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Resolving Conflicts between the General Agreement on Tariffs and Trade and Domestic Environmental Laws

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NOTES

RESOLVING CONFLICTS BETWEEN THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND DOMESTIC ENVIRONMENTAL LAWS

I.	INTRODUCTION.....	483
II.	HISTORY OF GENERAL AGREEMENT ON TARIFFS AND TRADE	485
III.	MEXICO-UNITED STATES TUNA PANEL REPORT	487
	A. <i>Facts</i>	487
	B. <i>Panel's Analysis</i>	488
	1. <i>Article III</i>	489
	2. <i>Article XI</i>	491
	3. <i>Article XX</i>	494
	a. <i>Article XX(b)</i>	494
	b. <i>Article XX(g)</i>	497
IV.	PROPOSAL	498
	A. <i>Dispute Resolution Mechanism</i>	499
	B. <i>Environmental Code</i>	501
V.	CONCLUSION.....	505

I. INTRODUCTION

The General Agreement on Tariffs and Trade¹ (GATT), the principal multilateral agreement governing international trade,² reduces tariffs and other restrictions on international trade.³ The contracting parties to GATT generally limit trade restrictions in order to increase employment, promote economic growth, and promote full utilization of natural resources.⁴

However, the benefits of trade liberalization under GATT are

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter GATT].

2. AMERICAN BAR ASS'N, AN INTRODUCTION TO INT'L TRADE LAW 2-3 (1982).

3. GATT, *supra* note 1, 61 Stat. at A11, 55 U.N.T.S. at 196.

4. *See id.* The economist Paul Samuelson stated, there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.

JOHN H. JACKSON, THE WORLD TRADING SYSTEM 8 (1989) [hereinafter JACKSON, THE WORLD TRADING SYSTEM]. GATT intends to accomplish the above stated goals by eliminating all unnecessary governmental interference. GATT, *supra* note 1, at A11, 55 U.N.T.S. at 196.

threatened by environmental regulations that apply internationally, whether they are established by an individual nation or by an international organization.⁵

The issue of extraterritorial application of environmental law reached a defining moment when a GATT dispute panel⁶ recently held that the United States had violated GATT by enforcing a prohibition on the importation of certain yellowfin tuna from Mexico.⁷ The fundamental issue addressed by the tuna panel was whether, under GATT, one member state may impose its environmental regulations on other member states.⁸ There was no indication that the

5. SEYMOUR J. RUBIN & THOMAS R. GRAHAM, ENVIRONMENT AND TRADE 3 (1982). The United States has actively pursued freer trade since GATT was instituted. *Id.* at 4.

6. A dispute resolution panel under GATT is an ad hoc group established to resolve disputes between member countries. Members of the panels are experts on the subject matter of the dispute. LYONETTE LOUIS-JACQUES, GATT/TRADE LAW: A GUIDE TO SOURCES OF INFORMATION 4 (1990). (A report prepared for the AALL Summer Institute "International Law: The Basics and Beyond" Minneapolis, MN, June 12-15, 1990).

Dispute panels currently are the favored form of dispute resolution mechanism under GATT. JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 63 (1990) [hereinafter JACKSON, RESTRUCTURING GATT]. This has not always been the case. When GATT was first established, disputes were resolved at the biannual meeting of the contracting parties. Disputes subsequently were handled by the intercessional committee and later by a working party comprised of representatives of member states. The dispute panel came to prominence in 1955 because the working parties did not effectively resolve disputes. *Id.*

A panel report in itself has no power. The report must be submitted to the GATT Council of Representatives, which operates by consensus. A losing party may block the report by voting against it. JACKSON, RESTRUCTURING GATT *supra* at 67. A blocked report does not become legally binding. *Id.* Blocking, however, has not been a significant problem. Most of the panel reports in the past forty years have been adopted. Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 591-92 (1990-91).

7. *United States—Restrictions on Imports of Tuna, Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991) at 37-47 [hereinafter *U.S. Tuna Panel*]. This tuna panel involving the United States and Mexico should be distinguished from the tuna panel involving Canada and the United States, *see infra* note 63. The United States enacted the prohibition pursuant to the Marine Mammals Protection Act of 1972 (MMPA). 16 U.S.C §§ 1371-1407 (1988). The tuna affected by the ban were caught by means of purse seine nets. Purse-seining is a practice of fishers who take advantage of the fact that, in the eastern tropical Pacific Ocean, yellowfin tuna swim beneath schools of certain species of dolphins and porpoises. The fishers set their nets around the dolphins to trap the tuna; many of the dolphins become entangled in the nets and are drowned. This practice is often referred to as "setting on" or "fishing on" the cetacean. Laura L. Lones, *The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation*, 22 VAND. J. TRANSNAT'L L. 997, 998 (1989).

8. *GATT Dolphin Decision's Implications on U.S. Health and Environmental Laws, Hearings on GATT/Dolphin Issue Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 1 (1991) [hereinafter *Hear-*

tuna panel considered the environmental impact of its decision,⁹ which evoked a strong reaction from environmental groups.¹⁰

This comment employs the tuna panel decision as a means to show that a unilateral environmental regulation is inconsistent with GATT and that GATT must accommodate environmental regulations in order to achieve its long-term trade objectives.¹¹ Part I provides a brief history of GATT in order to illustrate its shortcomings as a governing document. Part II analyzes the tuna panel decision and addresses other relevant issues not raised by the tuna panel. Part III posits an alternative framework for resolving environmental disputes utilizing the existing GATT structure.

II. THE HISTORY OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

GATT had an inauspicious beginning.¹² GATT began as part of a system of economic regulation devised at the Bretton Woods Conference in 1944.¹³ The system originally devoted itself to international monetary and banking concerns.¹⁴ The Bretton Woods Conference leaders, however, saw the need for an International Trade Organization (ITO).¹⁵ GATT was intended to be one part of

ings on GATT] (Ralph Nader testified: "Now, a GATT panel has ruled that a U.S. environmental law is an illegal barrier to trade and must be eliminated.") *Id.* See also Keith Bradsher, *U.S. Ban on Mexico Tuna Is Overruled*, N.Y. TIMES, Aug. 23, 1991, at C1, C3.

9. See generally *U.S. Tuna Panel*, *supra* note 7.

10. Bradsher, *supra* note 8, at C3.

11. *Id.* Free trade is a means to an end, and not an end in itself. The goal of GATT is to raise the standard of living of member countries. Consequently, environmental restrictions are not, in fact, contrary to GATT. Rather, the restrictions fulfill GATT's policy of improving the standard of living. GATT, *supra* note 1, 61 Stat. at A11, 55 U.N.T.S. at 196.

When the environment is damaged by free trade, the standard of living declines. In addition, preventative measures embodied by environmental regulations are, in many cases, much less expensive than remedial measures. See RUBIN, *supra* note 5, at 3.

12. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 30-39. International economic relations are often governed by treaties such as GATT, which create organizations to resolve disputes. Generally, GATT trade panels do not create binding secondary authority. In practice, however, previous trade panel decisions are, at least, persuasive authority. *Id.* at 89-90.

13. *Id.* at 32.

14. JACKSON, *RESTRUCTURING GATT*, *supra* note 6, at 9. Two factors helped bring the GATT into existence. First, the 1934 Reciprocal Trade Agreements Act delegated power to the president to enter into agreements to lower tariffs. From the various agreements entered into under this Act came many of the substantive articles embodied in GATT. Second, protectionist measures spurred by the Great Depression in turn slowed international trade. During World War II, many leaders saw the need for a regulatory system for international trade. *Id.*

15. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 27-28.

the ITO, but the ITO was never ratified by the U.S. Congress.¹⁶ Consequently, other members abandoned the organization.¹⁷ GATT, however, remained.¹⁸

As a result of the dissolution of the ITO, the Bretton Woods system had no mechanism to govern international trade.¹⁹ GATT was the natural choice to meet that need,²⁰ but it lacked the comprehensive authority necessary to govern international trade.²¹

As its role changed from a loose association of trading states to the primary agreement governing international trade, many additional countries joined in the agreement.²² Today, GATT plays a central role in governing trade.²³ But in spite of its role as the cornerstone of international trade for many decades, there remains some question whether GATT is flexible enough to survive the changing conditions of international trade.²⁴

16. *Id.* at 12. An international agreement can become the law of the United States if: (1) it is accompanied by the advice and consent of the Senate (a treaty), (2) it is authorized or approved by Congress and the matter falls within the constitutional authority of Congress (a congressional-executive agreement), (3) it is authorized by a prior treaty which received the advice and consent of the Senate (an executive agreement pursuant to treaty), or (4) it is based on the President's own constitutional authority (a sole executive agreement). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1987).

There is some debate about whether GATT is binding under U.S. law. Compare 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 (1990) with John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967).

17. JACKSON, RESTRUCTURING GATT, *supra* note 6, at 12-13.

18. *Id.* GATT survived because the United States was negotiating under the authority of the 1934 Reciprocal Trade Agreements Act. *Id.* The authority of the act had been renewed in 1945. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 4, at 33. The Act did not authorize the President to enter into an agreement which established an organization. It did, however, authorize agreements for the reduction of trade restrictions. As a result, GATT is carefully worded so as not to imply the institution of an organization. For example, when a decision is made pursuant to the GATT, it is the *contracting parties* acting jointly and not by an organizational body. GATT, *supra* note 1, art. XXV, 61 Stat. at A68, 55 U.N.T.S. at 272-75.

19. JACKSON, RESTRUCTURING GATT, *supra* note 6, at 15.

20. *Id.*

21. See JACKSON, THE WORLD TRADING SYSTEM, *supra* note 4, at 33.

22. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 4, at 33. Originally, there were 23 contracting parties. LOUIS-JAQUES, *supra* note 6, at 2-3. Presently, there are over 100 contracting parties. Keith Bradsher, *Trade Proposal Draws Lukewarm Response*, N.Y. TIMES, Jan. 13, 1992, at C1.

23. JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND 12-13 (1984) [hereinafter JACKSON, IMPLEMENTING THE TOKYO ROUND]. Since its inception, GATT has conducted multilateral negotiations called "rounds" which are aimed at the reduction of trade barriers. *Id.* There have been seven rounds, and GATT is now nearing completion of the eighth. LOUIS-JAQUES, *supra* note 6, at 3.

24. JACKSON, IMPLEMENTING THE TOKYO ROUND, *supra* note 23 at 1.

III. THE MEXICO-UNITED STATES TUNA PANEL REPORT

A. Facts

During the past three decades, there has been an increase in the use of "purse seine"²⁵ nets to catch tuna and other species of fish.²⁶ This presents a special problem in the Eastern Tropical Pacific where tuna school beneath dolphins.²⁷ In order to catch the tuna swimming below the dolphins, fishers intentionally encircle and net both the tuna and dolphins.²⁸ Large numbers of dolphins are killed each year in the region by the use of purse seine nets.²⁹

On August 28, 1990, the United States imposed a prohibition on the importation of yellowfin tuna from Mexico, Venezuela, Vanuatu, Panama, and Ecuador.³⁰ The prohibition was enacted pursuant to the Marine Mammals Protection Act of 1972 (MMPA).³¹ The United States lifted the prohibition on September 7, 1990, for Mexico, Venezuela and Vanuatu after the Commerce Department found the countries in compliance with the MMPA.³² Panama and Ecuador were later exempted after they stopped using the purse seine method of fishing.³³ On October 19, 1990, however, the prohibition was reinstated against Mexico until such time that the Commerce Department could document the percentage of dolphins killed by the Mexican fleet over the period of an entire season.³⁴

Pursuant to GATT, on November 5, 1990, Mexico requested consultations with the United States concerning the prohibition on the

25. For a definition of "purse seine," see *supra* note 7.

26. *U.S. Tuna Panel*, *supra* note 7, at 2.

27. *Id.*

28. *Id.*

29. *Hearings on GATT*, *supra* note 8 (testimony of David Phillips) (on file with the *William Mitchell Law Review*).

30. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) (allowing an injunction against the Secretary of Commerce on the importation of tuna caught in violation of the Marine Mammal Protection Act).

31. *U.S. Tuna Panel*, *supra* note 7, at 2-3. "The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2) (Supp. 1991).

32. *U.S. Tuna Panel*, *supra* note 7, at 4.

33. *Id.*

34. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991). Subsequently, an appeals court, on November 14, 1990, ordered the embargo to be stayed. *Id.* at 1452 n.3. The appeals court lifted the stay on February 22, 1990. *U.S. Tuna Panel*, *supra* note 7, at 5. The United States Customs Service instituted a further embargo on April 3, 1991, which required importers of yellowfin tuna and "light meat" tuna products that contained some yellowfin tuna to prove the tuna was not fished with purse seine nets. *Id.* The embargo expired on March 26, 1991. *Id.*

importation of tuna.³⁵ These consultations failed to resolve the dispute. Consequently, Mexico requested that the contracting parties establish a dispute resolution panel pursuant to article XXIII:2 of GATT.³⁶

B. *The Panel's Analysis*

The panel first sought to determine whether the U.S. prohibition was consistent with GATT.³⁷ According to GATT, the tuna panel had to determine whether the United States was in violation of GATT and, if so, whether an exception to GATT would nonetheless permit the U.S. import restrictions to stand.³⁸ The United States argued that the prohibition pursuant to the MMPA was an internal restriction enforced at the time and point of entry and, therefore, should be controlled by article III.³⁹ Mexico, for its part, argued that the measures were quantitative restrictions controlled by article XI.⁴⁰

35. *U.S. Tuna Panel*, *supra* note 7, at 5.

36. *U.S. Tuna Panel*, *supra* note 7, at 5. Article XXIII:2 reads as follows:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary.

GATT, *supra* note 1, art. XXIII:2, 61 Stat. at A64-5, 55 U.N.T.S. at 268. For a description of the process involved in bringing an article XXIII panel, see *infra* note 120.

37. *U.S. Tuna Panel*, *supra* note 7, at 37-39. In addition, the panel examined several related issues. First, the panel considered the prohibition of imports from intermediary nations based on the MMPA. The panel found that the embargo on imports of certain yellowfin tuna and certain yellowfin tuna products from intermediary nations was inconsistent with GATT under article XI. *Id.* at 48.

Second, the panel analyzed the possible extension of each import prohibition by the MMPA and section 8 of the Fisherman's Protective Act (the Pelly Amendment) 22 U.S.C. § 1978 (1988). The panel dismissed this argument as it would require a judgment on something that has not happened. Since the amendment has not been instituted, nothing has occurred contrary to GATT. *U.S. Tuna Panel*, *supra* note 7, at 42-43.

Finally, the panel considered the application of the Dolphin Protection Consumer Information Act (DPCIA). This act allows tuna fished in the Eastern Tropical Pacific to apply a "dolphin safe" sticker only when the tuna has been fished in a manner other than by purse seine nets. The panel found that the DPCIA was not in violation of the GATT. *Id.* at 49-50.

38. *U.S. Tuna Panel*, *supra* note 7, at 39.

39. *Id.*

40. *Id.*

1. Article III

The panel first conducted an article III analysis.⁴¹ Article III, the National Treatment on Internal Taxation and Regulation, creates an obligation not to discriminate against importing countries.⁴² It is a counterpart to the Most Favoured Nation (MFN) article, which seeks to control discrimination between GATT signatories by requiring them to afford each other the most favorable trade terms available.⁴³ The national treatment obligation is a corollary to MFN status as it requires that imported products be treated the same as domestic goods.⁴⁴

The national treatment obligation states that internal taxes, other charges, laws, regulations and requirements may not be used to protect domestic producers against competition from imported products.⁴⁵ In addition, it requires that internal taxes or other internal

41. *Id.*

42. The relevant sections of article III read:

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

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Note Ad Article III. Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provision of Article III.

GATT, *supra* note 1, art. III, (62 Stat. 3679, 55 U.N.T.S. at 204-09) (as amended and restated by the Protocol Modifying Part II and Article XXVI of GATT).

43. See GATT, *supra* note 1, art. I, 61 Stat. at A12-13, 55 U.N.T.S. at 196-201. The MFN article imposes an obligation in international trade on member states to accord GATT signatories the most favorable treatment they offer any state. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 133.

44. John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207 (1989).

45. See GATT *supra* note 1, art. III, 61 Stat. at A18. 55 U.N.T.S. at 206.

charges on imported products not be imposed in excess of restrictions on domestic products.⁴⁶ While internal restrictions with protectionist intent are forbidden under the national treatment obligation, internal restrictions with no intent to protect domestic industries may also be barred.⁴⁷ As a result, the national treatment obligation is at the center of many disputes.⁴⁸

The national treatment obligation intends to control only those products that enter the stream of commerce of the importing country.⁴⁹ In the Mexico-U.S. tuna case, the panel found that the restriction was imposed at the time and point of importation, as required by the national treatment obligation.⁵⁰ The panel noted, however, that the MMPA did not regulate tuna or tuna products, but rather regulated the manner in which tuna were caught.⁵¹ The panel concluded that, because dolphins were not the product being imported, tuna could not be regulated as a means of controlling the killing of dolphins.⁵² The national treatment obligation thus did not justify the U.S. prohibition against tuna imports because the MMPA sought to regulate the production process.⁵³

A GATT dispute involving a French tax on automobiles further illustrates the distinction between regulation of a product and a production process.⁵⁴ A French law which taxes all automobiles exceeding sixteen horsepower clearly is regulation of a product.⁵⁵ If the law taxes all automobiles manufactured in factories that discharge a specified amount of pollution, however, the measure is aimed at the regulation of a process.

Regulating a product directly within a country's borders is a permissible function of that government. The national treatment obligation, however, allows the regulation of products only within the regulating country.⁵⁶ When a country projects its environmental policies on another country by attempting to regulate the production process, the affected country's sovereignty is diminished. This result

46. *Id.*

47. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 4, at 189-90.

48. *Id.* As of 1989, there had been 233 disputes brought to GATT; 31 of these were regarding article III. *Id.* at 367 n.4.

49. See GATT *supra* note 1, art. III, 61 Stat. at A18. 55 U.N.T.S at 204-09.

50. U.S. Tuna Panel, *supra* note 7, at 40.

51. *Id.* at 41.

52. *Id.* at 41.

53. *Id.* at 39-42. The panel noted that, because article III did not justify the U.S. prohibition on the importation of Mexican tuna, the U.S. was, in fact, in violation of article III:4. *Id.*

54. THE GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX, art. III-12 (1989)[hereinafter GATT ANALYTICAL INDEX].

55. *Id.*

56. *Id.*

is impermissible under article III.⁵⁷

The problem becomes even more complex when the exporting country is not subject to any restriction while the importing country maintains significant environmental restrictions. Naturally, the cost of producing goods in the importing country, reflecting regulatory costs, is higher.⁵⁸ Accommodating these costs is problematic because environmental regulations affect the manufacturing process,⁵⁹ and the national treatment obligation demands that like products be treated alike regardless of the manufacturing process.⁶⁰ Consequently, a country cannot adjust its taxes on imports to accommodate a higher standard of environmental protection.⁶¹ This result frustrates many environmentalists because the country with the least environmental protection enjoys an advantage in international trade.⁶²

2. Article XI

After concluding that the national treatment obligation of article III did not apply to the U.S. prohibition against the importation of Mexican tuna, the panel next analyzed the tuna dispute under article XI. Disputes arising from a conflict between GATT and prohibitions

57. *Id.* at III-12.

58. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 208-209. To offset this disadvantage, the author posits several suggestions:

Could the importing nation take a countermeasure such as (1) impose a ban (or limitation) on imports of goods which are manufactured by processes which cause health, safety, or environmental problems; or (2) impose an additional charge at the border on the imported goods, to equal the amount of the cost which domestic producers incur through compliance with health, safety, or environmental standards; or (3) impose a tax on all goods, domestic and foreign, related to the cost of the regulation; then rebate that tax to domestic manufacturers or subsidize them so as to offset their costs of compliance?

Id. at 209. The author concludes that these suggestions probably will not be adopted because article III does not allow discrimination on the basis of differences in the exporting country or its manufacturing environment. *Id.*

59. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 209.

60. See GATT, *supra* note 1, art. III, 61 Stat. at A18, 55 U.N.T.S. at 204-209.

61. *Id.* Border tax adjustments provide an exception to this rule. An importing nation may impose a tax on imported goods equal to a tax on a domestic product. Border tax adjustments must be borne by the product and not by the producer. Examples of taxes borne by the product include sales tax, value added tax, and excise tax. The United States, however, does not generally employ this type of tax. Instead, the United States relies on direct taxes such as corporate or income taxes. The latter type are not eligible for border tax adjustment. Therefore, the United States is unable to take advantage of this equalization procedure. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 194-97.

62. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 194-97. If the pollution from the factory producing the product affects the importing country directly, a remedy may be found in international tort law. *Id.* at 210.

or restrictions legislated by a contracting party typically are resolved under article XI,⁶³ which disallows quantitative restrictions and prohibitions.⁶⁴ However, article XI contains an exception for import restrictions and prohibitions on any agricultural or fisheries products if those restrictions are necessary to the enforcement of measures which similarly restrict the production of like domestic products.⁶⁵ Such laws do not violate GATT.

There is an important distinction between the general rule prohibiting trade restrictions and the exception dealing with agricultural and fisheries products. The first provision disallows all restrictions and prohibitions on the importation of products.⁶⁶ The second provision is an exception that allows import restrictions, but not prohibitions, on agricultural and fisheries products.⁶⁷ GATT con-

63. See, e.g., *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc. L./5198 (Feb. 22, 1982), reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 91, 96 (29th Supp. 1983) [hereinafter *Canada-U.S. Tuna Panel*].

64. GATT, art. XI(1) provides:

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

GATT, *supra* note 1, art. XI(1), 61 Stat. at A32, 55 U.N.T.S. at 224-26. Quantitative restrictions include limits on quantity or value of a product permitted to be imported or exported. ATLANTIC COUNCIL OF THE UNITED STATES, GATT PLUS—A PROPOSAL FOR TRADE REFORM 20 (1976).

65. GATT, *supra* note 1, art. XI:2(c)i, 61 Stat. at A33-A34, 55 U.N.T.S. at 224-229.

The provisions of article XI do not extend to:

(c) 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 permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; . . .

. . . .

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Id. art. XI:2(c)i, 61 Stat. at A33-A34, 55 U.N.T.S. at 226.

66. *Id.* art. XI:2(c)i, 61 Stat. at A32, 55 U.N.T.S. at 224-29.

67. *Id.* art. XI:2(c)i, 61 Stat. at A33, 55 U.N.T.S. at 226.

tains no exceptions for outright prohibitions on these products.⁶⁸

In the Mexico-U.S. tuna case, the panel found that the U.S. prohibition on tuna imports violated article XI.⁶⁹ The United States did not submit arguments to the contrary.⁷⁰ As indicated, the agricultural and fishery products exception does not extend to prohibitions of imports. Accordingly, the MMPA could not have qualified for the exemption from article XI.⁷¹

Had the MMPA instituted only a partial restriction to achieve its end, the agricultural and fishery products exception may have applied.⁷² Such restrictions may be consistent with GATT. However, there is another significant barrier in the text of the exception. The restriction on the importation of tuna would have to be "necessary" to enforce the restriction of tuna caught by U.S. fishers.⁷³ Therefore, if the unlimited importation of tuna contravened the purpose of the domestic supply restriction, a partial restriction could have been instituted to maintain the effectiveness of the domestic restriction.

In a similar case, the Canada-U.S. Ice Cream Panel⁷⁴ found certain circumstances must be present before trade restrictions would be deemed necessary.⁷⁵ Canada claimed that imports of U.S. milk, ice cream, and yoghurt would render ineffective its policy aimed at restricting supply in order to subsidize domestic farmers.⁷⁶ The panel decided the "necessary" threshold was not met because the regula-

68. *Id.* art. XI:2(c)i, 61 Stat. at A33, 55 U.N.T.S. at 226.

69. *U.S.-Tuna Panel*, *supra* note 7, at 42.

70. *U.S.-Tuna Panel*, *supra*, note 7, at 42. The likelihood of success would have been minimal had the United States argued for an exception under article XI:(c)(i). Previous dispute panels have recognized distinctions between XI:1 and XI:2(c)(i). Namely, article XI:1 disallows prohibitions and restrictions, while article XI:2(c)(i) provides an exception for restrictions on agricultural and fisheries products. See *supra* notes 66-68 and accompanying text. Therefore, if the United States had argued that the prohibition should be excepted pursuant to article X:2(c)(i), it likely would have met defeat because the MMPA was a prohibition not a restriction.

71. *U.S.-Tuna Panel*, *supra* note 7, at 42.

72. See *supra* note 70.

73. GATT, *supra* note 1, art. XI:2(c), 61 Stat. at A33, 55 U.N.T.S. at 226. Considerable time has been devoted to defining the term "necessary" because the interpretation of the word is often dispositive. See GATT ANALYTICAL INDEX, *supra* note 54, at XI-11 to XI-12.

74. *Canada—Import Restrictions on Ice Cream and Yoghurt*, reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC DOCUMENTS AND SELECTED INSTRUMENTS 68 (36th Supp. 1990) [hereinafter *Canada-U.S. Ice Cream Panel*].

75. *Id.* Necessity is one of seven criteria used in deciding whether a given domestic restriction will be held consistent with article XI:2(c). Exceptions such as article XI:2(c) are construed narrowly, making it difficult to meet the threshold. The burden assures that any error will fall in favor of freer trade. *Id.* at 72-85. The substantial nature of the burden is consistent with the GATT policy toward the liberalization of trade. See *supra* note 4 and accompanying text.

76. *Canada-U.S. Ice Cream Panel*, *supra* note 74, at 74.

tion was not necessary to support an internal supply restriction.⁷⁷ In practice, dispute panels rarely allow the use of this exception.⁷⁸

3. Article XX

The United States argued that, although contrary to article XI:1, the prohibition could be justified under article XX(b) or XX(g).⁷⁹ Article XX provides a general exception to the other GATT provisions.⁸⁰ The preamble to article XX states that countries cannot employ GATT exceptions to create unjustifiable discrimination or a disguised restriction on international trade.⁸¹ Dispute panels generally examine the application of the law rather than the law itself.⁸²

a. Article XX(b)

Once a dispute panel determines that a domestic environmental measure is neither discriminatory nor protectionist in nature, according to the article XX preamble, an exception under article XX(b) may be allowed if two further requirements are met.⁸³ First, article XX(b) authorizes environmental legislation that affects a prohibition

77. *Id.* at 93. In addition, the panel found that Canada did not comply with the "like products imported in any form" standard. This standard dictates that like products are not merely products with a common origin. Rather, the imported products must be directly competitive with the product governed by the supply restriction. *Id.* at 86-93.

78. *Id.* at 84-85.

79. Article XX reads in relevant part:

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 1, art. XX:1, 61 Stat. at A60-A61, 55 U.N.T.S. at 262.

80. Article XX is a limited and conditional exception from other provisions of GATT. It is not a positive rule and does not establish obligations. Panels therefore interpret article XX narrowly, and the burden of persuasion lies on the party invoking the exception. *Canada—Administration of the Foreign Investment Review Act*, reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC DOCUMENTS AND SELECTED INSTRUMENTS 140, 164 (36th Supp. 1990).

81. GATT, *supra* note 1, art. XX:1, 61 Stat. at A60, 55 U.N.T.S. at 262.

82. GATT ANALYTICAL INDEX, *supra* note 54, at XX-4. The tuna panel first looked at the requirements set out in the preamble of article XX. Satisfied that the restriction was neither a discriminatory nor protectionist measure, the panel analyzed the sub-parts of article XX. *U.S. Tuna Panel*, *supra* note 7, at 44.

83. See *supra* note 79.

or restriction so long as it is "necessary to protect human, animal or plant life or health."⁸⁴ Trade panels have historically construed "necessity" narrowly.⁸⁵

In the Mexico-U.S. tuna dispute, the United States argued that, because there was no alternative manner by which to protect dolphins, the MMPA was necessary to accomplish the conservation of dolphins.⁸⁶ The GATT panel, however, did not approach the necessity of the MMPA prohibition directly.⁸⁷ Rather, it disallowed the application of the article XX(b) "life or health" exception on the basis of a second criterion, jurisdiction.⁸⁸

The panel noted that the basic question was whether the life or health exception applied outside the jurisdiction of the importing country.⁸⁹ The panel recognized that the text of GATT does not directly address this issue and considered both the history and effect of an extraterritorial application of the life or health exception.⁹⁰

The panel concluded that under the interpretation suggested by the United States, an importing country could impose its life and health policies on other nations.⁹¹ Moreover, the nations affected by the extraterritorial application of environmental regulation would have to comply with the regulation or jeopardize their rights under GATT.⁹² As a result, GATT would provide legal security only for those countries with identical life or health policies.⁹³ On the basis

84. See *supra* note 79. Health and sanitary regulations have sometimes been convenient devices for accomplishing protectionist ends. Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins, and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, at n.288 (1991) (citing KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 1, 192-95 (1970)).

85. See, e.g., *Canada-U.S. Ice Cream Panel*, *supra* note 74, at 91-92.

86. *U.S. Tuna Panel*, *supra* note 7, at 44.

87. *Id.* at 45.

88. *Id.*

89. *Id.* at 44. Professor Jackson argues that the focus of article XX should be on products rather than the production process, which is similar to the analysis under article III. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 209. Article III permits regulation of a product and allows a country to maintain certain controls. See *supra* notes 41-51 and accompanying text.

Professor McDorman states that a broad reading of article XX(b) would allow an unlimited application of trade barriers. McDORMAN, *supra* note 84, at 522. The MMPA sought to protect dolphins outside the territorial waters of the U.S. The rationale on which the MMPA is based seems to be that even though the dolphins are not presently in U.S. territorial waters, they may be in U.S. waters in the future; therefore the United States has a right to protect the dolphins. McDorman states that the unconvincing connection between the prohibition and protection of dolphins would not be allowed under article XX(b). *Id.*

90. *U.S. Tuna Panel*, *supra* note 7, at 44-45.

91. *Id.* at 45.

92. *Id.*

93. *Id.* Another probable result of a broad interpretation of article XX(b) is that

of these considerations, the panel found that the U.S. prohibition against Mexican tuna and tuna products could not be applied outside the jurisdiction of the United States.⁹⁴

b. Article XX(g)

The application of article XX(g) must also be consistent with the requirements of the article XX preamble in two respects. First, the measure must not constitute arbitrary or unjustifiable discrimination.⁹⁵ Second, the measure must not be a disguised restriction on international trade.⁹⁶

Article XX requires that the domestic measure be “primarily aimed at” the conservation of exhaustible natural resources within the jurisdiction of the enacting country.⁹⁷ Although the text of article XX(g) says that GATT will not be interpreted to bar domestic

smaller exporting countries would see a decrease in their ability to legislate independent life and health policy measures. The decrease in sovereignty would be at the hands of nations with the most purchasing power. The alternative to conforming with the economically more powerful nations would be to face trade restrictions.

94. *Id.* at 46.

95. *See supra* note 79.

96. *See supra* note 79.

97. *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268 (Mar. 22, 1988), reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 98 (35th Supp. 1989) [hereinafter *Canada—Herring Panel*].

The panel examined whether export prohibitions on unprocessed salmon and herring “related to” the conservation of exhaustible natural resources under article XX(g). The panel noted that the article is unclear as to how closely related the trade restrictions must be to conservation goals. The panel in its analysis then looked to the language of subparagraphs (a), (b), (d), and (j), which state the measure must be “necessary” or “essential” to the achievement of the policy purpose. Subparagraph (g) imposes a lesser standard and refers to measures “relating to” the conservation of exhaustible natural resources. *Id.* at 114.

The panel concluded that the “relating to” language in (g) was “merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.” The panel adopted a standard requiring that conservation measures must be “primarily aimed” at achieving the conservation of exhaustible natural resources. Moreover, the panel held that the export restraints on salmon and herring were not general prohibitions because they merely limited access to certain unprocessed forms of salmon and herring. Thus, the prohibitions were not “primarily aimed at” the overall conservation of salmon and herring stocks. *Id.*

A panel formed under the auspices of the Canada-U.S. Free Trade Agreement directly discussed the “primarily aimed at” test:

In the Panel’s view, [the ultimate basis for] the “primarily aimed at” test . . . [is whether] the [trade restrictive] measure would have been adopted for conservation reasons alone. . . . In order to apply this test, the Panel considered that it must examine the objective factors that go into a decision to adopt such a measure, including the conservation benefits that the measure itself would produce and whether there is a genuine conservation reason for choosing the actual measure in question.

measures "relating to" the conservation of exhaustible natural resources, a previous panel held that "relating to" can be interpreted only to mean "primarily aimed at" the conservation of exhaustible natural resources.⁹⁸

In the Mexico-U.S. tuna case, the United States argued that the measures mandated by the MMPA were "primarily aimed at" rendering effective a domestic measure to conserve dolphins.⁹⁹ Mexico counterargued that the exhaustible natural resources exception could not have extraterritorial application.¹⁰⁰ The GATT panel found that the prohibition instituted under the MMPA was not, in fact, primarily aimed at the conservation of dolphins.¹⁰¹ The panel was convinced that the means chosen to achieve the goals of the MMPA could result in arbitrary or unjustifiable discrimination or disguised trade restriction.¹⁰² For example, Mexico, in order to comply with the MMPA limit on killing dolphins, would need to know contemporaneously how many dolphins U.S. fishers killed.¹⁰³ The MMPA states that the incidental killing of dolphins shall not exceed a rate based on those killed by the United States.¹⁰⁴ The panel found this requirement so unpredictable that the measure could not be "primarily aimed at" the conservation of dolphins.¹⁰⁵

The "primarily aimed at" test is stringent.¹⁰⁶ Moreover, the narrow reading of the test poses a serious threat to many U.S. environmental laws that regulate one product in order to conserve another.¹⁰⁷

A restrictive measure must be enacted in conjunction with restrictions on domestic production or consumption to be valid under the exhaustible natural resources exception.¹⁰⁸ This exception was not

McDorman, *supra* note 84, at 518 (quoting Canada's Landing Requirement for Pacific Coast Salmon and Herring, CDA 89-180701, at 1, 22 (Free Trade Panel)).

98. *Canada-Herring Panel*, *supra* note 97, at 114.

99. *U.S. Tuna Panel*, *supra* note 7, at 46.

100. *Id.*

101. *Id.* The panel stated that measures relating to the conservation of exhaustible natural resources must be "in conjunction with restrictions on domestic production or consumption." Moreover, these restrictions must be aimed at supporting restrictions "within their jurisdiction." *Id.* at 46-47.

102. *Id.* at 47.

103. *See* 16 U.S.C. § 1371 (a)(2)(B)(ii) (1988).

104. *Id.*

105. *U.S. Tuna panel*, *supra* note 7, at 47.

106. *See* McDORMAN, *supra* note 84, at 519.

107. McDORMAN, *supra* note 84, at 519. The author discusses the "primarily aimed at" test in conjunction with several acts that prohibit imports of certain products, including the Packwood-Magnuson Amendments, Endangered Species Act, and the MMPA. The author suggests that a prohibition would be in violation of the "primarily aimed at test" because the product banned is not the product being conserved. *Id.*

108. GATT, *supra* note 1, art. XX(g), 61 Stat. at A61, 55 U.N.T.S. at 262.

intended to apply extraterritorially.¹⁰⁹ Accordingly, the panel stated that a measure with extraterritorial applications can be considered to be enacted in conjunction with a domestic measure only if the measure was primarily aimed at the conservation of exhaustible natural resources within the country's jurisdiction.¹¹⁰ The GATT panel concluded that the U.S. prohibition of Mexican tuna was not enacted in conjunction with domestic restriction.¹¹¹

The panel noted that the exhaustible natural resources exception allows contracting parties to adopt their own conservation policies.¹¹² If the extraterritorial application of the exhaustible natural resources exception was adopted, as the United States suggested, each contracting party could set a conservation policy from which no other contracting party could deviate without jeopardizing compliance with GATT.¹¹³ As a result, the benefits of GATT would apply to only those countries with identical internal restrictions. In such a case the multilateral framework of GATT would be jeopardized.¹¹⁴ The panel found that the exhaustible natural resources exception could not justify the U.S. prohibition on the importation of Mexican tuna.¹¹⁵ The tuna panel concluded that the MMPA was not consistent with GATT and found no acceptable manner in which to accommodate its environmental goals.

IV. PROPOSAL

In its present form, GATT is ill-equipped to accommodate the evolving relationship between international trade and environmental conservation. The tuna panel decision highlights the growing link between trade and environmental issues. This link should not be ignored; rather, trade and environmental conservation should have common goals.

109. *U.S. Tuna Panel*, *supra* note 7, at 47.

110. *Id.* This criteria was dispositive for the Canada-U.S. Tuna Panel. *See Canada-U.S. Tuna Panel*, *supra* note 63, at 109.

The Canada-U.S. tuna panel held that the U.S. measures restricting tuna were not equal in strength or aim to those imposed against Canada.

[T]he Panel examined the compatibility of the U.S. measures with paragraph (g) of Article XX but "could not accept it to be justified that the United States prohibition of imports of all tuna products from Canada . . . had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products."

GATT ANALYTICAL INDEX, *supra* note 54, at XX-9.

111. *U.S. Tuna Panel*, *supra* note 7, at 47.

112. *Id.*

113. *Id.* In actuality, the countries with the largest purchasing power would control the conservation measures of the smaller states. To export to the United States, for example, Mexico would need to comply with U.S. conservation measures. *See id.*

114. *Id.*

115. *Id.*

In the Mexico-U.S. tuna panel decision, free trade worked to the disadvantage of U.S. environmental concerns. This decision illustrates a larger problem. Free trade may cause environmental decline in some situations, and thus decrease the standard of living of member nations.¹¹⁶ Therefore, in some situations, environmental restrictions on trade may be necessary to accomplish GATT objectives.

At least two things must occur to link environmental conservation with international trade. First, the dispute resolution mechanism of GATT must change from a power-oriented to a rule-oriented basis. Second, GATT must recognize that trade affects the environment.¹¹⁷ This can be achieved through an environmental code delineating the relationship.

A. Dispute Resolution Mechanism

GATT provides a means of resolving disputes that arise from its substantive provisions.¹¹⁸ Most of the provisions require negotiation or consultation.¹¹⁹ If the negotiations do not resolve the dispute or if there is no existing method of dispute settlement in the applicable article, the parties must then look to article XXIII.¹²⁰

116. RUBIN, *supra* note 5, at 3-4.

117. *See id.* at 18-19.

118. *See* PIERRE PESCATORE, HANDBOOK OF GATT DISPUTE SETTLEMENT 62 (William J. Davey & Andreas F. Lowenfeld eds., 1991).

119. *Id.* at 62.

120. Article XXIII can be invoked if a contracting party claims its benefit under GATT is being "nullified or impaired" by another contracting party or if any objective of the GATT is being impeded. ROBERT HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 162 (1975).

The GATT states three means by which nullification or impairment may occur:

- (a) [T]he failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

GATT, *supra* note 1, 61 Stat. at A64-A65, 55 U.N.T.S. at 266-69.

The first step in resolving a dispute is negotiation. If the negotiation fails, article XXIII calls for the contracting parties to promptly investigate the matter and give recommendations or a ruling on the disputed matter. *Id.*

The burden of proof may be on either the petitioner or respondent. A prima facie case for nullification or impairment is made simply by alleging a violation of GATT. The burden of proof is on the violating party to show their actions were justified. Where no violation is shown, the burden is on the complainant because the contracting parties have been uncomfortable with the idea that actions consistent with GATT may still result in nullification or impairment. PESCATORE, *supra* note 118, at 63.

Normally, the contracting parties investigate through a dispute panel. Reif, *supra* note 6, at 590-91. The panel reviews the facts of the dispute, analyzes the GATT

Article XXIII is vague as to the proper method for settling disputes.¹²¹ As a result, there has been much confusion about the appropriate role of the dispute panel. There are two primary views. First, some GATT members view dispute resolution as merely a step in the negotiation process.¹²² This is called the power-oriented model.¹²³ Proponents of this model include Japan and the European Community.¹²⁴

The power-oriented model is based on economic strength.¹²⁵ Countries with more economic power possess the upper hand in negotiating a resolution.¹²⁶ Smaller nations are forced to negotiate at a disadvantage and therefore rarely achieve beneficial results.¹²⁷ As a result, less powerful nations gradually lose their ability to formulate independent trade policy. Under this model, GATT represents a commitment to work out a solution to any dispute that may arise, but it is not viewed as a body of rules.¹²⁸

The second view of dispute resolution is the rule-oriented model.¹²⁹ The rule-oriented model, advocated by the United States, gives deference to GATT as a body of rules.¹³⁰ A rule-oriented dispute resolution mechanism is preferable to a power-based system for several reasons.

Most importantly, a rule-oriented, or legalistic, dispute resolution mechanism lends predictability to the outcome of a given dispute.¹³¹ The primary objective of a dispute resolution mechanism is to give

rules, and recommends a solution to the contracting parties. Lisa Sue Klaiman, *Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed With Caution*, 13 U. PA. J. INT'L BUS. L. 657, 662-63 (1990).

Article XXIII indicates that the preferable remedy is one that is mutually agreeable to the disputing parties. GATT ANALYTICAL INDEX, *supra* note 54, at XXIII-64. If no such solution is found, the panel should secure a withdrawal of offending measures. There is, however, a provision in GATT that has been interpreted to allow monetary compensation to the winning nation. This provision is resorted to only if the offending measure is not easily removed. Lastly, article XXIII authorizes retaliatory measures by the contracting party. Action under this last remedy has rarely been taken. *Id.*

121. GATT, *supra* note 1, art. XXIII, 61 Stat. at A64-A65, 55 U.N.T.S. at 226-69.

122. PESCATORE, *supra* note 118, at 71. Phan van Phi, *A European View of the GATT*, 14 INT'L BUS. LAW. 150 (1986).

123. PESCATORE, *supra* note 118, at 70-71. *See also*, William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L. L. J. 51, 55 (1987).

124. PESCATORE, *supra* note 118, at 71.

125. JACKSON, RESTRUCTURING GATT, *supra* note 6, at 47-48.

126. *Id.*

127. *Id.*

128. PESCATORE, *supra* note 118, at 71.

129. *Id.*

130. *Id.*

131. *Id.* at 72.

credence and enforcement to those rules.¹³² Members can rely on the rules as they are written and interpreted by side codes. Furthermore, a rule-oriented approach applies more equitably than a power-based system because the rules apply to all members in the same way regardless of the economic power of the parties.

A frequent concern about a rule-oriented approach is that an important case will be decided incorrectly.¹³³ To avoid an aberrant decision, a procedure of appellate review should be instituted.¹³⁴ Parties, under this system, would have an automatic right of appeal to a GATT constitutional body, which would have limited powers to review the ruling in terms of consistency with GATT.

Recognizing environmental conservation as a legitimate GATT policy possesses the risk of protectionism. Unilateral environmental conservation measures can disguise protectionism.¹³⁵ A rule-oriented dispute resolution mechanism in conjunction with an environmental code would diminish the threat of protectionism in environmental measures that affect international trade.

B. *The Environmental Code*

In addition to the procedural reform discussed above, GATT would require substantive reform to accommodate environmental concerns. The contracting parties may amend GATT,¹³⁶ but it is a difficult process.¹³⁷ Theoretically, the amendment is binding only on those parties that accept and ratify it.¹³⁸ As a result, amendment has not been favored by GATT members.¹³⁹

Alternatively, GATT permits the development of side codes.¹⁴⁰

132. *See id.* at 71.

133. *Id.* at 73.

134. *See id.* at 74.

135. *See supra* notes 99-105 and accompanying text.

136. Article XXV:5 states:

In exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The contracting parties may also by such a vote

- (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
- (ii) prescribe such criteria as may be necessary for the application of this paragraph.

GATT, *supra* note 1, art. XXV:5, 61 Stat. at A68-A69, 55 U.N.T.S. at 272-75.

137. JACKSON, *RESTRUCTURING GATT*, *supra* note 6, at 25. Amendment requires a two-thirds acceptance by all contracting parties in most cases. Even then, the amendment is binding on only those contracting parties that accept it. *Id.*

138. *Id.*

139. *Id.* at 24.

140. *Id.* at 25.

Side codes are special treaties that enlarge and interpret the law of GATT.¹⁴¹ An environmental side code would be regarded as a separate treaty and would require an approval independent from GATT.¹⁴² Membership in GATT would not be affected by the environmental code.¹⁴³

An environmental code that sets out specific interpretations of articles III, XI, and XX with regard to domestic environmental regulation would allow GATT to accommodate the conflict between trade and environmental concerns.¹⁴⁴ The Agreement on Interpretation and Application of Articles VI, XVI and XXII of GATT could serve as a model for an environmental code.¹⁴⁵

The code would necessarily contain several measures to remain consistent with the existing GATT provisions. In the preamble, the proposed environmental code should recognize that environmental policies are used by governments to preserve and improve the standard of living. The preamble should also recognize that environmental regulation is potentially restrictive to the free flow of goods.

The principal goal of the environmental code should be to interpret articles III, XI, and XX in a manner that accommodates environmental conservation. The code must ensure that the application of such measures does not unjustifiably impede international trade. The code should include the following interpretations of articles III, XI, and XX to accomplish these objectives.

Article III should be enlarged to include domestic environmental regulation. Therefore, the national treatment obligation which

141. *Id.*

142. *Id.* The Most-favoured-nation provision may bar countries from treating member nations differently due to their acceptance of a side code. However, not all side codes would fall under the MFN provision. An "understanding" is another form of a general obligation that may arise from article XXV. It is not a separate treaty and does not require a nation to sign or ratify it. *Id.* at 28-29.

143. *Id.* The concepts of amendment and side code may be combined in a single model. Under this model, a side code would bind only nations that choose to sign it. When and if two-thirds of the member nations sign the code, it becomes an amendment to GATT. Whether amendments are binding on those who do not accept them, however, is unresolved. *Id.* at 25-26.

144. This idea is similar to one proposed by Montana Senator Max Baucus. Baucus suggested the following criteria be included in such a code: (1) The environmental protection standards applied must have a sound scientific basis; (2) The same standards must be applied to all competitive domestic production; (3) The imported products must be causing economic injury to competitive domestic production. *Baucus Calls for GATT Environmental Code Modeled After Subsidies Code*, Int'l Trade Daily (BNA) (Oct. 28, 1991).

145. Commonly referred to as the subsidies code, the Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade merely designates an interpretation of the articles mentioned with regard to subsidies. GATT, THE TEXTS OF THE TOKYO ROUND AGREEMENTS 51 (1986).

states that imported products shall not be subject to internal charges of any kind in excess of those applied to like domestic products, should be interpreted to allow a government to equalize the effects of environmental restrictions. In this manner, domestic producers will not be penalized for their compliance with environmental regulations that increase the cost of production. Consequently, GATT would no longer give a trade advantage to the country with the most permissive environmental regulations.

The requirements of the environmental code should not apply beyond the territory of the regulating country. For example, in the U.S.-Mexico tuna case, this code would permit the United States to impose a tax on tuna imports to equalize the cost of production. It would not, however, allow the United States to impose specific requirements on Mexican fishing techniques. As a result, Mexico would be subject to the extraterritorial effects of U.S. environmental legislation only to the extent that it affected domestic producers.

The potential for protectionism would be limited because the code would allow only the burden of environmental regulations to be equalized. In an effort to curb any tendencies toward protectionism, however, the code should be the binding interpretation of article III with regard to environmental conservation. The definite interpretation would add predictability to the code and thereby diminish opposition to it based on the threat of protectionism. Article III:1 disallows any domestic legislation with protectionist intent.¹⁴⁶ The enlarged interpretation of article III would allow GATT to accommodate domestic environmental concerns while avoiding unnecessary restrictions on international trade.

Article XI, which limits quantitative restrictions, should be interpreted to include bona fide environmental regulations that employ quantitative restrictions to equalize the effects of the regulations. Article XI needs little change to accommodate domestic environmental regulation affecting agricultural or fisheries products and should not be included in the code beyond that scope. Article X:2(c)(i) states that an import restriction on agricultural or fisheries products will be consistent with GATT if the restriction is necessary to the success of a domestic restriction on a like product.¹⁴⁷

The Canada-U.S. Ice Cream Panel devised a framework for analysis that is helpful in determining whether the exception to quantitative restrictions applies.¹⁴⁸ To accommodate environmental concerns, the exception should be invoked only when the following requirements are met:

146. GATT, *supra* note 1, art. III:1, 61 Stat. at A18, 55 U.N.T.S at 204-06.

147. *Id.* art. XI:2(c)(i), 61 Stat. at A33, 55 U.N.T.S at 226.

148. *Canada-U.S. Ice Cream Panel*, *supra* note 74, at 85-86.

1. the measure must constitute a restriction, not a prohibition on importation of the product;
2. the import restriction must be on an agricultural or fishery product;
3. the import, domestic marketing, or production restriction must apply to "like" products in any form to include directly substitutable products if there is no substantial production of the like product;
4. there must be governmental measures which operate to restrict the quantities of domestic product permitted to be marketed or produced.
5. the import restriction must be necessary to the enforcement of the domestic supply restriction;
6. the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and
7. the restrictions applied must not reduce the proportion of total of imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.¹⁴⁹

This analysis of the article XI:2(c)(i) agricultural and fisheries exception would allow a dispute panel to identify a valid environmental regulation of agricultural or fisheries products.

With regard to article XX, the environmental code would be limited to sections XX(b), XX(g), and the preamble.¹⁵⁰ The code would allow each contracting party to adopt its own conservation policies aimed at the protection of human, animal or plant life or health. Furthermore, the life or health exception would apply only to the extent necessary for the success of environmental regulation within the importing country. This would minimize the extraterritorial implications of article XX(b) while maintaining the continuity of domestic environmental regulation.

In the Mexico-U.S. tuna case, the panel stated that GATT allows each contracting party to legislate its environmental policy.¹⁵¹ The panel noted that an extraterritorial interpretation of the life or health exception would diminish the multilateral nature of GATT.¹⁵² The proposed environmental code would be consistent with the panel's decision up to this point. In addition, the code would equalize the additional cost of catching tuna incurred by United States fishers due to the MMPA. Therefore, the United States would not be penalized for enacting environmental protection laws, and Mexico would be free to formulate its own environmental policy. Moreover, Mexico's

149. *Id.* (interpreting the requirements of articles XI:2(c)).

150. *See supra* note 79.

151. *U.S. Tuna Panel, supra* note 7, at 45.

152. *Id.*

competitive advantage as a result of its lower environmental protection would be eliminated only to the extent necessary to equalize the cost incurred by U.S. fishers.

The environmental code should accommodate environmental concerns while minimizing restrictions on trade. This can be achieved by requiring that a restriction on trade be primarily aimed at conservation of natural resources within the jurisdiction of the enacting country. Article XX(g) states that any restriction on international trade must be enacted in conjunction with a restriction on domestic production or consumption.¹⁵³ A GATT panel has found that a restriction on trade must be primarily aimed at the conservation of exhaustible natural resources within the jurisdiction of the enacting country.¹⁵⁴ Moreover, both articles XX(b) and XX(g) disallow extra-territorial applications.¹⁵⁵

V. CONCLUSION

The Mexico-U.S. tuna case illustrates the conflict between international trade and environmental conservation. The tuna panel reached the correct legal conclusion because GATT is unable to accommodate environmental concerns. But the better response to the conflict between free trade and environmental conservation is a substantive and procedural reform of GATT. Procedurally, a rule-oriented dispute resolution mechanism would give dispute panels additional authority to enhance the effectiveness of the environmental code. The dispute panels would then have the authority to distinguish between protectionism and valid environmental conservation policies. Substantively, an environmental code would provide an agreed-upon interpretation of articles III, XI, and XX that would allow dispute panels to consider environmental conservation in resolving conflicts. The procedural and substantive reforms would substantially diminish the conflict between the environment and trade.

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153. *See supra* note 79.

154. *Canada-U.S. Ice Cream Panel, supra* note 74, at 85-86.

155. *See supra* note 79.

