

10-1-1992

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Elizabeth E. Kruis

Recommended Citation

Elizabeth E. Kruis, *The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier*, 14 Loy. L.A. Int'l & Comp. L. Rev. 903 (1992).

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The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?

I. INTRODUCTION

Historically, issues of international trade and environmental protection have inhabited largely separate political spheres.¹ The international community, however, is quickly recognizing environmental protection as a global concern,² and, as a result, these two areas of public policy can no longer be kept apart.³ A former United States Treaty official recently commented that the environment will be the most important trade issue of the 1990s.⁴ The United States' free trade negotiations provide a poignant example of the convergence of these two issues. While the Bush administration aggressively pursues a free-trade pact with Mexico, both the United States Congress and environmental groups worry that such an agreement could lead to environmental backsliding.⁵ Environmentalists fear that a free trade agreement will supersede and weaken the United States' federal and state environmental laws.⁶ Although Congress expresses concern over the environment, its objections to free trade with Mexico stem in part from a fear of losing domestic jobs.⁷ Congress believes that

1. Before the latter part of the twentieth century, nations had few environmental or conservationist regulations. However, scientific research, the media, politicians, and environmental groups have played large roles in creating public awareness of environmental problems. See Robert W. Helm & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421 (1989).

2. See generally *id.*

3. *GATT: Trading Nations Reconvene Environment Committee*, GREENWIRE, Oct. 16, 1991, available in LEXIS, Nexis Library, Wires File; see also *Baucus Calls for Environmental Code in GATT Modeled After Subsidies Code*, 8 Int'l Trade Rep. (BNA) No. 43, at 1568 (Oct. 30, 1991) [hereinafter *Baucus Calls*].

4. See *Baucus Calls*, *supra* note 3 (statement by Michael Smith).

5. See Jessica Mathews, *Dolphins, Tuna and Free Trade*; "No Country Can Protect Its Own Smidgen of Air or Ocean," WASH. POST, Oct. 18, 1991, at A21.

6. *Primer: A Layperson's Guide to Trade and the Environment*, GREENWIRE, Oct. 16, 1991, available in LEXIS, Nexis Library, Wires File.

7. A report by Joseph Haring, Director of the Pasadena Research Institute, predicts that Southern California will lose half of its 125,000 metal-finishing jobs to Mexico over the next five years as employers try to escape the region's strict air quality standards. STAFF OF THE HOUSE SUBCOMM. ON INT'L ECONOMIC POLICY AND TRADE 102D CONG., 1ST SESS.,

United States producers will take advantage of the comparatively loose environmental standards in Mexico⁸ and move their production across the border.⁹ This practice could affect both the United States' economy and the environment.¹⁰

These issues culminated on August 28, 1990, when the United States District Court for the Northern District of California issued its decision in *Earth Island Inst. v. Mosbacher*.¹¹ The court ordered the United States Department of Commerce to ban the importation of tuna from Mexico and four other nations.¹² The court ordered the ban to remain in effect until the Commerce Department could show proof that the affected nations were complying with the requirements of the Marine Mammal Protection Act ("MMPA").¹³ Although the Commerce Department ostensibly imposed the embargo on September 6, 1990, it proceeded to lift the ban on Mexican tuna the very next

REPORT ENTITLED: NORTH AMERICAN FREE TRADE AGREEMENT: TOO FAST A TRACK? (1991) (Prepared at the direction of Sam Gejdenson).

8. A congressional subcommittee reported that Mexico's environmental laws are "quite good," but that the laws are poorly enforced. *Id.*

9. See *Hearing of the International Economic Policy and Trade Subcomm. and the Western Hemisphere Affairs Subcomm. of the House Foreign Affairs Comm.*, 102d Cong., 1st Sess. (1991), FEDERAL NEWS SERVICE, Dec. 9, 1991, available in LEXIS, Nexis Library, Current File (Congress' objections to free trade with Mexico may stem from fear of losing domestic jobs rather than from concern over the environment.).

10. Many United States firms currently take advantage of the more flexible environmental standards in Mexico. Presently, there are nearly 530 foreign-owned firms, known as "maquiladoras," in Tijuana, Mexico. Maquiladoras have been allowed into Mexico under special trade rules since 1965. These industries have significantly fouled the water, air, and soil. See e.g., Judy Pasternak, *Firms Find a Haven from U.S. Environmental Rules*, L.A. TIMES, Nov. 19, 1991, at A1.

11. 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). The court granted the plaintiff's motion for a preliminary injunction, restraining the Secretary of the Treasury from allowing importation of commercial yellowfin tuna or yellowfin tuna products harvested with purse seine nets in the Eastern Tropical Pacific by any foreign nation. The court restrained further importation

unless and until the Secretary of Commerce makes a positive finding based upon documentary evidence provided by the government of the exporting nation that the average rate of the incidental taking by vessels of such foreign nation is no more than 2.0 times that of the United States vessels during the same period.

Id. at 976.

12. The other four nations to which the ban applied were Panama, Venezuela, Ecuador, and Vanatu. *Id.*

13. *Id.* The MMPA, codified and amended at 16 U.S.C. §§ 1361-1407 (1988), essentially sets a moratorium on the taking and importation of marine mammals. The Act, however, provides for significant exceptions to the moratorium. For an excellent discussion of the MMPA, 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).

day.¹⁴ Subsequently, the district court granted Earth Island, the environmental group which was the plaintiff in the case, its request for a temporary restraining order stopping the importation of tuna from Mexico.¹⁵ On October 19, 1990, the district court granted the plaintiff's request to convert the temporary restraining order to a preliminary injunction and the government filed an appeal.¹⁶ On April 11, 1991, the Ninth Circuit affirmed the district court's decision and reinstated the ban.¹⁷ The ban is currently in effect.

Concurrently, however, at Mexico's request, the United States and Mexico held consultations on the embargo.¹⁸ When these consultations failed to provide a solution, Mexico requested that the Contracting Parties to the General Agreement on Tariffs and Trade ("GATT") establish a panel to mediate the dispute.¹⁹ The Contracting Parties created what has been called the Mexican Tuna Panel on February 6, 1991.²⁰ Mexico's complaint alleged that the embargo constituted an unfair trade practice.²¹ On August 16, 1991, the Mexican Tuna Panel ruled that the United States' embargo conflicts with the rules of the international trading system.²² Mexico has requested the full GATT Council to defer its review of the matter while Mexico attempts to develop a plan that will satisfy the United States.²³ Nevertheless, if the full GATT Council eventually reviews and adopts the Mexican Tuna Panel's decision, the United States must lift the

14. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1451 (9th Cir. 1991).

15. The district court issued the restraining order on October 4, 1990. *Id.*

16. *Id.* at 1452.

17. *Id.* at 1449.

18. Consultations were held on December 19, 1990. *United States Restrictions on Imports of Tuna: Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991) [hereinafter *Panel Report*].

19. Mexico requested the panel on January 25, 1991. *Id.* at 1.

20. *Id.*

21. *Id.* at 7.

22. *Id.* at 2.

23. *Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo*, 8 Int'l Trade Rep. (BNA) No. 37, at 1351 (Sept. 18, 1991). The European Community has threatened to file its own formal complaint after the GATT Council did not adopt the Panel Report at its February 1992 meeting. *GATT Council Refuses EC Request to Adopt Panel Report on U.S. Tuna Embargo*, 9 Int'l Trade Rep. (BNA) No. 9, at 353 (Feb. 26, 1992). At the March 18, 1992, GATT Council meeting, the European Community and other nations urged the United States and Mexico to adopt the Panel Report, despite the fact that the United States and Mexico said they were close to resolution of the matter. Representatives of the European Community argued that the Panel Report should be adopted on principle. *EC Urges Adoption of Tuna Report but U.S., Mexico Claim Accord is Near*, 9 Int'l Trade Rep. (BNA), No. 13, at 524 (Mar. 25, 1992).

embargo.²⁴

Further complicating the issue, on January 10, 1992, United States District Court Judge Henderson ruled that the United States must impose a secondary embargo on tuna imports from countries that permit or sanction purchases of dolphin-unsafe tuna from Mexico, Venezuela, and Vanatu.²⁵ In order to avoid the embargo, these nations must certify that they do not purchase tuna from countries that are barred from directly exporting tuna to the United States.²⁶ In accordance with the decision, on January 31, 1992, the United States Customs Service banned tuna imports from twenty nations.²⁷

This Comment will first examine the history and purpose of the MMPA. Second, it will discuss the structure and dispute resolution process of the GATT. Third, it will outline both the United States and Mexican views of the recent trade embargo. Fourth, this Comment will discuss the Mexican Tuna Panel's findings and critique its decision, including its potential ramifications on the environment. Fifth, this Comment will explore weaknesses in the MMPA. Sixth, this Comment will offer solutions to this problem, including revising the GATT as well as the MMPA. This Comment concludes by proposing that the Contracting Parties to the GATT adopt regulations that protect the environment.

II. THE MARINE MAMMAL PROTECTION ACT

A. General Overview

Congress passed the MMPA in 1972,²⁸ placing a "moratorium

24. See Ivo Van Bael, *The GATT Dispute Settlement Procedure*, 22 J. WORLD TRADE, Aug. 1988, at 67.

25. *Earth Island Inst. v. Mosbacher*, 785 F. Supp. 826, 828 (N.D. Cal. 1992). See also Keith Bradsher, *U.S. Told to Ban Tuna Imports to Protect Dolphins*, N.Y. TIMES, Jan. 15, 1992, at D16. Note that before this secondary embargo went into effect, the GATT Panel determined that the MMPA provisions for a secondary embargo on intermediary nations violated the GATT rules. See *infra* notes 119, 165.

26. See *Earth Island*, 785 F. Supp. 826.

27. The Customs Service enforced the embargo on the following nations: Canada, Japan, Spain, Colombia, Republic of Korea, Taiwan, Costa Rica, Malaysia, Thailand, Ecuador, The Marshall Islands of Trinidad and Tobago, France, the Netherlands, Antilles, the United Kingdom, Indonesia, Panama, and Venezuela. *U.S. Customs to Block Import of Tuna Not Dolphin-Safe*, PR NEWSWIRE, Jan. 31, 1992, available in LEXIS, Nexis Library, Omni File.

28. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988)). The MMPA provides for protection of all types of marine mammals. See *Marine Mammal Protection Act*, 16 U.S.C. §§ 1361-1407 (1988). This Comment addresses only the provisions protecting dolphins from tuna fishers.

on the taking and importation of marine mammals.”²⁹ It enacted the law partially in response to the high rate of “incidental” dolphin mortality³⁰ caused by tuna fishers. Because yellowfin tuna is known to swim beneath schools of dolphin in the Eastern Tropical Pacific Ocean (“ETP”),³¹ tuna fishers in this region often set large circular nets, called purse seine nets, directly over schools of dolphin.³² When Congress enacted the MMPA, tuna fishers using this netting method were killing more than 250,000 dolphins each year.³³

When the MMPA first went into effect in 1972, the fishing industry claimed that the technology to reduce dolphin mortality was available.³⁴ Thus, Congress granted a two-year exemption from the MMPA for commercial fishing operations.³⁵ When this exemption expired, commercial fishers would be subject to the requirements of the MMPA and had to obtain permits from the National Marine Fisheries Service (“NMFS”)³⁶ in order to take any marine mammals in the course of fishing.³⁷ In 1980, the NMFS issued a five-year general permit to all United States Fishers in the ETP.³⁸ The permit set

29. *Id.*

30. The MMPA uses the terms “incidental taking” and “incidental killing” interchangeably to refer to the deaths of dolphins caused by fishers. See 16 U.S.C. § 1371(a)(2) (1988).

31. The ETP, as defined by the National Oceanic and Atmospheric Administration, includes the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coastlines of North, Central, and South America. 50 C.F.R. § 216.3 (1988).

32. Tuna fishers take advantage of this relationship between tuna and dolphins. Purse seine netting is the practice of tuna fishers in the Eastern Tropical Pacific whereby they set very large circular nets on schools of dolphin in order to catch the tuna swimming underneath. The dolphins are rounded up with speedboats, which then encircle the dolphins with a mile long fence of net that drops about 100 feet deep. The fishers then draw cables on the bottom of the net, trapping the dolphins and any tuna swimming underneath. Once the nets are “pursed,” the fishers lower them back into the water a few feet to try to release the dolphins. However, the process of rounding up the dolphins often disorients them and makes them unable to escape. Dolphins that are still trapped in the nets when the fishers raise them often drown and/or have their fins torn off by the nets. Kenneth Brower, *The Destruction of the Dolphins*, ATLANTIC MONTHLY, July 1989, at 35, 37-48.

33. Lones, *supra* note 13, at 999.

34. Ken Schoolcraft Jr., *Recent Developments: Congress Amends the Marine Mammal Protection Act*, 62 OR. L. REV. 257, 271 (1983).

35. Pub. L. No. 92-522, 86 Stat. 1027, 1030 (1972).

36. The National Marine Fisheries Service is a branch of the National Oceanic and Atmospheric Administration (“NOAA”), which administers the MMPA. See 50 C.F.R. § 216 (1990).

37. *Id.*

38. Taking and Related Acts Incidental to Commercial Fishing Operations, 45 Fed. Reg. 72, 187 (1979) (codified as amended at 50 C.F.R. § 216.24).

the annual taking limit for dolphin at 20,500.³⁹ The 1984 amendments to the MMPA authorized the extension of this general permit for every year after 1984.⁴⁰ Thus, although the MMPA's stated goal is to annually reduce the number of dolphins that can be taken incidentally by commercial fishing until that number approaches zero,⁴¹ the annual limit for domestic fishers will permanently remain at 20,500.

In response to pressure from environmental groups,⁴² Congress again amended the MMPA in 1988 with more stringent requirements.⁴³ The 1988 amendments reinstated a prohibition on setting nets after sunset,⁴⁴ providing that "[t]he Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown."⁴⁵ The NMFS had implemented a similar prohibition on sundown sets in 1980, but revoked it after only eight days due to pressure from the tuna industry.⁴⁶

The 1988 amendments also required that NMFS observers be placed on United States tuna boats fishing in the ETP at all times.⁴⁷ These observers document fishing operations and report dolphin mortalities.⁴⁸

39. *Id.*

40. Pub. L. No. 98-364, 98 Stat. 440 (codified at 16 U.S.C. § 1374(h) (1988)).

41. The Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027, 1030 (codified at 16 U.S.C. § 1371(a)(2)(1988)).

42. See Brower, *supra* note 32, at 57-58. According to Sam LaBudde of The Earth Island Institute, "practically the entire environmental community" attended the reauthorization hearings for the Marine Mammal Protection Act. All of these environmental organizations want purse seining stopped. *Id.* at 58.

43. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (codified at 16 U.S.C. 1361-1407 (1988)).

44. This practice, referred to as "sundown sets," causes greater dolphin mortality due to low visibility. See Brower, *supra* note 32, at 58.

45. Pub. L. No. 100-711, 102 Stat. 4755, 4767 (codified at 16 U.S.C. § 1374(h)(2)(B)(iv) (1988)). The "backdown procedure" is the procedure in which the fishers lower their nets several feet beneath the water's surface. This procedure is supposed to allow the dolphins swimming above the tuna to escape the net.

46. See Brower, *supra* note 32, at 58.

47. Pub. L. No. 100-711, 102 Stat. 4755, 4768 (codified at 16 U.S.C. § 1383(a)(b)(3)(B) (1988)).

48. Taking and Importing of Marine Mammals; "Dolphin Safe" Tuna Labeling, 56 Fed. Reg. 47,418 (1991) (to be codified at 50 C.F.R. §§ 216, 247).

B. *International Aspects*

In addition to the restrictions on United States tuna boats, the 1988 amendments for the first time defined a regulatory program for foreign tuna boats that export their tuna to the United States.⁴⁹ The requirements of this program included: (1) by the end of the 1989 fishing season, foreign nations must have an incidental taking rate on their tuna vessels no greater than 2.0 times that of United States' vessels, and no greater than 1.25 times that of the United States by the end of 1990 and thereafter;⁵⁰ (2) foreign vessels must discontinue both sundown sets and encircling pure schools of marine mammals;⁵¹ and (3) a porpoise mortality observer from the Inter-American Tropical Tuna Commission ("IATTC") must be present on all tuna boats in order to monitor the number of dolphin takings.⁵² Furthermore, coverage by the observers must be equal to those on the United States boats during the same period.⁵³

If an exporting nation fails to comply with this regulatory program, the regulations require the Secretary of the Treasury to ban any imports of tuna from that nation.⁵⁴ Additionally, within sixty days of the original embargo, the Secretary must place a secondary embargo on any imports of tuna from intermediary nations that purchase tuna from a noncomplying nation.⁵⁵

III. THE GENERAL AGREEMENT ON TARIFFS AND TRADE ("GATT")

A. *General Overview*

The GATT⁵⁶ constitutes both a multilateral agreement and a

49. 16 U.S.C. § 1371(a)(2)(B)(ii) (1988).

50. 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (1988).

51. 16 U.S.C. § 1371(a)(2)(B)(ii)(I) (1988).

52. 16 U.S.C. § 1371(a)(2)(B)(ii)(IV) (1988). The dolphin mortality rate may also be monitored by an equivalent international program in which the United States participates or which is approved by the Secretary of State. *Id.*

53. *Id.* The National Marine Fisheries Services determined that one hundred percent observer coverage is impossible for the 1992 fishing season, and thus decided that seventy-five percent coverage will be acceptable. The seventy-five percent standard will give the Inter-American Tropical Tuna Commission time to recruit and train additional observers. One hundred percent observer coverage is intended for all subsequent fishing seasons. Taking and Importing of Marine Mammals, 57 Fed. Reg. 668 (1992).

54. 16 U.S.C. § 1371(a)(2) (1988).

55. 16 U.S.C. § 1371(a)(2)(C) (1988). Congress enacted this provision of the MMPA to prevent "tuna laundering," a situation where an embargoed nation sells tuna to third-party nations who in turn export it to the United States. See *Earth Island*, 785 F. Supp. at 829.

56. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 55 U.N.T.S. 194

corresponding international organization.⁵⁷ The GATT is the only multinational body governing international trade and trade relations that determines the legal rights and obligations between its member countries.⁵⁸ Entered into force in 1948,⁵⁹ by 1991 the GATT reported having 103 member-countries,⁶⁰ approximately two-thirds of which are less developed countries.⁶¹ In 1990, GATT member-countries accounted for ninety percent of world trade.⁶²

The founding countries created the GATT in order to re-establish trade relations that were damaged by the protectionist policies that arose from the Great Depression and World War II.⁶³ They designed the GATT with the hope of stabilizing trade conditions.⁶⁴ One of the main goals of the GATT was to ensure equal access to markets and reciprocity in trade concessions.⁶⁵

The GATT's main objective is to

liberalize international trade and place it on a secure basis, thereby contributing to the economic growth, development and welfare of the world's people. It acts as both a code of rules and as a forum in which countries can discuss solutions to their trade problems and negotiate the reduction of various trade restrictive and distortive measures.⁶⁶

Another significant function of the GATT is to facilitate the economic growth of developing countries.⁶⁷

(entered into force Jan. 1, 1948) [hereinafter GATT]. The GATT is an extremely complex institution. This Comment discusses the GATT only to the extent necessary to understand the United States-Mexico tuna dispute. For detailed information on the GATT, see JOHN HOWARD JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989) and OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* (1987).

57. CONGRESSIONAL BUDGET OFFICE, *THE GATT NEGOTIATIONS AND U.S. TRADE POLICY* 15 (1987).

58. LONG, *supra* note 56, at 4.

59. GENERAL AGREEMENT ON TARIFFS AND TRADE, *GATT ACTIVITIES* 1990, at 4 (1991).

60. *See Guatemala Confirmed as 103rd Member*, FOCUS (GATT Newsletter), Oct. 1991, at 6.

61. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59. The term "less developed countries," as used in this Comment refers to countries that are in the early stages of economic development.

62. *Id.*

63. LONG, *supra* note 56, at 5.

64. *Id.*

65. *Id.*

66. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 4.

67. *Id.* Although the traditional principles of the GATT favor non-discrimination and reciprocity, these principles are often bent to the advantage of less developed countries. *See*

B. GATT Negotiations

The Contracting Parties to the GATT have completed seven rounds of negotiations on international trade policies and practices.⁶⁸ The member-countries began the eighth round, the "Uruguay Round," in Punta del Este, Uruguay, in September, 1986.⁶⁹ Although the earlier rounds of GATT negotiations focused primarily on reducing tariffs and quantity restrictions on imports, the Uruguay Round negotiations are more complex. According to the GATT, the Uruguay Round "seeks to ensure that the multilateral trading system is capable of meeting the commercial realities and challenges of the 1990s and beyond."⁷⁰

The Uruguay Round negotiations have also focused more heavily on non-tariff barriers⁷¹ than did previous rounds.⁷² Non-tariff barriers include broad national policies on foreign trade, not presently regulated by the GATT.⁷³ Because agreements to eliminate non-tariff barriers could limit the future policies of the member-countries' national governments, this area of negotiations is politically sensitive.⁷⁴ Members anticipated that this round of negotiations would be the most difficult yet,⁷⁵ and, in fact, the Uruguay Round did not conclude by the end of 1990 as scheduled.⁷⁶ On February 26, 1991, the GATT rescheduled the talks for a prolonged run in Geneva, Switzerland.⁷⁷

LONG, *supra* note 56, at 94-97. For example, under GATT rules, developed countries do not expect reciprocity from trade agreement concessions with less developed countries. See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 226-28 (1990).

68. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 19.

69. *Id.*

70. *Id.*

71. At the time the GATT was formed, the major barriers to international trade were quantitative restrictions and high custom duties. Thus, the first GATT negotiations focused on these problems. LONG, *supra* note 56, at 25. Non-tariff barriers are more subtle barriers to trade. They are government policies regarding imports and exports which purport to serve a valid government interest other than trade relations. These interests can include labeling requirements, inspection requirements, product standards, and pollution control. See JACKSON, *supra* note 56, at 130-31.

72. CONGRESSIONAL BUDGET OFFICE, *supra* note 57, at 37.

73. *Id.* at 12.

74. For example, the United States is currently lobbying for reform in European agricultural policies. However, success in this area may require reciprocal reforms in United States farm policies, a highly political issue. See *id.*

75. *Id.*

76. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 27.

77. *Uruguay Round Negotiations Back on Track as Participants Agree to Tackle Farm Trade*, Daily Rep. For Executives (BNA), at A-21 (Feb. 27, 1991).

C. Organization of GATT

Senior officials from each member-country generally meet once a year at the Session of Contracting Parties.⁷⁸ The Council of Representatives meets an average of nine times each year.⁷⁹ Representatives of all Contracting Parties who wish to become members of the Council may do so.⁸⁰ The Council is authorized to address all questions discussed by the Contracting Parties during these sessions, as well as any other urgent matters.⁸¹

The Council also has the authority to establish any subsidiary body it considers necessary.⁸² For example, the Council often creates a panel of experts to mediate disputes between member-countries.⁸³ In addition, several specialized standing committees meet regularly to discuss various aspects of trade policies and practices established during the negotiation sessions.⁸⁴

D. Dispute Settlement Procedure

The GATT dispute settlement system assists parties in settling their differences, rather than holding oral arguments and issuing rulings.⁸⁵ Thus, when Contracting Parties disagree over trade policies, such as the disagreement over the United States' embargo on Mexican tuna, the GATT first encourages them to reconcile the problem among themselves.⁸⁶ If the parties cannot resolve the dispute on their own, one or both parties may request a mediation panel of third party representatives, as Mexico did in response to the United States' embargo.⁸⁷ The panel then hears each party's argument and makes a recommendation.⁸⁸

Before reporting its findings to the Contracting Parties, the panel

78. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 4. Legally, the authority to interpret the provisions of the GATT lies exclusively with the Contracting Parties. Sessions of the Contracting Parties are not open to the public but are held in private in order to discourage political debate. LONG, *supra* note 56, at 46.

79. LONG, *supra* note 56, at 48.

80. *Id.* at 46.

81. *Id.* at 47.

82. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 4.

83. *Id.*

84. See LONG, *supra* note 56, at 48-49.

85. See generally Van Bael, *supra* note 24.

86. *Id.*; see GATT, *supra* note 56, art. XXII.

87. While there is no automatic right to have a panel established, the request has always been granted. Van Bael, *supra* note 24, at 68.

88. *Id.*

issues its findings, decision, and recommendations to the disputing parties.⁸⁹ In order to encourage the parties to reach a bilateral settlement, the panel gives them one to two months to examine its report and to attempt to settle the dispute among themselves.⁹⁰ If the parties are unable to reach an agreement, the panel gives the report to the full Council.⁹¹ At the next Council session, the Council members either adopt or reject the panel's recommendation.⁹² Before the full Council can adopt the panel's report, the members must come to a consensus.⁹³ The panel's ruling is not binding unless the full Council accepts it.⁹⁴ Thus, theoretically, in the present dispute, the United States may refuse to accept the panel's recommendation and prevent the Council from adopting it. However, the Council has never actually rejected a panel report.⁹⁵

Once the Council adopts a panel decision, it is legally binding.⁹⁶ The Contracting Parties may then make recommendations to the concerned parties regarding what action they should take,⁹⁷ and supervise all matters on which they have made recommendations.⁹⁸ If one of the parties to the dispute does not comply with the recommendations, the other party can ask the GATT to intervene a second time.⁹⁹ Such intervention may include authorizing a retaliatory measure against the non-complying party.¹⁰⁰

IV. THE EMBARGO DISPUTE

A. *Factual Background*

This section of the Comment discusses the dispute over the United States embargo on Mexican tuna.¹⁰¹ First, this section pro-

89. *Id.* at 69.

90. *Id.* In the present case, the Mexican Tuna Panel issued its decision in August 1991, but did not release its report to the public until three months later.

91. Van Bael, *supra* note 56, at 69.

92. LONG, *supra* note 56, at 77. "If no bilateral settlement has been reached, the panel submits its findings and recommendations to the Council in written form. Normally included are findings, observations on the applicability of relevant provisions of the General Agreement, and the main reasons for the findings and recommendations that have been put forward." *Id.*

93. *Id.*

94. *Id.* at 48.

95. LONG, *supra* note 56, at 77.

96. GATT, *supra* note 56, art. XXIII:2.

97. *Id.*

98. LONG, *supra* note 56, at 78.

99. *Id.*

100. *Id.* at 77.

101. In addition to its charges that the embargo violated the GATT, Mexico's complaint

vides the background of the dispute and the parties' main arguments. This section then analyzes the Mexican Tuna Panel's findings.

Mexico has the second largest and most modern tuna fleet in the world.¹⁰² The fleet provides approximately 3,000 jobs.¹⁰³ The international tuna trade is a valued source of foreign currency for Mexico.¹⁰⁴ Mexico also has the largest tuna fleet fishing in the ETP, the region where yellowfin tuna swim with the dolphins.¹⁰⁵ Environmentalists estimate that the Mexican tuna fleet kills 50,000 dolphins annually.¹⁰⁶ However, because Mexico has not had full coverage by Inter-American Tropical Tuna Commission ("IATTC") observers,¹⁰⁷ the actual numbers are uncertain.

The United States is the second largest consumer of tuna in the world,¹⁰⁸ and seventy percent of the tuna consumed in the United States is imported.¹⁰⁹ Although only about ten percent of Mexico's tuna exports went to the United States before the embargo,¹¹⁰ a large portion of the remainder went to third party nations, many of whom exported this tuna back to the United States.¹¹¹

When the United States Department of Commerce imposed the Mexican tuna embargo, Mexico accused the United States of trying to

argued that the United States' tuna labeling practices also ran afoul of the GATT provisions. The GATT dispute panel ruled that the United States' labeling procedures did not conflict with the GATT. See *Panel Report, supra* note 18, at 49-50. This Comment does not examine that portion of the Mexican Tuna Panel's decision.

102. David Clark Scott, *U.S. Tuna Ban May Snag Trade Talks With Mexico*, CHRISTIAN SCI. MONITOR, Nov. 7, 1990, at 6.

103. *Id.*

104. *Id.*

105. See David Schriebera, *U.S. Mexico Engage in Tuna War*, SACRAMENTO BEE, Aug. 29, 1990, at A1.

106. Stuart Auerbach, *Raising a Roar Over a Ruling; Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991, at D1. Some estimates range as high as 100,000 per year. See Edward Epstein, *Conservationists Bash Salinas' Dolphin Plan*, S.F. CHRON., Sept. 27, 1991, at A14.

107. See *Mexico Reaffirms 'Ensenada Commitment' to Dolphin Safety: 100 Percent Fleet Observation to Begin Ahead of Schedule*, PR NEWSWIRE, Nov. 25, 1991, available in LEXIS, Nexis Library, Omni File.

108. Japan consumes approximately thirty-six percent of the world tuna catch, making it the largest world consumer. The United States is second, consuming about thirty-one percent. COMMITTEE ON REDUCING PORPOISE MORTALITY FROM TUNA FISHING, REDUCING DOLPHIN MORTALITY FROM TUNA FISHING (1992).

109. *Id.*

110. Schriebera, *supra* note 105, at A1. In early 1991, estimates of Mexican tuna exported to the United States were as low as three percent. David Clark Scott, *Mexico Chafes as U.S. Revisits Ban on Tuna Imports Involving Dolphin Kills*, CHRISTIAN SCI. MONITOR, Feb. 27, 1991, at 6.

111. See generally Scott, *supra* note 110.

protect its tuna industry rather than the dolphins.¹¹² In November 1990, Mexico filed a formal complaint against the United States under the GATT.¹¹³ According to a report on the GATT's activities in 1990, "Mexico considered [the United States' embargo] to be inconsistent with the United States' obligations under the General Agreement, in particular Article XI:1."¹¹⁴

B. Mexico's Primary Arguments

Mexico contested the MMPA's import prohibition provisions and the concomitant embargo on two principal grounds.¹¹⁵ First, Mexico argued that the embargo provisions of the MMPA were inconsistent with the general prohibition on quantitative restrictions contained in GATT Article XI.¹¹⁶ Second, Mexico asserted that the MMPA provisions for comparing yellowfin tuna regulations in the United States with those of another country violated GATT Article III.¹¹⁷

Article XI of the GATT calls for a general elimination of quantitative restrictions to international trade, stating:

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 product destined for the territory of any other

112. See generally *Panel Report*, *supra* note 18.

113. GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 59, at 67.

114. *Id.*

115. In addition to the points discussed in this Comment, Mexico made several other arguments. For instance, Mexico argued that the MMPA violated GATT Article XIII, by establishing specific discriminatory conditions for a specific geographical area. *Panel Report*, *supra* note 18, at 7. The Mexican Tuna Panel determined that it was not necessary to decide this issue. *Id.* at 42. Mexico also claimed that the possible extension of import prohibitions to all fish products of Mexico under the MMPA was inconsistent with GATT Article XI. *Id.* at 7. The Panel found that because this extension of import prohibitions was discretionary under United States law, this provision was not inconsistent with the GATT. *Id.* at 43. Finally, Mexico argued that the labeling provisions of the United States Dolphin Protection Consumer Information Act were inconsistent with GATT Article IX. *Id.* at 8. The Panel either disagreed with Mexico's arguments on these provisions or did not address them. *Id.* at 50.

116. *Id.* at 7. Mexico also challenged the provision for a secondary embargo, under 16 U.S.C. § 1371(a)(2)(C), against "intermediary nations" who export tuna to the United States as a violation of the GATT Article XI. *Id.* at 8.

117. The relevant provisions of the MMPA are sections 101(a)(2)(B)(I)-(III) and 104(h)(2)(A)-(B) (codified at 16 U.S.C. §§ 1371(a)(2)(B)(I)-(III) and 1374(h)(2)(A)-(B) (1991)).

contracting party.¹¹⁸

Mexico argued that an "infringement of obligations assumed under the General Agreement" constituted a prima facie case of "nullification or impairment" as defined by GATT Article XXIII.¹¹⁹ Thus, Mexico asked that the Mexican Tuna Panel recommend revisions by the United States to bring the MMPA into conformity with the GATT.¹²⁰

Mexico's second contention was that the MMPA violated Article III of the GATT. GATT Article III:1¹²¹ 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.¹²²

Note Ad Article III, a supplementary provision to Article III,¹²³ further states:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to 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 paragraph 1, and is accordingly subject to the provisions of Article III.¹²⁴

Mexico argued that the MMPA was inconsistent with the "like product" requirement of Article III and, therefore, applying the MMPA to Mexican tuna violated the national treatment principles embodied in Article III.¹²⁵ Mexico reasoned that although the United States

118. C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47, 49 (1990).

119. GATT, *supra* note 56, art. XXIII.

120. *Panel Report*, *supra* note 18, at 8.

121. Article III:1 refers to paragraph 1 of Article III in the GATT numbering system.

122. GATT, *supra* note 56, art. III.

123. The text of the GATT contains interpretative notes entitled Ad Articles which are to be read in conjunction with their corresponding articles. The Panel Report refers to the interpretative note to Article III as Note Ad Article III. See *Panel Report*, *supra* note 18, at 9.

124. GATT, *supra* note 56, Note Ad Art. III (emphasis added).

125. Mexico claimed that the MMPA violated all articles of the GATT that contained a

embargo applied to tuna, the United States was not regulating just tuna, but "tuna associating with dolphin," a hybrid category "existing neither in the natural world nor in tariff nomenclature."¹²⁶ Due to this argued inconsistency, Mexico claimed that the MMPA was an internal regulation that violated national treatment principles when applied to Mexican tuna.¹²⁷ Mexico argued that "internal regulations on producers [which are inconsistent with the GATT] could not be imposed at the border on imported products, just as taxes on producers could not be adjusted for in border tax adjustments on products."¹²⁸ Furthermore, Mexico claimed that the MMPA violated Article III because it discriminated between domestic and imported products based exclusively on the production process.¹²⁹ Finally, Mexico stated that the MMPA provisions favored the United States fleet over foreign fleets, and thus were inconsistent with Article III:4.¹³⁰ Article III:4 states:

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.¹³¹

Mexico noted that the United States fleet had a maximum ceiling of 20,500 incidental dolphin takings per year. Mexico complained that because the number of incidental dolphin takings allowed for foreign fleets varied each year, depending upon the performance of the United States fleet, that number could not be known until the end of the year.¹³² In addition, the number of United States vessels still fishing in the ETP was very small, resulting in a further reduction on the

"like product" requirement, including Article III. *Panel Report, supra* note 18, at 11. The "like product" and national treatment principles of Article III basically require that member countries treat products imported from another member country equal to domestic products. These principles are intended to defend against protectionism resulting from internal regulations. However, customs duties are outside the scope of this requirement. LONG, *supra* note 56, at 9.

126. *Panel Report, supra* note 18, at 11.

127. *Id.*

128. *Id.*

129. The Panel Report generally refers to tuna fishing as part of the production process of tuna as a commodity. See generally *Panel Report, supra* note 18.

130. *Id.* at 13.

131. GATT, *supra* note 56, art. III:4.

132. *Panel Report, supra* note 18, at 13.

limit of dolphin takings by foreign fleets.¹³³

C. *The United States' Response*

The United States argued that GATT Article XI¹³⁴ did not apply to the MMPA tuna import restrictions.¹³⁵ The United States defended both the restrictions and the embargo based on GATT Article III¹³⁶ and Article XX.¹³⁷

In contesting Mexico's claims that the MMPA violated Article III, the United States first argued that the provisions of the MMPA involving yellowfin tuna conformed with GATT Article III:4.¹³⁸ The United States then argued that even if the relevant provisions of the MMPA transgressed Article III, they fell under the exceptions in Article XX(b) and XX(g).¹³⁹

The United States specifically claimed that the MMPA requirements were regulations affecting a product of national origin within the meaning of Article III:4.¹⁴⁰ Noting that Article III:4 referred to the sale and purchase of a product, the United States claimed that no meaningful distinction existed between regulations affecting the purchase and sale of a product, and regulations affecting the production of a product.¹⁴¹ Therefore, the United States reasoned that because the MMPA regulations required the production methods for tuna to comport with certain requirements before the tuna could be sold, the regulations affected the product itself, not merely the production process.¹⁴²

Furthermore, the United States stated that the MMPA regulations for production of imported tuna were no less favorable than the regulations on domestic production.¹⁴³ In fact, because the MMPA allows foreign fleets to take twenty-five percent more dolphins than the domestic fleet, the United States claimed that the MMPA actually favored foreign nations.¹⁴⁴ Thus, the United States concluded that

133. *Id.*

134. GATT, *supra* note 56, art. XI.

135. *Panel Report, supra* note 18, at 9.

136. *See supra* text accompanying notes 122-31.

137. *See infra* text accompanying note 147.

138. *Panel Report, supra* note 18, at 8.

139. *Id.* at 8-26.

140. *Id.* at 11.

141. *Id.*

142. *Id.* at 12.

143. *Id.* at 12-14.

144. *Id.*

the MMPA regime was fully consistent with the Article III:4 requirement that imported goods be treated no less favorably than the like products of national origin.¹⁴⁵

Finally, the United States argued that regardless of whether the MMPA provisions conflicted with the GATT regulations in question, they were authorized under Article XX.¹⁴⁶ Article XX deals with general exceptions to the Agreement. It provides 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; . . . [or]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .¹⁴⁷

The MMPA embargo, according to the United States, was necessary to protect dolphins and thus fell under the exception in Article XX(b).¹⁴⁸ Since tuna fishers using purse seine nets in the ETP were deliberately setting nets on dolphins, these dolphins would be killed without efforts to protect them.¹⁴⁹ The United States stated that no alternative measure was proposed or available that was likely to preserve dolphins.¹⁵⁰ Thus, since the MMPA restrictions on yellowfin tuna fishing are "directly and explicitly" intended to prevent dolphin mortality or injury, they fall within the Article XX(b) exception.¹⁵¹

Similarly, the United States claimed that the MMPA provisions fell within Article XX(g).¹⁵² Citing a previous panel report,¹⁵³ the United States noted that dolphins were an exhaustible natural re-

145. *Id.*

146. *Id.* at 15-24.

147. GATT, *supra* note 56, art. XX.

148. *Panel Report, supra* note 18, at 17.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 19.

153. *Canada Measures Affecting Exports of Unprocessed Herring and Salmon: Report of the Panel*, GATT Doc. L/6268 (Mar. 22, 1988) (Available in 35 GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 98 (1988-89)) [hereinafter *Canadian Salmon Panel Report*]; see *infra* notes 212-20 and accompanying text.

source.¹⁵⁴ In addition, the need to preserve dolphins is recognized internationally, as evidenced by the Inter-American Tropical Tuna Commission ("IATTC") and the United Nations Convention on the Law of the Sea.¹⁵⁵ The United States also stressed that Article XX(g) did not specify that the natural resource must be threatened or that its provisions were limited to only certain types of conservation measures.¹⁵⁶

The United States further noted that the MMPA provisions in question were not a disguised restriction on trade nor a means of arbitrary or unjustifiable discrimination,¹⁵⁷ and thus did not violate the Preamble to Article XX.¹⁵⁸ Rather, the MMPA explicitly identifies any potential trade effects.¹⁵⁹ Furthermore, the objective of these provisions is to conserve and protect the lives of dolphins.¹⁶⁰ Finally, the United States emphasized that the MMPA applied evenly to all countries harvesting yellowfin tuna in the ETP, except the United States, which was subject to more stringent restrictions.¹⁶¹

D. *The Panel Findings*

The Mexican Tuna Panel ("Panel") concluded that the MMPA provisions did not constitute internal regulations as provided in Article III:4.¹⁶² The Panel reasoned that since the MMPA provisions regulated production methods, they did not directly regulate the sale of tuna, and, thus, did not affect tuna as a product.¹⁶³ Therefore, they did not constitute the internal regulations to which Note Ad Article III referred.¹⁶⁴ In addition, the Panel stated that regulations governing the taking of dolphins "could not possibly affect tuna as a

154. *Panel Report, supra* note 18 at 19.

155. *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF.62/122 (1982).

156. *Panel Report, supra* note 18, at 19.

157. *Id.* at 24-25.

158. *See supra* text accompanying note 147.

159. *Panel Report, supra* note 18, at 24-25.

160. *Id.* at 25.

161. *Id.* Note that under the MMPA, foreign fleets can take twenty-five percent more dolphins than domestic fleets. *See supra* note 50 and accompanying text.

162. *Panel Report, supra* note 18, at 39-42. Since the Panel found that the United States domestic regulations on tuna harvesting did not apply to tuna as a product, it determined that the "intermediary nations" embargo did not fall within the scope of Note Ad Article III, and, therefore, was a quantitative restriction subject to Article XI. *Id.* at 48.

163. *Id.*

164. *Id.*

product.”¹⁶⁵ Thus, the Panel concluded that Article III:4 required that the United States treat Mexican tuna “no less favorabl[y]” than United States tuna, regardless of whether the number of dolphin takings by Mexico corresponded to the number of dolphin takings by the United States.¹⁶⁶

The Panel also found that the MMPA was inconsistent with Article XI:1.¹⁶⁷ Noting that Article XI forbids quantitative restrictions on imports, the Panel stated that the United States’ direct import prohibition on certain yellowfin tuna from Mexico, as authorized by the MMPA, violated Article XI.¹⁶⁸

In examining the United States’ Article XX defense, the Panel first noted that previous GATT panels limited the scope of Article XX, stating that it is “not a positive rule establishing obligations in itself.”¹⁶⁹ Furthermore, in interpreting Article XX(b), the Panel found that the drafting history of the Article did not support extrajurisdictional protection of animal life.¹⁷⁰ According to the Panel, the drafters were primarily concerned with promoting sanitary regulations to protect human, animal, and plant life within the jurisdiction of an importing country.¹⁷¹ The Panel stated that if it accepted the United States’ broad interpretation of the Article, “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”¹⁷² Thus, the GATT would provide legal security only to those contracting parties with the same internal regulations.¹⁷³

Moreover, according to the Panel, the United States failed to show that it could not reasonably pursue its dolphin protection objectives through measures consistent with the GATT.¹⁷⁴ Even assuming that import restrictions were the only means reasonably available to the United States, the Panel stated that the MMPA provisions were

165. *Id.* at 41.

166. *Id.* at 41-42.

167. *Id.* at 42. For the text of paragraph 1, see *supra* text accompanying note 122.

168. *Panel Report, supra* note 18, at 42. The Panel Report notes that the United States did not present any arguments on this issue. *Id.*

169. *Id.* at 43.

170. *Id.* at 44-45.

171. *Id.* at 45.

172. *Id.*

173. *Id.*

174. *Id.* at 46.

not necessary within the meaning of Article XX(b).¹⁷⁵ Specifically, the Panel pointed out that the MMPA linked Mexico's maximum incidental dolphin taking rate to the actual rate recorded for the United States.¹⁷⁶ Thus, Mexico could not know whether its policies at any given time conformed to the United States' standards.¹⁷⁷ The Panel stated that it could not regard a regulation based on such unpredictable conditions as necessary to protect the health or the life of dolphins.¹⁷⁸

The Panel similarly found that the MMPA could not be justified under the exception in Article XX(g).¹⁷⁹ The Panel first stated that the same considerations which led it to reject the extrajudicial interpretation of Article XX(b) similarly applied to Article XX(g).¹⁸⁰ Thus, Article XX(g) does not permit the United States to impose conservation regulations outside its borders.¹⁸¹ Additionally, because the MMPA restrictions on imports of yellowfin tuna were based on indefinite conditions, the Panel stated that the MMPA could not be regarded as primarily aimed at the conservation of dolphins.¹⁸²

Thus, the Panel concluded that the United States' restrictions on yellowfin tuna imports and the MMPA provisions that authorized these restrictions were contrary to Article XI:1, and were not justified by either Article XX(b) or Article XX(g).¹⁸³ The Panel then recommended that "the Contracting Parties request the United States to bring the above measures into conformity with its obligations under the General Agreement."¹⁸⁴

V. CRITIQUE OF THE PANEL REPORT

This section of the Comment focuses on several weaknesses in the Panel's decision. First, this section examines the Panel's analysis of the MMPA in connection with GATT Articles III, XX(b) and XX(g). This section then identifies inconsistencies between the Panel's decision, the text of the GATT, past GATT dispute resolution panel reports, and other GATT documents. Next, this section dis-

175. *Id.* at 46.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 46-47.

180. *Id.* at 46.

181. *Id.* at 46-47.

182. *Id.* at 47.

183. *Id.* at 44-47.

184. *Id.* at 51.

cusses the conflicts between the present GATT standards and the need for global environmental protection and conservation. Finally, this section discusses possible ramifications of the Panel's decision for the North American Free Trade Agreement.

A. Article III

The Mexican Tuna Panel's analysis of Article III was unsatisfactory in several respects. First, the Panel distinguished between a product itself and its method of production.¹⁸⁵ It stated that Article III applied only to internal regulations that affect a product "as such."¹⁸⁶ The Panel noted that the MMPA regulates the method of harvesting tuna, rather than tuna itself.¹⁸⁷ Thus, the Panel concluded that the MMPA did not fall within the scope of Article III.¹⁸⁸

Unfortunately, the Panel failed to explain why this distinction between the regulation of a product and the regulation of its production method is meaningful. It did not state that regulation of a product was less likely to interfere with free trade than regulation of a production method. Indeed, the Panel pointed out that the GATT allowed measures that affect imported products while also affecting "the like domestic product."¹⁸⁹ An example of such a measure is the United States law prohibiting the importation of automobiles that do not meet specified emissions requirements.¹⁹⁰ Presumably, the rationale behind this type of import prohibition is protection of the environment. In the present case, harvesting yellowfin tuna in the ETP with the purse seine method does not itself harm the environment, but its method of production does. Thus, this distinction between regulation of the product itself and regulation of its production method is a mere technicality that does not advance the goal of free trade.

In addition, GATT Article III:1 refers to "regulations and requirements affecting the internal sale, . . . or use of products, and internal quantitative regulations requiring the mixture, *processing* or use of products in specified amounts or proportions."¹⁹¹ Arguably, the MMPA is such a quantitative regulation on processing. Fishing for yellowfin tuna in the ETP, using the purse seining method and

185. *Panel Report, supra* note 18; *see also* text accompanying notes 162-165.

186. *See Panel Report, supra* note 18, at 41.

187. *Id.*

188. *Id.* at 41-42.

189. *Panel Report, supra* note 18, at 40.

190. *See* The Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7642 (1991).

191. GATT, *supra* note 56, art. III:1 (emphasis added).

setting nets on dolphins, necessarily results in the incidental taking of some dolphins. Under this theory, the MMPA is merely a processing requirement for yellowfin tuna which places a limit on the number of dolphins that may be taken in connection with this tuna processing method. Although the United States made this argument,¹⁹² the Panel failed to address it.

Furthermore, as the United States acknowledged, the GATT approves of other internal regulations affecting trade which do not affect products themselves. The United States referred to a GATT report regarding marks of origin.¹⁹³ This report makes clear that regulations on marks of origin, which are notations on a product specifying where it was made, are within the scope of GATT Article III.¹⁹⁴ Yet, such regulations do not significantly affect the final product itself. In fact, this type of regulation is more closely related to a specification on production methods rather than a regulation on the contents of a product.

B. Article XX(b)

The Mexican Tuna Panel's finding that the drafting history of Article XX(b) does not support extrajurisdictional application¹⁹⁵ creates serious problems for conservation efforts like the MMPA. If the GATT restricts a nation's conservation efforts to its own borders, it renders protection of highly migratory species impossible. For instance, one nation acting alone cannot adequately protect dolphins because dolphins do not remain within the physical boundaries of any one nation. Thus, the Panel's decision provides the United States with little incentive to continue its dolphin protection program at home. Indeed, if the Panel's report is accepted, and the domestic provisions of the MMPA remain in effect, the United States' tuna fleet would probably stop fishing for yellowfin tuna in the ETP because it would no longer be able to compete with the foreign fleets.¹⁹⁶

192. *Panel Report, supra* note 18, at 11-12.

193. *Report of the Working Party on "Certificates of Origin, Marks of Origin, Consular Formalities,"* GATT Doc. L/595 (available in 55 GATT BASIC DOCUMENTS AND SELECTED INSTRUMENTS 102 (1956)); *see also Panel Report, supra* note 18, at 13.

194. *See Report of the Working Party on "Certificates of Origin, Marks of Origin, Consular Formalities," supra* note 193.

195. *Panel Report, supra* note 18, at 45.

196. Some commentators have stated that, since the MMPA limitations on dolphin takings went into effect, many United States yellowfin tuna fishers have adopted a "flag of convenience." This is the practice of registering and sailing their ships under another nation's flag. *See Lones, supra* note 13, at 1017. Nations engaging in this practice were able to avoid the

Although the response to this criticism is that conservation measures should be taken in the form of multilateral treaties rather than unilateral measures, the present case illustrates that such treaties are not always possible. Since Mexico and other Latin American nations have a strong interest in purse seining in the ETP,¹⁹⁷ it is unlikely that they will forego this practice.

The Mexican Tuna Panel's finding is also inconsistent with another GATT dispute resolution panel's analysis of Article XX(b). That panel recently mediated the United States' dispute with Thailand over Thailand's restrictions on cigarette imports.¹⁹⁸ Similar to the United States' argument in its dispute with Mexico, Thailand also justified its measures as health policies falling within the GATT Article XX(b) exception.¹⁹⁹ As in the United States-Mexico tuna embargo case,²⁰⁰ the Thai Cigarette Panel found that Thailand's measures were not "necessary" within the meaning of Article XX(b).²⁰¹ The Thai Cigarette Panel further stated that Thailand's import restrictions "could be considered 'necessary' in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."²⁰² Although both the Mexican Tuna Panel and the Thai Cigarette Panel refused to accept the Article XX(b) claims, in the United States-Thailand case, the United States suggested several alternatives to Thailand's policy, thereby demonstrating that Thailand's measures were not "necessary."²⁰³ The Thai Cigarette Panel did not place the burden of proof on Thailand, even though Thailand was the party invoking Article XX. In the United States-Mexico dispute, however, the Mexican Tuna Panel did impose the burden of proving necessity on the United States. The Mexican Tuna Panel stated that, since the United States was invoking an Article XX(b), it had the burden of

MMPA until the embargo was enforced. If the Panel's report is accepted, this practice will be likely to increase. Conversely, if extrajurisdictional application of the MMPA is allowed, this practice should decrease because United States tuna fishers will lose incentive to register under other nation's flags, since these nations will also be subject to restrictions on dolphin takings.

197. See *infra* notes 105-07 and accompanying text.

198. *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes: Report of the Panel*, GATT Doc. DS10/R (Nov. 7, 1990) (available in 37 GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 200) [hereinafter *Thai Cigarette Panel Report*].

199. *Id.* at 206.

200. *Panel Report*, *supra* note 18, at 46.

201. *Thai Cigarette Panel Report*, *supra* note 198, at 223.

202. *Id.*

203. *Id.*

proving that its trade restrictions were "necessary."²⁰⁴ Necessity was to be proven by demonstrating that no alternative trade measures consistent with the GATT existed.²⁰⁵ Understandably, the United States failed the daunting task of proving a negative. It would have been more appropriate for the Mexican Tuna Panel to have placed the burden on Mexico to prove that alternative trade measures existed.

C. Article XX(g)

The Mexican Tuna Panel's finding that GATT Article XX(g) does not cover extrajurisdictional trade measures is also flawed. The Panel first noted that a trade measure cannot be considered "primarily aimed at" conservation, under Article XX(g), unless taken "in conjunction with" domestic production or consumption restrictions.²⁰⁶ Citing an earlier GATT dispute resolution panel report,²⁰⁷ the Panel further stated that a trade measure could not be considered "in conjunction with" domestic production or consumption restrictions unless "it was primarily aimed at rendering effective these [domestic production or consumption] restrictions."²⁰⁸ The Panel then reasoned that a nation could only effectively restrict production or consumption of an exhaustible natural resource to the extent that it has jurisdiction over the production or consumption.²⁰⁹ Thus, the Panel concluded, the United States MMPA does not fall within Article XX(g) because it applies outside the United States' jurisdiction.²¹⁰

The Panel's reasoning on this issue is unsound. The crux of its analysis is based on the notion that a trade measure applied outside a nation's physical borders cannot be "primarily aimed at" conservation because a nation cannot effectively restrict production or consumption beyond its national territory. The purpose of the MMPA, however, is clearly to conserve marine mammals.²¹¹ Additionally, the MMPA evidently has been effective at restricting the production of tuna caught by purse seine methods. Had the MMPA not restricted Mexico's production of tuna in this manner, Mexico would not have brought this action.

204. *Panel Report, supra* note 18, at 43.

205. *Id.*

206. *Id.* at 46-47.

207. *Canadian Salmon Panel Report, supra* note 153.

208. *Panel Report, supra* note 18, at 46-47.

209. *Id.*

210. *Id.*

211. *See generally*, 16 U.S.C. §§ 1361-1407 (1988).

The United States-Mexico tuna case is similar to a complaint that the United States brought to the GATT against Canada regarding Canadian restrictions on exports of Pacific Coast unprocessed salmon and herring.²¹² In that case, Canada sought to justify its actions under Article XX(g) of the GATT, which allows conservation measures for exhaustible natural resources.²¹³ The United States argued that the measures in question were not "primarily aimed" at conservation, but rather were disguised restrictions on international trade.²¹⁴ The Canadian Salmon Panel agreed with the United States' position.²¹⁵

However, there are several important distinctions between the Canadian Salmon Panel decision and the Mexican Tuna Panel decision. In the Canadian salmon case, Canada conceded that its trade measures were not specifically conservationist measures, but were measures effecting conservation.²¹⁶ In the Mexican tuna case, the United States aggressively argued that the MMPA was primarily aimed at conservation.²¹⁷ Additionally, several aspects of Canada's trade measure indicated that it was not "primarily aimed at" conservation. First, the Canadian program applied not to salmon and herring in general, but to salmon and herring in its unprocessed form.²¹⁸ By contrast, the United States MMPA applies to all yellowfin tuna caught with purse seine methods in the ETP, regardless of whether the tuna has been processed.²¹⁹ In addition, the Canadian Salmon Panel considered the fact that Canada's limit on purchases of unprocessed salmon and herring only applied to foreign processors and consumers, and not to domestic processors and consumers.²²⁰ Conversely, the United States MMPA applies to both domestic tuna fishers and fishers from other nations.²²¹ In light of these distinctions, the Mexican Tuna Panel should have held that the MMPA is "primarily aimed at" conservation and thus consistent with GATT Article XX(g).

212. *Canadian Salmon Panel Report, supra* note 153.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 114.

217. *Panel Report, supra* note 18, at 19-24.

218. *Canadian Salmon Panel Report, supra* note 153, at 115.

219. *See generally* 16 U.S.C. §§ 1361-1407 (1988).

220. *Canadian Salmon Panel Report, supra* note 153, at 115. The Canadian Salmon Panel also examined two other factors that are not comparable with the Mexican tuna case.

221. *See generally* 16 U.S.C. §§ 1361-1407 (1988).

D. GATT and the Environment

The most serious problem with the Mexican Tuna Panel Report is that it leaves virtually no avenues open for environmental protection measures that affect international trade. Since the GATT does not specifically mention the environment,²²² the exceptions under Article XX²²³ provide the only safeguards for national measures designed to protect the global environment. Unfortunately, the Panel stated that the GATT interprets Article XX very narrowly.²²⁴ Indeed, the language of the present decision indicates that nations will rarely be able to rely on Article XX to justify environmental regulations affecting trade.²²⁵ Furthermore, GATT panels have currently examined five disputes involving environmental measures,²²⁶ and in none of these disputes has a panel ruled that environmental regulations were consistent with the GATT.²²⁷ This record suggests that the GATT needs to be updated to allow nations to address environmental problems.

Moreover, if the full Council accepts the Mexican Tuna Panel's ruling, serious ramifications could result for many environmental laws. According to an attorney for the Environmental Protection Agency, many areas for potential collision between environmental and trade laws exist.²²⁸ As the present case illustrates, trade can compromise or invalidate environmental laws.²²⁹ In addition, the GATT may generally view environmental laws as impermissible barriers to trade.²³⁰ Furthermore, the world community as a whole currently favors free trade over environmental protection.²³¹

222. See generally GATT, *supra* note 56.

223. *Id.* art. XX.

224. See *supra* text accompanying note 169.

225. See *Panel Report, supra* note 18, at 43-50.

226. See *GATT Dispute-Settlement and Trade-Environment Measures*, FOCUS (GATT Newsletter), Oct. 1991, at 4.

227. *Id.*

228. *Deadlines Approach for Two GATT Airbus Complaints, Boeing Official Tells ABA*, 8 Int'l Trade Rep. (BNA) No. 44, at 1628 (Nov. 6, 1991) (statement of Peter Lallas of the Environmental Protection Agency).

229. See generally *Swing Supporters of NAFTA Talks Urge Agreement on Environmental Protection*, 8 Int'l Trade Rep. (BNA) No. 44, at 1621 (Nov. 6, 1991).

230. *Deadlines Approach for Two GATT Airbus Complaints, Boeing Official Tells ABA, supra* note 228.

231. In reference to the GATT decision, a European Commission official stated that "we have to avoid creating new non-tariff barriers." *GATT Official Assesses Tuna Decision's Impact on Link Between Environment, Trade*, 8 Int'l Trade Rep. (BNA) No. 41, at 1505 (Oct. 16, 1991).

Environmentalists have also expressed concern that the ruling will invalidate many existing trade practices designed to protect the environment.²³² For example, international trade sanctions designed to halt the trade of endangered species, or the trade in rare hardwoods and shipments of toxic wastes, now may be illegal under GATT rules.²³³ A representative of the Humane Society of the United States has stated that the decision “reduces environmental law to the lowest common denominator, and sets a deadly precedent for worldwide environmental protection.”²³⁴

E. Ramifications of the Panel Decision for the North American Free Trade Agreement

On February 5, 1991, the leaders of Canada, Mexico, and the United States announced that they would negotiate a North American Free Trade Agreement (“NAFTA”).²³⁵ NAFTA’s objective is to eliminate tariffs, trade quotas, import licensing, and other traditional trade barriers.²³⁶ Because the United States and Canada already have a free trade agreement, most of the negotiation centers on Mexico.²³⁷ However, environmental concerns have played an important part in Congress’ discussions of NAFTA.²³⁸ Indeed, these concerns almost prevented Congress from initially approving the negotiations.²³⁹

Since the Mexican tuna decision, environmentalists have become increasingly alarmed about NAFTA’s potential consequences to the environment. In a letter to United States Trade Representative Carla Hills, an attorney representing the Humane Society argued that Mex-

232. See Auerbach, *supra* note 109. “Environmental groups have been fighting the current Uruguay Round of free-trade talks for years, arguing that new GATT rules could weaken U.S. health, safety and environmental protection laws by labeling them as trade barriers in much the same way Mexico characterized the law to save dolphins.” *Id.* See also David Crosson, *Dolphin Killings Ruffle Trade Pact*, S.F. EXAMINER, Sept. 27, 1991.

233. David Clark Scott, *Mexico Wins Battle Over U.S. Tuna Ban, but Backs Off to Save Image, Trade Talks*, CHRISTIAN SCI. MONITOR, Sept. 27, 1991, at 8.

234. *House Members Spearhead Congressional Opposition to Dolphin-Deadly Trade Ruling*, PR NEWswire, Sept. 20, 1991, available in LEXIS, Nexis Library, OMNI File (statement by Patricia Forkan, senior vice president of the Humane Society of the United States).

235. M. Delal Baer, *North American Free Trade*, FOREIGN AFF., Fall 1991, at 132.

236. Wesley Smith, *Guidelines for U.S. Negotiators at the Trade Talks with Mexico*, HERITAGE FOUND. REP., Oct. 18, 1991, at 861.

237. *Id.*

238. See Baucus Concerned About NAFTA Talks’ Pace, Warns Environment, Trade Must Be Linked, 9 Int’l Trade Rep. (BNA) No. 7, at 271 (Feb. 12, 1992).

239. Keith Bradsher, *Company News; U.S. Ban on Mexico Tuna is Overruled*, N.Y. TIMES, Aug. 23, 1991, at D1.

ico's GATT challenge "could result in a serious crippling of the domestic environmental laws the U.S. has carefully pieced together over the past twenty-five years."²⁴⁰ She further questioned how Mexico could "expect to be a full partner with the U.S. when it uses the GATT to avoid U.S. environmental laws?"²⁴¹

Mexican President Carlos Salinas de Gortari's concern over NAFTA prompted his decision to defer Mexico's challenge of the United States' embargo in the GATT.²⁴² NAFTA is extremely important to Salinas, who sees the treaty as a way to sustain domestic reforms he claims are improving the quality of life for Mexican citizens.²⁴³

VI. CRITIQUE OF THE MMPA

This section of the Comment discusses specific problems of the MMPA. This section first notes that the Panel correctly concluded that the MMPA's variable standards for foreign fishers produced an unfair result for foreign nations. Next, this section analyzes the special concerns of applying national environmental standards such as the MMPA to less developed countries such as Mexico.

A. Variable Standards for Foreign Nations

In response to the United States' position that Article XX of the GATT justifies the MMPA, the Mexican Tuna Panel emphasized that the MMPA applies different restrictions to dolphin takings by foreign nations than it applies to takings by the United States.²⁴⁴ Specifically, under the MMPA, foreign tuna fishers who export to the United States may not take more than 1.25 times the number of dolphins the United States takes in a given year.²⁴⁵ At first glance, this rule appears to benefit foreign nations because their limit on dolphin takings is higher than the limit for the United States. However, as the Mexican Tuna Panel revealed, foreign nations have no way to know

240. *NAFTA Public Hearings Conclude with Recommendations, Warnings*, 8 Int'l Trade Rep. (BNA) No. 37, at 1361 (Sept. 18, 1991).

241. *Id.*

242. The agreement not to pursue the challenge to the United States' embargo was reached during the annual meeting of the United States-Mexico Binational Commission. *Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo*, 8 Int'l Trade Daily (BNA) (Sept. 20, 1991).

243. Larry D. Hatfield, *Salinas Hails Common Market*, S.F. EXAMINER, Oct. 1, 1991, at A4.

244. *Panel Report*, *supra* note 18, at 46-47.

245. *See supra* note 50 and accompanying text.

whether their policies conform to the MMPA under this rule.²⁴⁶ Thus, the Panel determined that the MMPA failed to satisfy both the GATT Article XX(b) requirement that a measure must be "necessary to protect human, animal or plant life or health,"²⁴⁷ and the GATT Article XX(g) requirement that the measure needs to be "primarily aimed at" conservation of dolphins.²⁴⁸

Regardless of whether the Panel is correct in its determination that the MMPA fails the requirements of GATT Article XX(b) and Article XX(g), the Panel highlights the fact that this variable standard for foreign fleets is unfair. The uncertainty of this standard could cause foreign tuna fleets to suffer economic injury in any given year if they fail to meet this unpredictable criterion. Moreover, under this standard, foreign fleets can be subject to stricter limits than United States fleets. Recall that the United States has imposed a flat limit on dolphin takings at 20,500,²⁴⁹ and foreign nations can take no more than 1.25 times the number that the United States actually takes. If the United States takes less than 15,600 dolphins in a given year, the ceiling for foreign nations will be less than 20,500. Indeed, foreign nations actually were subject to a stricter limit than the United States in 1990, as the United States' dolphin taking rate was well under 15,600.²⁵⁰ Thus, while the United States claims that its standards for foreign fleets are more liberal than those for the United States' fleets,²⁵¹ in practice, they are actually more stringent.

B. *Economic Concerns of Less Developed Countries*

Underlying this dispute over the United States' embargo on Mexican tuna is the theory that a nation's concern for the environment is directly proportional to the strength of its economy.²⁵² Less developed countries such as Mexico often consider environmental protection a concern for rich nations.²⁵³ In essence, even if the government of a less developed country acknowledges that it has environmental

246. *Panel Report*, *supra* note 18, at 46-47.

247. *See supra* text accompanying notes 174-77.

248. *See supra* text accompanying note 182.

249. *See supra* notes 38-39 and accompanying text.

250. The Inter-American Tropical Tuna Commission estimates that the United States was responsible for 12,643 dolphin deaths in 1989 and 5,083 in 1990. COMMITTEE ON REDUCING PORPOISE MORTALITY FROM TUNA FISHING, REDUCING DOLPHIN MORTALITY FROM TUNA FISHING 4 (1992).

251. *See Panel Report*, *supra* note 18, at 12.

252. Runge, *supra* note 118, at 52.

253. *Id.*

problems, it generally considers increasing its level of production to be a more pressing matter.²⁵⁴

According to a report issued by the Conference Board of Canada,

Many developing countries are currently poised to use environmentally harmful products and technologies that were instrumental in bringing the industrialized countries to their current level of prosperity. These include the proposed large-scale use of chlorofluorocarbons for refrigeration in India and burning of high-sulfur coal reserves for power generation in China²⁵⁵

The United States and other highly industrialized nations must be sensitive to the fact that environmental concerns did not exist during their developing years.²⁵⁶ Because less developed countries that wish to industrialize must do so against the current backdrop of environmental regulations, the industrialized nations need to devise a plan to share the burden of these regulations with developing nations.²⁵⁷ Indeed, the Canadian report further states that "[i]t is likely that participation of developing countries in global [environmental] efforts will not be forth-coming without compensation. Debt, commodity prices, protectionism toward developing countries, financial and technological transfers all promise to feature prominently in any future global negotiations."²⁵⁸

VII. SOLUTIONS TO THE UNITED STATES-MEXICO TRADE DISPUTE

A. Amending the MMPA

As the Mexican Tuna Panel illuminated in its decision, the MMPA provisions that tie the foreign dolphin taking limit to the United States' actual taking rate for a given year²⁵⁹ are unfair.²⁶⁰ The United States should amend the MMPA to provide a specific limit on

254. *Id.*

255. *Conflicting Trade and Environment Goals Threaten Competitiveness, Report Concludes*, 8 Int'l Trade Rep. (BNA) No. 44, at 1627 (Nov. 6, 1991) [hereinafter *Conflicting Trade and Environment Goals*].

256. See generally Mark Allen Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291 (1990).

257. The Canadian report proposes a shift toward incentive-based environmental standards. For example, the report suggests that nations might use such methods as tradeable emissions permits. See *Conflicting Trade and Environment Goals*, *supra* note 255.

258. *Id.*

259. See *supra* note 50 and accompanying text.

260. See *supra* text accompanying notes 176-79.

dolphin takings for *both* the United States and foreign tuna fleets. This limit must be the same for all tuna fishers. These changes would solve the problem of the unpredictable limit on foreign fleets,²⁶¹ as well as the problem of discrimination between the United States and foreign fleets.²⁶²

B. *Inclusion of Environmental Provisions in the NAFTA*

Although serious concerns about NAFTA's implications on the environment exist,²⁶³ the NAFTA negotiations could be an opportunity to promote the linkage between trade and the environment.²⁶⁴ If NAFTA included environmental regulations, many issues such as the current tuna embargo dispute may be resolved. Furthermore, the NAFTA negotiations can give the United States an opportunity to affect many of Mexico's environmental policies that, in turn, affect the United States.²⁶⁵

Because Congress will be unable to modify the agreement once it has been approved,²⁶⁶ Congress should require that NAFTA provide for satisfactory environmental regulations at the outset.²⁶⁷ NAFTA should include a dispute settlement process to address environmental concerns.²⁶⁸ In addition, NAFTA should permit its parties to amend their environmental regulations so that the regulations are consistent with current scientific knowledge.

C. *Amending the GATT*

Currently, the GATT is deficient in the area of environmental protection. In light of present worldwide environmental conditions, the GATT must be updated. Perhaps the solution to this dilemma lies with the recently convened Group on Environmental Measures and International Trade.²⁶⁹ The Group's agenda is as follows: trade

261. *Id.*

262. See *Panel Report*, *supra* note 18, at 10.

263. See *supra* notes 5-6 and accompanying text.

264. See, e.g., *Baucus Calls*, *supra* note 3.

265. For example, NAFTA could allow the United States to help Mexico amend its clean air regulations. Furthermore, NAFTA negotiations could give the United States an opportunity to help Mexico with its sewage treatment problems in Baja California.

266. Smith, *supra* note 236.

267. See *International Trade: Sen. Baucus Expresses Concern About Fast Pace of NAFTA Talks*, Daily Rep. For Executives (BNA), at A3 (Feb. 7, 1992).

268. This environmental code could be similar to Baucus' plan for the GATT. See *Baucus Calls*, *supra* note 3.

269. *GATT to Focus on Trade and Environment Link*, FOCUS (GATT Newsletter), Oct.

provisions contained in existing multilateral environmental agreements (e.g., the Montreal Protocol); multilateral transparency of national environmental regulations likely to effect trade; and trade effects of new packaging and labeling requirements aimed at protecting the environment.²⁷⁰ According to GATT representative David Woods, the GATT has recognized that the intersection between environmental regulations and international trade is a political reality.²⁷¹

The GATT also should consider the plan suggested by United States Senator Max Baucus. Senator Baucus advocates that the GATT incorporate an environmental code and dispute settlement mechanism, modeled after the current subsidies code.²⁷² The code would remedy the "obvious deficiency" in the GATT, that its regulations put trade law above environmental considerations.²⁷³ The objective of such a code would allow nations to promote legitimate environmental goals by setting reasonable standards.²⁷⁴ According to Senator Baucus, an environmental code should permit nations to set their own environmental protection standards.²⁷⁵ If imported products or the processes used to produce them do not meet the importing nation's environmental standards, then duties can be applied provided the following criteria are met: (1) the importing nation's environmental protection standards have a sound scientific basis; (2) the standards are applied equally to domestic production; and (3) the imported products cause economic injury to competitive domestic production.²⁷⁶ Baucus' plan also calls for the GATT to establish an environmental dispute settlement body similar to the one established by the subsidies code.²⁷⁷

In addition, Senator Baucus has suggested that the next round of GATT negotiations focus primarily on environmental issues.²⁷⁸ While such protracted negotiations are necessary to bring the GATT

1991, at 1. The GATT Council originally established the Group in 1971, but the Group had never met. *Id.*

270. *Id.*

271. *Id.* at 2.

272. *Baucus Calls*, *supra* note 3.

273. Nancy Dunne, *U.S. Calls for a GATT Code on Environment*, FIN. TIMES, Sept. 18, 1991, at 6.

274. *Id.*

275. *Baucus Calls*, *supra* note 3.

276. *Id.*

277. *Id.*

278. *Trade: U.S. Senator Calls for GATT "Green Round,"* INTER PRESS SERVICE, Oct. 30, 1991, available in LEXIS, Nexis Library, Omni File.

up to date with environmental issues, preliminary discussions should begin immediately. As the United States tuna embargo dispute demonstrates, the link between the environment and trade is a serious problem. The Contracting Parties need to begin discussions immediately on ways to equip the GATT to deal with the environment.

VIII. CONCLUSION

While the recent Mexican Tuna Panel Report's²⁷⁹ disapproval of the United States trade embargo on Mexican tuna may have been legally correct in part, the GATT is out of touch with environmental concerns. Certain provisions of the United States MMPA²⁸⁰ may be prejudicial to foreign nations.²⁸¹ However, the broad language of the Panel's ruling requires that environmental trade measures affect only the product and not the production method,²⁸² and refuses to permit any extrajurisdictional environmental measures affecting trade.²⁸³ This language is not supported by the text of the GATT nor by past GATT panel decisions. This recent decision, along with past decisions involving environmental measures, leaves almost no room for environmental regulations that affect trade. As this conflict demonstrates, nations can no longer ignore environmental concerns in their negotiations on free trade. Thus, the GATT, along with other free trade agreements, must include provisions for environmental protection.

Elizabeth E. Kruis

279. *Panel Report, supra* note 18.

280. 16 U.S.C. §§ 1361-1407 (1988).

281. *See supra* notes 250-51 and accompanying text.

282. *See supra* text accompanying note 163.

283. *See supra* text accompanying notes notes 170-81.

