section provides:

Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder may be assessed a civil penalty . . . of not more than \$10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense . . . .

both.<sup>157</sup> Furthermore, they risk seizure of their cargo if they violate the provisions of the MMPA.<sup>158</sup>

The MMPA also mandates the embargo of yellowfin tuna caught in the Eastern Tropical Pacific by nations that fail to meet several requirements set forth in the MMPA.<sup>159</sup> The government of any foreign country exporting tuna or tuna products to the United States must provide to the Secretary of Commerce several pieces of documentary evidence.<sup>160</sup> The MMPA requires proof that the harvesting nation has adopted a program, comparable to that in the United States, that regulates the incidental taking of marine mammals.<sup>161</sup>

Additionally, to overcome the ban, the foreign nation bears the burden of documenting to the Secretary of Commerce that the incidental taking rate of its tuna vessels is comparable to that of American vessels harvesting Eastern Tropical Pacific tuna.<sup>162</sup> Initially, Congress defined "comparable" as a rate of no more than two times the U.S. rate. However, the definition evolved and by the end of the 1990 fishing season, "comparable" was defined as no more than 1.25 times the U.S. rate.<sup>163</sup> Each harvesting nation is also limited with respect to the types of dolphins taken. Eastern spinner dolphins takings may not exceed fifteen percent of the total incidental taking, and the coastal spotted dolphin taking rate is limited to two percent.<sup>164</sup>

Once the embargo has been in place for six months, the Secretary of Commerce must certify the embargo to the president,<sup>165</sup> which triggers the Fishermen's Protective Act of 1967 (the Pelly Amend-

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157. *Id.* § 1375(b). This section provides criminal penalties such that "[a]ny person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both." *Id.*

158. *Id.* § 1377(d)(3) (1988 & Supp. 1991). This provision allows the seizure of "the cargo of any vessel . . . subject to the jurisdiction of the United States used or employed contrary to the provisions of this subchapter or the regulations issued hereunder . . ." *Id.*

159. *Id.* § 1371(a)(2) (1988 & Supp. 1991). The MMPA was amended in October 1992 by the International Dolphin Conservation Act of 1992, 16 U.S.C.A. §§ 1411-1418 (West Supp. 1992). The law puts a five-year global moratorium on the practice of purse seine fishing for yellowfin tuna in the Eastern Tropical Pacific. 16 U.S.C.A. § 1415. For a discussion of this amendment and its provisions, see *infra* notes 266-92 and accompanying text.

160. 16 U.S.C. § 1371(a)(2)(B).

161. *Id.* § 1371(a)(2)(B)(i).

162. *Id.* § 1371(a)(2)(B)(ii).

163. *Id.* § 1371(a)(2)(B)(ii)(II).

164. *Id.* § 1371(a)(2)(B)(ii)(III).

165. *Id.* § 1371(a)(2)(D).

ment).<sup>166</sup> This certification can lead to the embargo of all of the harvesting nation's fish products, not just the specific products targeted by the original embargo.<sup>167</sup> At the time of the GATT hearing, Mexico had not been certified and was not subject to the provisions of the Pelly Amendments.

Moreover, section 1371 of the MMPA requires proof from foreign governments that harvesting of tuna for export to the United States was not conducted with large-scale driftnets, no matter what the incidental taking rate is.<sup>168</sup> Congress further extended the requirements to "any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States . . . ." <sup>169</sup> Intermediary nations are those which import tuna for processing and canning and then export the processed tuna to the United States. These exporting nations are required to document that they have acted to prohibit the import into their own countries of tuna from any country whose tuna is banned pursuant to the MMPA in the United States.<sup>170</sup> Moreover, there are no exceptions to the MMPA provisions. These provisions were recently litigated in the Ninth Circuit in *Earth Island Institute v. Mosbacher*.<sup>171</sup>

## II. EARTH ISLAND INSTITUTE V. MOSBACHER

On April 11, 1991, the U.S. Court of Appeals for the Ninth Circuit affirmed the grant of an injunction by the U.S. District Court for the Northern District of California barring the importation of yellowfin tuna from Mexico.<sup>172</sup> Earth Island Institute, a nonprofit organization whose members share a commitment to the protection of marine mammals, sought to enforce various provisions of the MMPA, especially those that apply to the foreign tuna fishing fleet.<sup>173</sup> In 1984, the MMPA provided that tuna harvested with purse seine nets could be imported only upon proof by the exporting nation's government that it: 1) has in place a "comparable" regula-

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166. 22 U.S.C. § 1978 (1988 & Supp. 1991).

167. *Id.* § 1978(a)(4). The secondary embargo is discretionary, not mandatory. *Id.*

168. 16 U.S.C. § 1371(a)(2)(E)(ii).

169. *Id.* § 1371(a)(2)(C).

170. *Id.* Costa Rica, France, Italy, Japan, and Panama were embargoed. Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 55 Fed. Reg. 26,995 (notifying importers of the embargo).

171. 929 F.2d 1449 (9th Cir. 1991).

172. *Id.* The government has not applied to the United States Supreme Court for certiorari.

173. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 966 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).



tory program to that of the United States and 2) has an average incidental taking rate comparable to that of the U.S. fleet.<sup>174</sup> Congress gave the Secretary of Commerce broad discretion to promulgate and enforce regulations.<sup>175</sup>

Four years later, in 1988, only interim final regulations had been enacted, giving foreign nations until 1991 to comply with the terms of the MMPA.<sup>176</sup> Congress reacted by taking away agency discretion. It required foreign fleets to comply with specific comparability standards by the end of 1989. The court in *Earth Island* noted that at the time of the decision, "the 1989 fishing season ha[d] come and gone" and that "nearly nine months into the 1990 fishing season, no comparability findings [had] been made . . . ."<sup>177</sup>

The defendant, the Secretary of Commerce, argued that the MMPA mandated comparability findings "by the end of the 1989 fishing season"<sup>178</sup> and that this meant it was required to base its findings on the entire 1989 fishing season.<sup>179</sup> The agency argued that many vessels left port in December and did not return for several months and that only upon their return could data be collected.<sup>180</sup> The district court disagreed, stating that the comparison "[could] be made based upon data from the first six months of 1990, or even for the year of 1989, so long as that data demonstrated that the average taking rates . . . [did] not exceed 1.25 times that of the United States vessels for the same period."<sup>181</sup>

The district court granted a preliminary injunction against the importation of yellowfin tuna from Mexico.<sup>182</sup> The court held that the Secretary's inaction was in clear contravention of the statute and, therefore, the agency decision was not entitled to deference.<sup>183</sup> It stated that the Secretary was required to make positive and complete findings by the end of 1989 regarding exporting nations' incidental taking rates.<sup>184</sup> The Secretary was consequently enjoined

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174. 16 U.S.C. § 1371(a)(2)(B); see *Earth Island*, 746 F. Supp. at 968.

175. 16 U.S.C. §§ 1373, 1374; see *Earth Island*, 746 F. Supp. at 967.

176. *Reauthorization of the Marine Mammal Protection Act, 1988: Hearings on S261 Before the Subcomm., supra* note 146, at 4 (opening statement of Sen. Breaux).

177. *Earth Island*, 746 F. Supp. at 968.

178. *Id.* at 971.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 976.

183. *Id.* at 964.

184. *Id.* at 965.

from allowing the importation of yellowfin tuna or tuna products caught in the Eastern Tropical Pacific with purse seine nets by foreign nations.<sup>185</sup>

The Court of Appeals for the Ninth Circuit affirmed the lower court's decision.<sup>186</sup> Because the Secretary had made no positive findings with respect to tuna harvested by Mexico, the provisions of the MMPA required that the importation of yellowfin tuna from that country cease.<sup>187</sup> Furthermore, the court invalidated a National Marine Fisheries Service regulation that allowed the Secretary to base reconsideration of a tuna embargo on only six months of data concerning dolphin kill comparability findings.<sup>188</sup>

The government argued that the six-month "reconsideration" provision was within the discretion granted by Congress for regulatory implementation of the Act.<sup>189</sup> The court stated that "agencies do not have discretion to issue regulations which conflict with statutory language and congressional purpose . . . . This regulation clearly does."<sup>190</sup>

The government also argued that its regulation should be upheld as a matter of policy because it "offers an incentive to foreign countries to speed up their efforts to meet the statutory standards."<sup>191</sup> Again, the court rejected the government's argument, stating that the "record in this case belies the existence of any incentive effect."<sup>192</sup> The court criticized the agency's "lax record of promulgating and enforcing standards for foreign fleets" and held that there was "no basis in the history of the enforcement of the Act for [the court] to conclude that the agency's policies [were] aimed at more stringent enforcement of Congressional policy."<sup>193</sup> Accordingly, the court affirmed the district court's injunction.<sup>194</sup>

As a result of the court order, the United States barred the importation of yellowfin tuna from Mexico, Venezuela, and the Pacific island nation of Vanuatu.<sup>195</sup> Additionally, tuna and tuna product

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185. *Id.* at 976.

186. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991).

187. *Id.* at 1452-53.

188. *Id.*

189. *Id.* at 1452.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1453.

194. *Id.*

195. Vanuatu was formerly known as New Hebrides. The embargo on imports from Vanuatu

imports from France, Costa Rica, Italy, Japan, and Panama were barred because those countries purchase tuna from the embargoed countries.<sup>196</sup>

The Ninth Circuit allowed the MMPA to govern without examining the impact of the ruling on GATT obligations, even though the two directly conflict. Whereas the MMPA mandates a quantitative restriction, GATT prohibits such restrictions. In light of this conflict, an analysis of the legality of the MMPA under GATT and the relationship of the two sets of obligations under U.S. domestic law is required.

### III. THE GATT PANEL REPORT ON THE UNITED STATES TUNA EMBARGO

The GATT panel findings remain confidential until the CONTRACTING PARTIES adopt them.<sup>197</sup> They remain confidential to encourage further negotiations and settlement between the disputing parties.<sup>198</sup> The GATT panel report addressing the tuna embargo was released at the request of the disputing parties.<sup>199</sup>

The panel found the primary embargo under the MMPA to be an impermissible prohibition.<sup>200</sup> Mexico argued that the applicable provision was Article XI of GATT, which prohibits quantitative restrictions and embargoes,<sup>201</sup> and that both the MMPA and the Pelly Amendment violated Article XI.<sup>202</sup> Mexico further urged a restrictive interpretation of Article III.<sup>203</sup> It argued that the U.S. actions illegally discriminated between domestic and imported products

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was lifted in January, 1992 after Vanuatu submitted evidence that its regulations were comparable to the United States regulatory program. Department of Commerce, National Oceanic and Atmospheric Administration Agency, 57 Fed. Reg. 2710 (1992); see *Government Asks Appeals Court to Overturn Tuna Embargo and Stay Order Pending Appeal*, Int'l Trade Daily (BNA) (Feb. 6, 1992).

196. The United States Customs Service announced that the embargo would cover yellowfin tuna imported from Britain, Canada, Colombia, Costa Rica, Ecuador, France, Indonesia, Italy, Japan, Korea, Malaysia, Panama, Singapore, the Marshall Islands, the Netherlands Antilles, Spain, Taiwan, Thailand, Trinidad and Tobago, and Venezuela. *U.S. Enforces Tuna Embargo*, N.Y. TIMES, Feb. 3, 1992, at D3.

197. *GATT: Implications on Environmental Laws*, *supra* note 2, at 7 (statement of John Bolten, General Counsel, Office of the U.S. Trade Representative).

198. *Id.*

199. *Id.*

200. *Dispute Settlement Panel Report*, *supra* note 3, at 1618-20.

201. *Id.* at 1602.

202. *Id.*

203. *Id.* at 1603.

based solely on production processes.<sup>204</sup> Mexico also urged a restrictive interpretation of the exceptions allowed in Article XX.<sup>205</sup>

The Americans disputed Mexico's challenge of the Pelly Amendment. They pointed out that the Pelly Amendment was discretionary and that no action had been taken pursuant to it.<sup>206</sup> They argued that, in the absence of certification or further embargo, the GATT panel should not act with respect to it.<sup>207</sup>

As for the MMPA, the United States argued that the pertinent provision was Article III of GATT rather than Article XI.<sup>208</sup> The argument was based on the fact that the embargo was an internal measure which, according to the United States, treated imported tuna no differently from domestic tuna.<sup>209</sup> The United States also argued that the requirements under the MMPA were simply internal measures applied equally to domestic and foreign products and not in a protectionist manner.<sup>210</sup> It claimed that the general exceptions in Article XX applied to the MMPA and that the MMPA was necessary to avoid "needless deaths."<sup>211</sup>

The GATT panel disagreed. Based on the plain meaning of the wording, it stated that in order to apply internal measures at the border, the measures must apply to the product itself.<sup>212</sup> The panel determined that the MMPA illegally based its measures on the production process rather than the product.<sup>213</sup> The panel further noted that the embargo was a quantitative restriction, in clear violation of Article XI.<sup>214</sup>

Second, the panel explained that the exceptions for measures necessary to protect animal life or health in Article XX(b) or those relating to the conservation of exhaustible natural resources in Article XX(g) are not available for measures applied extrajurisdictionally.<sup>215</sup>

The panel conceded that GATT is ambiguous as to whether Arti-

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204. *Id.*

205. *Id.* at 1605.

206. *Id.*

207. *Id.*

208. *Id.* at 1602.

209. *Id.*

210. *Id.* at 1603.

211. *Id.* at 1606.

212. *Id.* at 1618.

213. *Id.*

214. *Id.*

215. *Id.* at 1619-20.

cle XX(b) covers measures taken to protect life outside a contracting party's jurisdiction but found that the exception could not be applied to protect the life or health of humans, animals, or plants outside the jurisdiction of the United States.<sup>216</sup> Similarly, the panel found that Article XX(g) could not be applied extra-jurisdictionally.<sup>217</sup>

The panel's reasoning in both instances, Article XX(b) and Article XX(g), depended partially on each country's freedom under GATT to set its own environmental policies.<sup>218</sup> The panel was concerned that if the exceptions were available for extrajurisdictional measures, a country could take trade measures based on another country's different environmental policies, thereby infringing on that other country's right to establish its own environmental policies. The panel considered that if the broad interpretation suggested by the United States was accepted, each GATT contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under GATT.<sup>219</sup> The unilateral nature of these measures would be contrary to the multilateral nature of GATT.

In its concluding remarks, however, the panel noted that adoption of its report would not affect 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 GATT.<sup>220</sup> The panel said the Pelly Amendment was not GATT-inconsistent.<sup>221</sup> According to the panel, provisions that merely authorize action inconsistent with GATT are not, in themselves, inconsistent with GATT.<sup>222</sup>

The panel concluded that its decision did not limit the ability of countries to pursue their own internal environmental policies. Countries are free to tax or regulate imported products and like domestic products as long as the taxes or regulations do not discriminate against imported products or afford protection to domestic products. A country is also free to tax or regulate domestic production for

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216. *Id.* For a contrary view, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 1991 J. WORLD TRADE L. 37, 52-53.

217. *Dispute Settlement Panel, supra* note 3, at 1619-22.

218. *Id.*

219. *Id.*

220. *Id.* at 1622.

221. *Id.* at 1619.

222. *Id.*

environmental purposes.<sup>223</sup> The panel recommended that if it is necessary to have a different rule for extrajurisdictional application of measures, then it would be preferable to amend or supplement GATT rather than to interpret the exceptions broadly.

#### IV. ANALYSIS

There is an obvious tension between the United States' domestic law and its GATT obligations as interpreted by the GATT panel. The United States claimed an exemption based on the general exception provided in Article XX of GATT.<sup>224</sup> This exception allows a country to implement measures affecting foreign countries that are designed to conserve "exhaustible natural resources" where the measures apply equally to domestic production or consumption.<sup>225</sup> The panel, however, agreed with the Mexican position that the ban was a commercial barrier and a protectionist measure incompatible with GATT principles.<sup>226</sup>

First, this Analysis examines the most-favored-nation principle with respect to the MMPA. Second, it discusses the relationship between the national treatment principle and the MMPA. A discussion of the MMPA and the principle against nontariff barriers follows. Next, the legality of the MMPA under GATT and the possible application of the Article XX exception to the statute are evaluated. Finally, GATT's status in U.S. domestic law is summarized.

##### *A. The MMPA and the Most-Favored-Nation Principle*

The MMPA does not conflict with GATT's most-favored-nation treatment provisions. Article I of GATT requires that each contracting party treat each other contracting party equally with respect to imports and exports.<sup>227</sup> A contracting party may not extend a privilege to a country without permitting all contracting parties to benefit from that privilege.

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223. *Id.* at 1622.

224. *See supra* notes 208-11 and accompanying text (summarizing the United States' argument for allowing the MMPA provisions to operate).

225. GATT, *supra* note 21, art. XX (g); *see supra* notes 98-112 (outlining Article XX's general exceptions to GATT obligations).

226. *See supra* notes 197-223 and accompanying text (discussing the GATT panel decision).

227. GATT, *supra* note 21, art. I; *see supra* notes 60-64 and accompanying text (discussing GATT's most-favored-nation principle).

The MMPA does not single out specific countries to which its requirements apply. Rather, the statute requires that "the government of the exporting nation" provide evidence that its fishing vessels comply with the enumerated taking rates.<sup>228</sup> The statute does not make exceptions for any particular country or countries; it imposes on all countries the same restrictions and accords to all countries the same privileges upon compliance, whether they are contracting parties to the Agreement or not. As applied, the MMPA does not discriminate in contravention of GATT. The MMPA mandates that similar measures be taken for similar reasons against imports of tuna and tuna products from countries other than Mexico (e.g., Vanuatu and Venezuela). The embargo does not apply in a manner that arbitrarily or unjustifiably discriminates between countries where the same conditions prevail. However, the MMPA does create problems vis-à-vis the second GATT nondiscrimination principle — the national treatment principle.

### *B. The MMPA and the National Treatment Principle*

At first glance, the MMPA appears not to discriminate between foreign and domestic tuna. The GATT national treatment principle, set forth in Article III, aims to prevent protectionist measures.<sup>229</sup> To this end, the provision requires that contracting parties treat like domestic and imported products the same. Both foreign and domestic tuna fishermen are subject to comparable restrictions. Under the MMPA, however, some imported tuna is discriminated against in a way that may be considered illegal under GATT.

There is no question that the domestic and imported products at issue are like products.<sup>230</sup> In both cases the product is yellowfin tuna caught in the Eastern Tropical Pacific Ocean. Similarly, even when the tuna is processed by an intermediary country, there appears to be equal treatment of like products. A member of the U.S. fishing fleet may not circumvent the MMPA by selling its tuna to a foreign country for processing. The dolphin mortality ceiling is imposed on the entire catch of the domestic fishing fleet, and it is not restricted to that part which is brought directly back into the United States.

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228. 16 U.S.C. § 1371(a)(2)(B).

229. See *supra* notes 70-91 and accompanying text (discussing GATT's national treatment principle).

230. See *supra* notes 80-91 and accompanying text (discussing "like products" with respect to GATT).

Therefore, regardless of where the domestic fishermen sell their catch, they are subject to permit restrictions.<sup>231</sup>

Thus, in one respect, the MMPA appears to treat *imported* tuna more favorably than *domestic* tuna. Foreign fleets are subject to more relaxed standards concerning dolphin mortality. A harvesting nation is permitted to kill dolphins at a rate twenty-five percent higher than that of the United States.<sup>232</sup> Furthermore, the foreign fishermen are dependent on the U.S. mortality rate. They are subject to a rate that is not constant, whereas, the rate for domestic fishermen is constant. Additionally, the domestic fleet is small, so depending on the number of vessels a country has, there is a disparity not only between the United States and the foreign allowance, but also among the foreign fleets.

However, discrimination based on the manufacturing process or some characteristic of the exporting country violates GATT obligations to treat like products equally.<sup>233</sup> The focus of the obligation is on the good itself, regardless of what manufacturing process takes place.<sup>234</sup> Under this interpretation, the embargo provisions of the MMPA do indeed violate GATT because they are aimed at fishing methods unacceptable to the United States, rather than being aimed at some characteristic of the yellowfin tuna itself. Since the prohibition's goal is not preservation of depleted *yellowfin tuna*, it violates GATT.

Additionally, the MMPA may fail to meet the national treatment standard of GATT where the MMPA sanctions are concerned. Both domestic and foreign fleets face the prospect of a closed market in the United States. However, the sanctions are imposed in different manners depending on who caught the tuna: a foreign fleet faces embargo, the domestic fleet faces seizure of cargo after a hearing. Whereas domestic fishermen are not subject to sanctions without due process protections,<sup>235</sup> there is no opportunity for a foreign nation to challenge an embargo *prior* to its imposition. While this dis-

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231. 16 U.S.C. § 1374(h); *see supra* notes 153-58 (enumerating penalties imposed on domestic fishermen).

232. 16 U.S.C. § 1371(a)(2)(B)(ii)(II); *see supra* notes 159-64, 168-71 (listing the penalties imposed against foreign fishing fleets).

233. JACKSON, *supra* note 26, at 224-25; *see supra* notes 212-20 (explaining the GATT panel decision that the MMPA illegally regulated production methods rather than goods themselves and did not fall under any exceptions).

234. *See* JACKSON, *supra* note 26, at 208-09.

235. 16 U.S.C. § 1375.



inction is not troublesome under U.S. domestic law, it poses a problem under GATT's national treatment principle because the domestic producers have the benefit of prior notice and opportunity for a hearing *before* the U.S. market is closed to them. This is in contrast to the treatment of foreign producers who have no opportunity to challenge U.S. action prior to confiscation of their goods. More importantly, as the Mexican representative alleged, and as the GATT panel confirmed, the United States violates the GATT principle that prohibits nontariff barriers because it imposes quantitative restrictions when it enforces the embargo provision of the MMPA.

### *C. The MMPA and the Principle Against Nontariff Barriers*

When the United States embargoed tuna imported from nations that were contracting parties, it clearly violated Article XI, paragraph 1 of GATT. This provision explicitly states that tariffs are the only restrictions that a contracting party may impose on products imported from any other contracting party.<sup>236</sup> Article XI states that "quotas, import or export licences or other measures" are prohibited and that only "duties, taxes or other charges" are permissible restrictions.<sup>237</sup>

The MMPA, on the other hand, burdens contracting parties by mandating an import restriction that is neither a duty, a tax, nor another charge. The requirement that foreign governments provide written documentation that the dolphin mortality rates of their vessels comply with U.S. environmental legislation operates as a "license" at worst and constitutes an "other measure" at best. The exporting contracting party faces a closed U.S. market if it fails to study the dolphin mortality rate of its commercial fishing fleets or if it fails to implement regulations similar to those of the United States, including the requirement of an observer on board the vessel. Because this limitation violates GATT, the United States must justify it in some way. To that end, it claimed that the MMPA falls under the exception in Article XX.

### *D. The MMPA as an Article XX Exception*

The United States argued that its action was fully justified under

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236. GATT, *supra* note 21, art. XI, para. 1; *see supra* notes 92-97 (discussing nontariff barriers under GATT).

237. GATT, *supra* note 21, art. XI.

Article XX (g) of GATT,<sup>238</sup> which provides an exception to other GATT obligations for measures relating to conservation of exhaustible natural resources.<sup>239</sup> One could argue further that the MMPA was in no way motivated by trade considerations.

The first element in showing that the measures provided under the MMPA were justified under Article XX(g) was that the subject be an exhaustible natural resource. There is little question that dolphins are potentially subject to exhaustion or depletion.<sup>240</sup> Although Mexico argued that yellowfin tuna, the subject of the embargo, is not a depleted resource, dolphins are depleted and threatened with extinction. The dolphins face extinction if the purse seine method of fishing for tuna is continued; therefore, the protection of the species is inextricably linked to the methods employed for harvesting yellowfin tuna.

GATT states that the exception applies to measures "relating to the conservation of exhaustible natural resources."<sup>241</sup> A GATT panel found that a trade measure need not be "necessary or essential to the conservation of an exhaustible natural resource," but the measure must be "primarily aimed at the conservation of [such] resource to be considered as 'relating to' conservation within the meaning of Article XX(g)."<sup>242</sup> Unlike the Canada-U.S. tuna case where the GATT panel found that the U.S. embargo was actually a response to the Canadian seizure of American vessels,<sup>243</sup> there is no ulterior motive behind the embargo in this case.<sup>244</sup> The primary aim of the MMPA is the conservation of marine mammals and, in this particular instance, dolphins.<sup>245</sup> Additionally, there is a close nexus between restrictions on the harvesting of yellowfin tuna and protection against dolphin depletion, and it is arguable that this nexus should satisfy the GATT exception for conservation of natural resources.

The MMPA restrictions on both domestic and foreign producers

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238. *Dispute Settlement Panel Report*, *supra* note 3, at 1606; *see supra* note 198 and accompanying text.

239. *See supra* notes 98-112 (discussing Article XX's general exceptions to GATT obligations).

240. *See supra* notes 146-51 (explaining the effect of purse seine fishing on the dolphin population in the Eastern Tropical Pacific).

241. GATT, *supra* note 21, art. XX(g).

242. *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT, BISD 35 Supp. 98, 114 (1989) (stating that Article XX exceptions must be narrowly construed).

243. *See supra* notes 107-12 and accompanying text.

244. *See supra* notes 97-101 and accompanying text.

245. *See supra* notes 139-55 and accompanying text.

arguably "relate to" the conservation of dolphins. The method of fishing for yellowfin tuna is necessarily linked to the mortality of dolphins due to the symbiotic relationship the fish have with the mammals.<sup>246</sup> Purse seine fishing for tuna kills dolphins and poses a grave threat to the dolphins' survival in the Eastern Tropical Pacific. Eliminating this method of fishing and monitoring dolphin kills resulting from tuna fishing are conservation measures that the United States has deemed most appropriate. In this way, the restrictions placed on the tuna fishing fleets "relate to" the conservation of exhaustible natural resources.

Furthermore, as required by Article XX (g), the United States has made the measures effective "in conjunction with restrictions on domestic production . . . ."<sup>247</sup> The provisions of the MMPA require that domestic fishing fleets both obtain permits for taking of dolphins and limit the number of incidental dolphin killings.<sup>248</sup>

Finally, the legislation fulfills the GATT requirement that the measures not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail . . . ."<sup>249</sup> Under the MMPA, all foreign harvesting nations are subject to the documentary requirements and the same taking rates.

Although Mexico claimed that the U.S. action was a disguised restriction on international trade and the GATT panel agreed, the history of the legislation and the more stringent taking rates imposed on the domestic fishing fleet indicate that the motivation for the U.S. action was in no way trade related.

More importantly, the Secretary of Commerce resisted imposing the embargo in spite of the congressional mandate.<sup>250</sup> Significantly, it was a not-for-profit environmental protection group, Earth Island Institute, that brought suit to enforce the international provisions of the MMPA. There is no evidence that either the U.S. Congress, the Secretary of Commerce, or Earth Island Institute was motivated by international trade concerns when drafting, implementing, or seeking to enforce the MMPA.

The GATT panel noted that the United States unilaterally im-

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246. See *supra* notes 7-19 and accompanying text.

247. GATT, *supra* note 21, art. XX(g); see 16 U.S.C. §§ 1371-1374.

248. 16 U.S.C. §§ 1371-1374.

249. GATT, *supra* note 21, art. XX.

250. See *supra* notes 171-96 (summarizing *Earth Island Institute v. Mosbacher*, the case that forced the secretary to act).

posed its own conservation measures in an area not within U.S. jurisdiction.<sup>251</sup> Although GATT does not explicitly restrict conservation measures to resources found inside the importing country, the panel interpreted the provision this way. Indeed, one could argue that Article XX(g) applies to resources *inside* the importing country.

The panel has unequivocally condemned the use of quantitative import restrictions to promote and enforce domestic environmental protection policies extraterritorially. Nonetheless, the Secretary of Commerce will, indeed must, enforce the U.S. conservation policy concerning dolphins in the Eastern Tropical Pacific against foreign nations. This is because the MMPA, as a federal statute, trumps U.S. international obligations under GATT.

#### E. GATT in United States Domestic Law

As a valid executive agreement, GATT is law in the United States.<sup>252</sup> However, where Congress enacts legislation subsequent to an executive agreement, and where the two conflict, the subsequent legislation prevails.<sup>253</sup> GATT became law by proclamation in the 1940s,<sup>254</sup> whereas Congress enacted the relevant provisions of the MMPA in the 1980s.<sup>255</sup> Therefore, where GATT and the MMPA conflict, the MMPA prevails.

This puts the United States in a precarious position with its international trade partners. As an original drafter of GATT and a major proponent of open and free international trade, the U.S. executive branch would like to work within the parameters of GATT.<sup>256</sup> This is especially true in view of the critical attitude the United States takes toward contracting parties who disregard GATT obligations and panel recommendations.

Indeed, the Bush Administration considered amending the MMPA to eliminate the conflict.<sup>257</sup> However, members of Congress criticized this consideration.<sup>258</sup> Any effort by the executive to

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251. *Dispute Settlement Panel*, *supra* note 3, at 1619.

252. *See supra* notes 128-37 and accompanying text.

253. *See supra* note 137 and accompanying text.

254. *See supra* notes 132-36 and accompanying text.

255. *See supra* notes 138-41 and accompanying text.

256. *See supra* notes 27-31 and accompanying text.

257. *Members Agree to Develop Proposal on GATT Changes to Protect Environment*, 8 Int'l Trade Rep. (BNA) No. 39, at 1428 (October 2, 1991).

258. *Id.*

change the MMPA will meet with strong resistance. Members of Congress refuse to change the MMPA and have instead called for changing or amending GATT to allow for environmental protection provisions.<sup>259</sup>

One possible solution is to amend GATT to include an environmental code that would allow nations to promote legitimate environmental objectives. Each nation could establish its own environmental standards.<sup>260</sup> The importing nation could apply a duty if the imported product, or the manufacturing process used to produce that product, does not meet the importing country's environmental standards. The imposition of a duty would be subject to criteria such as: 1) the environmental regulations having a sound scientific basis; 2) the same environmental standards applying to all competitive domestic products and production; and 3) the imported products causing injury to competitive domestic products.<sup>261</sup> Contracting parties could bring disputes concerning environmental duties before a GATT dispute settlement panel, which is already provided for in GATT.

Such an amendment to GATT would address the competitive advantage lost by a nation that attempts to set rigorous environmental protection standards. If another nation chooses not to impose adequate environmental protection standards, it decreases the cost of doing business at the environment's expense.<sup>262</sup> As that nation continues to damage the environment, it gains a competitive advantage which can translate into trade gains.<sup>263</sup> The proposed amendment would accomplish the goal of "leveling the playing field" without contravening the GATT goal of eliminating nontariff trade barriers. As world economies grow more interdependent, and as nations recognize that environmental issues must be addressed globally, the scope of trade negotiations must expand to address environmental concerns.<sup>264</sup>

The enforcement of the MMPA and the subsequent conclusion by

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259. *Baucus Calls for Environmental Code in GATT Modeled After Subsidies Code*, 8 Int'l Trade Rep. (BNA) No. 43, at 1568 (October 30, 1991) [hereinafter *Baucus Calls for Environmental Code*].

260. *See Baucus Calls for Environmental Code in GATT Modeled After Subsidies Code*, Int'l Env't Daily (BNA) (Oct. 28, 1991).

261. *Id.*

262. *See Luncheon Address by Senator Max Baucus to the Institute for International Economics*, Federal News Service, Oct. 30, 1991, available in LEXIS, Fedcom Library, Fednew File.

263. *Id.*

264. *Id.*

a GATT panel that such enforcement constitutes a GATT-illegal trade barrier have brought to the forefront a major international trade issue of the 1990s.<sup>265</sup> United States reaction to the GATT decision affects both its relations with international trade partners and environmental protection policies, both domestic and international.

## V. IMPACT

The ruling by the GATT panel prohibits a contracting party from enforcing its own choice of environmental protection laws extraterritorially. In enforcing the MMPA, the United States forces its trade partners to adhere to its unilateral decision about conservation in an area which is not under U.S. jurisdiction. The United States, in not responding to the GATT panel ruling, sends a clear message that it considers the protection of dolphins more important than its obligations under GATT.

At the same time, U.S. participation in GATT is essential to GATT's international effectiveness. If the United States overrides GATT tenets by enacting contravening legislation, it could eviscerate one of the world's only organizations dedicated to free trade among nations. The United States' unique role as a charter member and creator of GATT, as well as its economic power, gives it a leadership role in the organization.

The *Earth Island* decision and the subsequent denunciation by GATT have pushed Congress a step further. The International Dolphin Conservation Act of 1992 (Act)<sup>266</sup> reflects Congress's entrenchment with respect to protecting dolphins from the effects of purse seine fishing.<sup>267</sup> Senator Kerry stated that the Act was "based on the recognition that the past strategy of trying to reduce dolphin mortality while continuing to fish for tuna in association with dolphin is no longer sufficient."<sup>268</sup> He placed "primary responsibility for dolphin mortality" on the "foreign flag fishing fleets of Mexico, Venezuela, Vanuatu, and elsewhere" and concluded that "domestic

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265. See *Baucus Calls for Environmental Code*, *supra* note 259.

266. 16 U.S.C.A. §§ 1411-1481 (West Supp. 1992).

267. Senator John Kerry stated that the amendment was "not aimed simply at 'making a statement' or 'sending a message'" 138 CONG. REC. S17,840, S17,841 (daily ed. Oct. 8, 1992). Rather, the senator stated, the law was "aimed at getting results" and reflected Congress's "best efforts to synthesize the ideas and views of a variety of organizations and tuna processors about how best to assure that positive results are indeed achieved." *Id.*

268. *Id.*

action alone [was] not sufficient to end the killing of dolphins."<sup>269</sup> Representative William Hughes, in a statement supporting passage of the Act and expressing belief that the embargoes effectively reduced dolphin mortality, said that the Act would resolve "the GATT problem."<sup>270</sup>

The Act authorizes the Secretary of State to enter into an international agreement to establish a five-year moratorium, beginning March 1, 1994, prohibiting purse seine fishing for tuna.<sup>271</sup> Congress required that any such international agreement provide for an international research program to develop dolphin-safe methods of tuna fishing.<sup>272</sup> If a major purse seine tuna fishing country<sup>273</sup> enters into this international agreement, the permit allowing purse seine fishing issued to the American Tunaboat Association<sup>274</sup> will expire March 1, 1994, effectively prohibiting any purse seining in the Eastern Tropical Pacific by Americans.<sup>275</sup>

The most important feature of the Act exempts nations fishing in the Eastern Tropical Pacific from the MMPA's trade sanctions only if they agree to a five-year moratorium on purse seine fishing. To qualify for exemption from a tuna embargo, the country must reduce dolphin mortality between now and March 1, 1994 and agree to suspend purse seine fishing on dolphins completely for a period of at least five years after that date.<sup>276</sup>

Qualifying nations must also commit to having an observer on each purse seine vessel larger than four-hundred short tons carrying capacity, and fifty percent of each country's observers must be supervised by and responsible to "a competent regional organization . . . ."<sup>277</sup> The United States will "periodically" review the actions of countries participating in the moratorium.<sup>278</sup> If the country is not "fully implementing" the moratorium commitments, it is subject to an embargo of not only its tuna, but also all of its other fish and fish

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269. *Id.*

270. 138 CONG. REC. E2774 (daily ed. Sept. 23, 1992).

271. 16 U.S.C.A. § 1412.

272. *Id.* § 1413.

273. A major purse seine tuna fishing country is one that "has an active purse seine tuna fishing fleet of 20 or more vessels." *Id.*

274. For a discussion of the permit issued to American fishermen, see *supra* notes 153-58.

275. 16 U.S.C.A. § 1416.

276. *Id.* § 1415(a).

277. *Id.*

278. *Id.* § 1415(b).

products.<sup>279</sup>

The current version of the Act, however, does not dispose of the embargo provisions of 16 U.S.C. § 1371, which were condemned by the GATT panel.<sup>280</sup> Rather, it adds an alternative method of avoiding the embargo but still requires that foreign fishing fleets adhere to standards established unilaterally by the United States.<sup>281</sup> Furthermore, the Act mandates an embargo of yellowfin tuna and allows exclusion of other fish products imported from any country that does not honor its initial commitment to refrain from purse seine fishing.<sup>282</sup> Because the Act does not eliminate the provisions found to be inconsistent with GATT obligations, and because it provides another mechanism to coerce trading partners to adhere to American production standards or suffer quantitative restrictions, the Act does nothing to solve "the GATT problem." It is likely that a complaint about the new provisions would receive the same recommendation from GATT that the United States not enforce the embargoes.

If Congress does not alter the force of the international provisions of the MMPA and continues trade sanctions against countries that do not adhere to the MMPA's dolphin preservation provisions, the United States may see retaliatory measures authorized and implemented. GATT may authorize affected countries to impose duties on products imported from the United States. Mexico and the other affected countries have not yet sought this recourse. On the contrary, Mexico and the European Community have sought to strengthen their own regulations concerning dolphin mortality resulting from purse seine fishing for tuna.<sup>283</sup> As a result of the enforcement of the MMPA, countries are reexamining and restricting the fishing methods that their tuna fishermen use. This could even-

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279. *Id.*

280. *See supra* notes 197-223 (outlining the GATT panel's report on the tuna embargo).

281. *See* 16 U.S.C.A. § 1415; *see also supra* notes 272-80 (describing the provisions of the Act).

282. 16 U.S.C.A. § 1415(b); *see supra* notes 279-80 and accompanying text (discussing the sanctions for failure to comply with moratorium commitments).

283. The European Parliament of the European Community (EC) voted on November 22, 1991 in favor of a resolution to ask the EC Commission to ban tuna imports caught by driftnets and purse seining operations affecting dolphins. *See EC Gets Assurances Italy Will Limit Imports of Tuna Caught by Purse Seines*, Int'l Env't Daily (BNA) (Jan. 21, 1992). Also, Mexico asserts that it will commit itself to harvesting "dolphin-free" tuna. *Salinas Discusses Trade, Immigration, Environment*, L.A. TIMES, Nov. 7, 1991, at 3; *Mexico Reaffirms 'Ensenada Commitment' to Dolphin Safety*, PR Newswire, Nov. 25, 1991, available in LEXIS, Nexis Library, PRNews File.



tually lead to the decrease in dolphin mortality that the MMPA anticipated. The United States should capitalize on the opportunity to insist that environmental issues be addressed in the international trade arena, and in particular, in GATT.

#### CONCLUSION

The GATT panel decision condemning the U.S. embargo of yellowfin tuna provides the United States with the opportunity to assert a leadership role in devising a method by which countries can implement strong environmental policies without risking economic damage. The United States should demand that the international community recognize that neither serious environmental problems nor their solutions respect territorial boundaries and, furthermore, that the resolution to the world's environmental problems is necessarily linked to international trade. This being the case, the international trade arena is an appropriate place to address and attempt to resolve international environmental concerns.

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