

The U.S./Mexico Tuna Embargo Dispute: a Case Study of the GATT and Environmental Progress

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NOTES AND COMMENTS

THE U.S./MEXICO TUNA EMBARGO DISPUTE: A CASE STUDY OF THE GATT AND ENVIRONMENTAL PROGRESS

I. INTRODUCTION	229
II. BASIC PRINCIPLES OF THE GATT	231
III. THE UNITED STATES/MEXICO DISPUTE	233
A. <i>The Marine Mammal Protection Act and Other Relevant Statutes</i>	233
B. <i>History of the United States/Mexico Dispute</i>	235
IV. THE PANEL DECISION	237
V. IMMEDIATE CONSEQUENCES OF THE PANEL DECISION	244
VI. IMPLICATIONS OF THE PANEL DECISION	246
VII. RESPONSES TO THE PANEL DECISION	249
VIII. CONCLUSION	253

I. INTRODUCTION

The General Agreement on Tariffs and Trade (GATT) entered into force on January 1, 1948,¹ in response to the growing interdependence of national economies and the consequent need to develop a base for increased international trade.² The GATT is both a multilateral trade agreement and an institution that oversees the agreement's opera-

1. The GATT is applied through the Protocol of Provisional Application, signed by the original twenty-three members of GATT. The original members were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Cuba, Czechoslovakia, France, India, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Rhodesia, South Africa, the United Kingdom and the United States. China, Lebanon and Syria were also original members but have since withdrawn. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 898 (1969).

The GATT was to have been one component of the International Trade Organization (ITO), which in turn was to combine with the World Bank and the International Monetary Fund to form the basis of the postwar international economic system. When the ITO collapsed in 1949, however, the GATT remained as the core international organization. ENVIRONMENT AND TRADE 20 n.1 (1982) (Seymour J. Rubin & Thomas R. Graham eds., 1982) [hereinafter Rubin & Graham].

2. See OLIVER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 43 (1985).

tion.³ It effects its purpose by providing both a legal framework for trade relations between member countries, and a forum for trade negotiations and for dispute resolutions.⁴ The GATT's key purpose is to promote international trade of goods and services through the reduction of tariffs and non-tariff barriers to trade.⁵ Although throughout much of its history the GATT focused primarily on reducing tariffs,⁶ it later recognized the need to address non-tariff barriers, such as quotas and import licenses.⁷ Non-tariff barriers also include environmental protection measures that often compete with the GATT goals of free trade.⁸

This Comment focuses on such a conflict between environmental protection and free trade. The conflict at issue arose when Mexico recently challenged a U.S. law limiting tuna imports because of the adverse effect of tuna harvesting on marine mammals.⁹ A GATT panel,¹⁰ established to resolve the dispute, held that the law violated the GATT.¹¹ Consequently, the panel decision stripped the United States of its ability to further its environmental policy objectives in the global commons, thus creating serious implications for nations desiring to promote environmental goals while still operating within the GATT framework.

Part II of this Comment highlights the relevant sections of the GATT. Part III discusses the U.S. law at issue — the Marine Mammal Protection Act (MMPA)¹² — and then describes how this Act led to the dispute between the United States and Mexico. Parts IV, V and VI detail the GATT panel decision, the immediate consequences of the decision and its long term implications. Finally, Part VII of this Comment discusses proposed responses to the environmental protection/free trade conflict.

3. *Id.* at 5.

4. *Id.*

5. *Primer: A Layperson's Guide to Trade and the Environment*, GREENWIRE, Oct. 16, 1991, available in LEXIS, Nexis Library, Wires File. Currently, close to one hundred nations, accounting for more than eighty-five percent of world trade, are members of GATT. *Id.*

6. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 117 (1989) [hereinafter JACKSON]. The GATT has been successful in its primary objective of reducing tariffs. The seven completed GATT trade negotiating rounds have resulted in an overall reduction in tariffs on industrial products to a level of about 4.7 percent. *Id.*

7. 137 CONG. REC. S13,169 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus) [hereinafter Baucus].

8. See JACKSON, *supra* note 6, at 203-16.

9. See *infra* text accompanying notes 56-63.

10. See *infra* note 59.

11. See *infra* text accompanying notes 64-94.

12. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988).

II. BASIC PRINCIPLES OF THE GATT

An integral component of the GATT's liberal trade objectives is eliminating discrimination.¹³ In the GATT context, nondiscrimination, defined as promoting equal access to a nation's markets, takes two forms. First, it is promoted through the Most Favored Nation (MFN) provision of Article I of the Agreement.¹⁴ This provision requires that each GATT member grant any other GATT member the most favorable treatment that the member extends to all other countries with respect to imports and exports.¹⁵ A second nondiscrimination requirement is found in the "national treatment" directive of Article III.¹⁶ "National treatment" prohibits imported goods from being treated any worse than domestically produced goods once they have cleared customs and border procedures, the goods may not be.¹⁷ In other words, Article III obligates an importing country to treat "like products" equally regardless of origin.¹⁸ A third safeguard against discrimination is also found in Article XI.¹⁹ This Article prohibits non-tariff barriers by banning many types of import restrictions and prohibitions.²⁰

13. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 297 (2d ed. 1986) [hereinafter JACKSON & DAVEY].

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, T.I.A.S. No. 1700, at 641 [hereinafter GATT].

15. The relevant language of Article I reads:

1. With respect to customs and duties and charges of any kind imposed on or in connection with importation or exportation . . . and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id. See also JACKSON, *supra* note 6, at 133.

16. GATT, *supra* note 14, art. III at 644-45. See also JACKSON, *supra* note 6, at 189.

17. The relevant language of Article III reads:

2. 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.

GATT, *supra* note 14, art. III at 645. See also JACKSON, *supra* note 6, at 189.

18. GATT, *supra* note 14, art. III at 644-45.

19. *Id.* art. XI at 653-54.

20. The relevant provision of Article XI reads:

1. No prohibitions or restrictions other than duties, taxes or other charges,

Conflict arises, however, between the above GATT provisions and other legitimate governmental policies.²¹ As occurred in the U.S./Mexico dispute, for example, a government may choose to enact certain conservation policies, the success of which depends on discrimination against nations not in compliance with these policies. Under the recent interpretation of Article III, however, the permissible scope of such discrimination is severely limited. An importing country can only enact measures for products that themselves create a pollution hazard.²² The country cannot address problems resulting from the manufacturing or harvesting processes of the exporting countries even though those processes may adversely impact the importing country.²³ Products produced in different manners are still considered "like."²⁴ Thus, under Article III, an importing country cannot require an exporting country to comply with the former's manufacturing regulations.²⁵ As a result, many environmental objectives cannot be achieved and domestic companies are placed at an unfair advantage.²⁶

Some legitimate environmental objectives are, however, preserved by Article XX²⁷ of the GATT. Nonetheless, Article XX fails to address adequately the above conflict. Article XX lists some valid domestic policies as exceptions to the GATT obligations. For example, governmental measures to promote public morals, to protect the lives and health of humans, animals or plants, to ban products of prison labor, to prevent deceptive practices and to conserve natural resources are expressly included within Article XX.²⁸ Thus, the Article recognizes the importance of promoting these policies regardless of a conflict with free world trade.²⁹ It is important to note, however, that Article XX has been interpreted to allow exceptions for health, safety and conservation

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 desired for the territory of any other contracting party.

Id. See also JACKSON, *supra* note 6, at 129.

21. JACKSON, *supra* note 6, at 203.

22. See *infra* text accompanying notes 66-74.

23. See JACKSON, *supra* note 6, at 208-09.

24. *Id.* at 209.

25. See *id.* at 208.

26. See *infra* text accompanying notes 163-165.

27. GATT, *supra* note 14, art. XX at 669-70.

28. *Id.* See also JACKSON, *supra* note 6, at 206.

29. JACKSON, *supra* note 6, at 206.

regulations of the *importing* country only.³⁰

III. THE UNITED STATES/MEXICO DISPUTE

A. *The Marine Mammal Protection Act and Other Relevant Statutes*

The failure of the GATT to provide for valid environmental protection measures was illustrated when Mexico challenged the U.S. Marine Mammal Protection Act.³¹ The MMPA was enacted by the U.S. Congress to prevent serious injury or incidental killing of marine mammals in the course of commercial fishing, especially in the Eastern Tropical Pacific Ocean (ETP).³² The ETP was of special concern to Congress because dolphins and tuna inhabit the same areas in these waters.³³ Knowing this, commercial fishermen in the ETP intentionally encircled the dolphins with purse-seine nets in order to catch the tuna swimming underneath.³⁴ Prior to the passage of the MMPA, these fishing techniques resulted in the death of an estimated 250,000 dolphins per year.³⁵

To address these fishing techniques, section 1371(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by U.S. fishermen in the course of commercial fishing pursuant to a permit.³⁶ Under this general permit, no more than 20,500 dolphins may be

30. See *infra* text accompanying notes 77-83. In addition, Article XX includes clauses to protect against abuses by nations attempting to restrain imports on unjustifiable grounds. GATT, *supra* note 14, at 669. The relevant passage is found at the text accompanying note 76.

31. For a discussion of the challenge, see *infra* text accompanying notes 56-63.

32. The Congressional declaration of policy states in part:

The Congress finds that —

- (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;
- (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimal sustainable population.

16 U.S.C. § 1361. See also Panel Report, *United States - Restrictions on Imports of Tuna*, GATT, DS21/R (1991) [hereinafter Panel Report].

33. See Panel Report, *supra* note 32, ¶ 2.2.

34. *Id.*

35. 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, 999 (1989).

36. 16 U.S.C. § 1371(a)(2).

incidentally killed or injured each year by the U.S. fleet fishing in the ETP.³⁷ Moreover, section 1371(a)(2)(B) of the Act prohibits the importation of yellowfin tuna from countries that permit harvesting with purse-seine nets in the ETP, unless the Secretary of Commerce finds that the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by U.S. vessels.³⁸

The MMPA also regulates imports from intermediary countries.³⁹ Section 1371(a)(2)(C) of the MMPA states that any intermediary nation that exports yellowfin tuna to the United States shall be required to certify to the Secretary of Commerce that it has acted to prohibit the importation of such tuna from any nation whose tuna exports to the United States are banned.⁴⁰

Furthermore, the MMPA provides that six months after the effective date of an embargo on yellowfin tuna or tuna products, the Secretary of Commerce shall certify this fact to the President.⁴¹ This certification triggers section 1978 of the Fishermen's Protective Act of 1967,⁴² also known as the "Pelly Amendment." The provision provides the President with discretionary authority to order a prohibition of imports of fish products from the embargoed country "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade."⁴³

The Dolphin Protection Consumer Information Act (DPCIA)⁴⁴

37. Panel Report, *supra* note 32, ¶ 2.4.

38. 16 U.S.C. § 1371(a)(2)(B). Specifically, the average incidental taking rate cannot exceed 1.25 times the average taking rate of U.S. vessels in the same period. *Id.*

39. Intermediary countries are countries that are not directly subject to the embargo.

40. The relevant provision of § 1371 of the MMPA states that the Secretary of Commerce:

shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States.

16 U.S.C. § 1371(a)(2)(C).

41. *Id.* § 1371(a)(2)(D).

42. Fishermen's Protective Act, 22 U.S.C. § 1978(a) (1988).

43. *Id.*

44. Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (Supp. III 1991).

was also enacted to protect marine mammals.⁴⁵ DPCIA specifies labeling requirements for any tuna product exported from, or offered for sale in, the United States.⁴⁶ The Act states that it is a violation of section 5 of the Federal Trade Commission Act (FTCA) for any producer, importer, exporter, distributor or seller to place a label on a tuna product stating that the tuna is "dolphin safe" or any other term falsely suggesting that the tuna was harvested in a manner safe to dolphins, if it were fished in a manner harmful to dolphins.⁴⁷

B. History of the United States/Mexico Dispute

From 1984 to 1990 the U.S. government failed to enforce the MMPA requirements, despite evidence that the foreign fleets were exceeding their allowed dolphin mortality rates.⁴⁸ In 1990, Earth Island Institute, an environmental organization, brought suit against the Commerce and Treasury Departments⁴⁹ for failure to enforce the MMPA comparability requirements.⁵⁰ In August 1990 and again in October 1990, the U.S. District Court in San Francisco found that the MMPA required the yellowfin tuna import embargo against Mexico⁵¹ because Mexico exceeded the dolphin kill rate of 1.25 times the U.S. rate.⁵² The Ninth Circuit Court of Appeals upheld this ruling, despite a

45. *Id.* § 1385(b)(1)(2). See also Panel Report, *supra* note 32, ¶ 3.3.

46. *Id.* § 1385(d).

47. 16 U.S.C. § 1385. Tuna is considered to be harvested in a manner harmful to dolphins if it either: (1) is harvested in the ETP by a vessel using purse-seine nets which do not meet specific conditions for being considered dolphin safe; or (2) is harvested on the high seas by a vessel engaged in driftnet fishing. *Id.* § 1385(d)(1)(A),(B).

48. *GATT: Implications on Environmental Laws: Hearing Before the Subcommittee on Health and the Environment of the House Energy and Commerce Committee*, 102d Cong., 1st Sess. 53 (1991) [hereinafter *Hearing*] (testimony of David Phillips, Executive Director of Earth Island Institute).

49. The U.S. Customs Service, under the Treasury Department, is responsible for enforcing the importation requirements of the MMPA. Panel Report, *supra* note 32, ¶ 2.3.

50. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, *Earth Island Inst. v. Mosbacher* 929 F.2d 1449 (9th Cir. 1991). See also *Hearing*, *supra* note 48, at 54 (testimony of David Phillips, Executive Director of Earth Island Institute).

51. Embargoes were also placed against Venezuela, Ecuador, Panama, and Vanuatu. Since that time, Ecuador and Panama have placed international observers on all their tuna vessels and enacted legislation prohibiting the vessels from setting nets on dolphins. *Hearing*, *supra* note 48, at 54-55 (testimony of David Phillips, Executive Director of Earth Island Institute).

52. Panel Report, *supra* note 32, ¶ 2.7. See *Hearing*, *supra* note 48, at 54 (testimony of David Phillips, Executive Director of Earth Island Institute).

strongly fought appeal by the U.S. government.⁵³ The Ninth Circuit ruled unanimously that tuna import embargoes against Mexico were required under the law.⁵⁴ The U.S. Customs Service, acting under the Treasury Department, then put an embargo in place against Mexico. Despite the embargo, Mexico continued to violate the MMPA dolphin mortality rates and thus remained under embargo.⁵⁵

In response to the embargo, Mexico filed a formal complaint with GATT.⁵⁶ Asserting that the MMPA regulations conflicted with the GATT, Mexico requested consultations with the United States.⁵⁷ These talks were unsuccessful, and Mexico consequently requested that the CONTRACTING PARTIES⁵⁸ establish a panel under Article XXIII:2⁵⁹ to examine the matter.⁶⁰ The Council⁶¹ agreed to establish the panel, and the panel held meetings with the parties to the dispute and other interested countries.⁶² The panel submitted its conclusions on Au-

53. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991). *See also Hearing, supra* note 48, at 60 (testimony of David Phillips, Executive Director of Earth Island Institute).

54. *Mosbacher*, 929 F.2d 1449.

55. *See Hearing, supra* note 48, at 55 (testimony of David Phillips, Executive Director of Earth Island Institute).

56. *Id.*

57. Panel Report, *supra* note 32, ¶ 1.1. The consultation and conciliation process is a key component of the GATT dispute resolution process. LONG, *supra* note 2, at 87.

58. "Under Article XXV:1 the contracting parties acting jointly are described in the General Agreement on Tariffs and Trade as the 'CONTRACTING PARTIES'. . . . The 'contracting parties' in small letters means the individual member countries." LONG, *supra* note 2, at 6 n.15.

59. GATT, *supra* note 14, art. XXIII at 671. Article XXIII:2 reads, in part:

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, . . . 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.

Id. In practice, the investigation and resolution of the matter is entrusted to a panel of experts. LONG, *supra* note 2, at 77.

60. Panel Report, *supra* note 32, ¶ 1.1.

61. The Council is the intersessional body and the executive organ of the CONTRACTING PARTIES. The Council prepares the sessions of the CONTRACTING PARTIES, oversees the work of the various committees and examines reports and makes appropriate recommendations to the CONTRACTING PARTIES. In addition, the Council appoints panel members for dispute settlement procedures. LONG, *supra* note 2, at 47.

62. Countries intervening on behalf of Mexico included Australia, Canada, the European Community, Indonesia, Japan, Korea, Norway, Philippines, Senegal, Thailand and Venezuela. *See* Panel Report, *supra* note 32, at 4.

gust 16, 1991.⁶³

IV. THE PANEL DECISION

The panel examined four issues in light of the GATT obligations. The four issues raised were: (1) the United States' prohibition of imports of certain yellowfin tuna and tuna products from Mexico; (2) the possible extension of each of these import prohibitions to all fish products from Mexico under MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment); (3) the United States' prohibition of imports of certain yellowfin tuna and tuna products from intermediary nations; and (4) the application of the labelling provisions of the DPCIA to tuna from Mexico.⁶⁴ If these issues were found to be GATT inconsistent, the panel then considered whether they fell within the Article XX exceptions.⁶⁵

The panel first addressed the primary embargo against Mexico. Mexico argued that the measures banning imports of tuna from Mexico were quantitative restrictions prohibited under Article XI of GATT.⁶⁶ The United States asserted that the measures were subject to Article III (national treatment) of the GATT rather than Article XI (quantitative restrictions).⁶⁷ In support of this proposition, the United States noted that because the embargo treated foreign-caught tuna no less favorably than domestic-caught tuna, it fulfilled the national treatment obligations of Article III. Furthermore, it was a valid internal measure enforced at the time or point of importation in accordance with the Ad Article III, which reads:

Any internal . . . regulation [affecting the sale of products] . . . 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 . . . regulation . . . subject to the provisions of Article III.⁶⁸

63. *Id.* ¶ 1.3.

64. *Id.* ¶ 5.7.

65. *See id.*

66. *Id.* ¶ 5.8. Quantitative restrictions are quotas or other measures, other than duties, which are used to restrict imports and/or exports. *See* GATT, *supra* note 14, art. XI at 653.

67. Panel Report, *supra* note 32, ¶ 5.8.

68. GATT, *supra* note 14, ad art. III. The "Ad" articles are the interpretive notes that accompany the GATT articles, and are found in the appendix of any reproduction of the GATT.

The panel, however, found that the embargo provisions were not internal regulations covered under Article III. The panel held that Article III applied only to measures affecting *products*, and found that the MMPA did not regulate tuna products as such but instead prescribed certain fishing techniques to protect dolphins. Although the MMPA regulates the domestic harvesting of yellowfin tuna, the panel noted that these regulations could not be regarded as applicable to the products themselves because they did not directly regulate the sale of tuna nor did they affect tuna as a product.⁶⁹ Therefore, the panel concluded that the import prohibition was not an internal regulation covered by Ad Article III.⁷⁰ Similarly, the panel found that even if the MMPA provisions were regarded as regulating the sale of a product, the import prohibition did not meet the requirements of Article III:4 which mandated "a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*."⁷¹ Regulations governing the incidental taking of dolphins in the course of harvesting tuna could not, the panel said, affect tuna as a product.⁷² Therefore, Article III:4 required Mexican tuna to be accorded no less favorable treatment than is accorded U.S. tuna, despite the different rate of dolphin deaths.⁷³ After determining that the MMPA provisions were not protected under Article III, the panel concluded the provisions were import prohibitions contrary to Article XI.⁷⁴

The panel next addressed the justifications raised by the United States under Article XX (b) and (g). Although Mexico asserted that contracting parties could not simultaneously argue a measure's compatibility with the GATT and invoke Article XX, since Article XX contained *exceptions* to the GATT directives, the panel held that simultaneous arguments were allowed.⁷⁵ The relevant provision of Article XX provides:

69. Panel Report, *supra* note 32, ¶ 5.10.

70. *Id.* ¶ 5.14.

71. *Id.* ¶ 5.15. Article III:4 reads:

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.

GATT, *supra* note 14, art. III:4 at 645.

72. Panel Report, *supra* note 32, ¶ 5.15.

73. *Id.*

74. *Id.* ¶ 5.18.

75. *Id.* ¶ 5.22.

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.⁷⁶

The panel first addressed the possible justification raised in Article XX(b). As noted above, Article XX(b) requires that an act's purpose be "necessary," that is, that there be no reasonable alternative measures available to accomplish the act's particular purpose. In this instance, the United States maintained that the MMPA's purpose was to protect the health and safety of the dolphin population. Because Mexico continued to use harvesting practices in contravention of the Act's provisions thereby endangering the dolphin population, the only option available to the United States to effectuate the Act was to enforce the embargo against Mexico.⁷⁷ Mexico, on the other hand, argued that Article XX(b) was inapplicable to protect the life or health of animals outside the jurisdiction of the contracting party.⁷⁸ Moreover, Mexico asserted the import provisions were unnecessary because there were GATT consistent alternatives, such as international cooperation between the parties.⁷⁹

The panel concurred with Mexico and found that the MMPA import ban was not justified by Article XX(b).⁸⁰ Article XX(b), the panel stated, did not clearly answer the question of whether it covers measures necessary to protect the lives or health of humans, animals, or plants outside the jurisdiction of the contracting party taking the measure.⁸¹ Therefore the panel believed that the issue should be analyzed in light of the drafting history, purpose of the provision and the opera-

76. GATT, *supra* note 14, art. XX at 669.

77. Panel Report, *supra* note 32, ¶ 5.24.

78. *Id.*

79. *Id.* International cooperation, however, often entails bringing environmental standards down to the lowest common denominator. *See infra* notes 119, 159.

80. Panel Report, *supra* note 32, ¶ 5.29.

81. *Id.* ¶ 5.25.

tional consequences of the alternative interpretations.⁸² The panel concluded that the drafting of Article XX(b) focused on the use of sanitary measures to safeguard the life or health of humans, animals or plants *within* the jurisdiction of the importing country.⁸³

Furthermore, the panel held that the implications of the U.S. analysis of Article XX(b) would be far too broad.⁸⁴ Each party remains free under GATT to set its own environmental policies, but if the U.S. interpretation were accepted each party could unilaterally determine life or health standards that other countries would be required to follow.⁸⁵ As a result, the GATT would change from a multilateral agreement to a device that protects only those countries with identical regulations.⁸⁶

Moreover, the panel continued, even if Article XX(b) were interpreted to allow extra-jurisdictional application of life and health measures, the MMPA provisions would not be "necessary."⁸⁷ The United States had not demonstrated, as required of a party invoking an Article XX exception, that it had exhausted all alternative remedies reasonably available to it to pursue its dolphin protection policy through GATT consistent measures.⁸⁸

The panel then addressed Article XX(g), stating that Article XX(g) requires measures relating to the conservation of exhaustible resources to be taken "in conjunction with restrictions on domestic production or consumption."⁸⁹ Relying on a past panel decision,⁹⁰ the panel noted that such measures would only be found to be in conjunction with domestic production restrictions "if [the measures were] primarily aimed at rendering effective these restrictions."⁹¹ Because a country can effectively control the production or consumption of an ex-

82. *Id.*

83. *Id.* ¶ 5.26.

84. *See id.* ¶ 5.27.

85. *Id.*

86. *Id.*

87. *Id.* ¶ 5.28.

88. *Id.* Finally, even if the import prohibition were the only reasonable alternative, it still could not be considered "necessary" within the meaning of XX(b) because it was based on such unpredictable conditions. Because the United States linked the maximum incidental take for Mexico to the actual take of the United States, the Mexican authorities could not know at a given time whether their policies conformed to U.S. protection measures. *Id.*

89. *Id.* ¶ 5.31.

90. Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted Mar. 22, 1988, GATT, BISD 35S/98, 114, ¶ 4.6 [hereinafter *Canada Report*].

91. Panel Report, *supra* note 32, ¶ 5.31.

haustible natural resource only to the extent that the production or consumption is within its jurisdiction, the panel found that Article XX(g) only permits contracting parties to take trade measures restricting production and consumption within their jurisdiction.⁹²

Furthermore, as with Article XX(b), if extrajurisdictional interpretation were accepted, each contracting party could unilaterally determine the conservation policies that other countries would be required to follow under the GATT.⁹³ Thus, the panel concluded that the direct import ban against Mexico was not justified by Article XX(g).⁹⁴

The panel did, however, find in favor of the U.S. position on the Pelly Amendment, despite Mexico's assertion that the possible extension of import prohibitions to all fish products under section 101 (a)(2)(D) and section 8 of the FPA was inconsistent with Article XI of the GATT.⁹⁵ The panel acknowledged that previous panel reports stated that legislation requiring inconsistent action with the GATT is inconsistent with the GATT, whether or not an occasion for its actual application has arisen.⁹⁶ However, the panel responded that legislation that merely gives the executive authorities *power* to act inconsistently is not, by itself, inconsistent with the GATT.⁹⁷

The panel later addressed the intermediary nation embargo, also known as the "secondary embargo." As with the panel's decision regarding the primary embargo, the panel found that the secondary embargo regulations were not applied to tuna as a product.⁹⁸ Therefore, the embargo did not fall within the provisions of Article III⁹⁹ and was thus a non-tariff barrier prohibited by Article XI.¹⁰⁰ The United States again invoked the exceptions under Article XX(b) and (g) — claiming

92. Panel Report, *supra* note 32, ¶ 5.31.

93. *Id.* ¶ 5.32. In addition, the import restriction was not a measure "relating to the conservation of exhaustible natural resources" because it was not "primarily aimed at such conservation." *Id.* ¶ 5.33. The panel said that the MMPA regulations were not primarily aimed at such conservation because the regulations relied on unpredictable factors. For example, the Mexican authorities did not know, at any given moment, whether their taking rate met the MMPA requirements. *Id.* In support of the "primarily aimed at" requirement, the panel cited the Canada Report, *supra* note 90. *Id.*

94. Panel Report, *supra* note 32, ¶ 5.34.

95. *Id.* ¶ 5.20.

96. *Id.* ¶ 5.21. The panel referred to Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, adopted June 17, 1987, BISD 34S/136.160, 163-4, ¶ 5.2.2, 5.2.9-10; and Panel Report, *EEC - Regulation on Imports of Parts and Components*, BISD 37S/132, L/6657, adopted May 16, 1990, ¶ 5.25-5.26. *Id.*

97. Panel Report, *supra* note 32, ¶ 5.21.

98. *Id.* ¶ 5.35.

99. *Id.*

100. *See id.*

the secondary embargo was necessary to protect dolphin life and related to the conservation of natural resources — but the panel found that the considerations that led the panel to reject the exceptions as applied to the direct embargo applied equally to the intermediary embargo.¹⁰¹

Finally, the panel addressed the Dolphin Protection Consumer Information Act (DPCIA).¹⁰² Mexico contended that the labelling provisions of DPCIA were inconsistent with Article I:1 because they discriminated against Mexico.¹⁰³ The panel disagreed, stating that the labelling requirements did not restrict the sale of tuna products, because tuna could be sold with or without a label.¹⁰⁴ Nor did these provisions establish requirements that must be met in order to obtain an advantage from the government; the advantage rests in the choice of the consumers.¹⁰⁵ Therefore, the panel concluded that the labelling provisions did not condition the right to sell tuna upon tuna harvesting methods, nor did it condition access to government-conferred advantages. Moreover, although the DPCIA affected only the tuna harvesting methods used in the ETP, it did not solely discriminate against Mexican tuna since the labelling requirements applied to all countries whose vessels fished in this geographical area.¹⁰⁶ For the above reasons, the labelling requirements of the DPCIA were not found to be inconsistent with Article I:1.¹⁰⁷

The GATT panel made four concluding remarks. First, the panel noted that it was only examining the issues “in light of the relevant GATT provisions.”¹⁰⁸ The panel was not commenting on the appropriateness of the conservation policies of the contracting parties.¹⁰⁹ Second, the panel explained that the GATT places few constraints on “a

101. *Id.* ¶ 5.38. The United States also invoked Article XX(d), which excepted from GATT obligations those measures that are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.” Panel Report, *supra* note 32, ¶ 5.39.

The panel stated that the secondary embargo was necessary to support the direct embargo. Therefore, because the direct embargo was inconsistent with the GATT, the secondary embargo could not be justified by Article XX(d). *Id.* ¶ 5.40.

102. *See supra* text accompanying notes 44-47.

103. Panel Report, *supra* note 32, ¶ 5.42.

104. *Id.* The statute only requires certain harvesting standards to be met before a “dolphin safe” label can be put on the tuna product. 16 U.S.C. § 1385(d).

105. Panel Report, *supra* note 32, ¶ 5.42.

106. *Id.* ¶ 5.43.

107. *Id.* ¶ 5.44.

108. *Id.* ¶ 6.1.

109. *Id.*

contracting party's implementation of domestic environmental policies."¹¹⁰ For example, under the GATT, a contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic products.¹¹¹ A contracting party is also free to tax or regulate domestic production for environmental purposes.¹¹² As a corollary to these rights, the panel decided, "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."¹¹³ Third, an embargo imposed to respond to differences in environmental regulation of producers could not be justified under Article XX(b) or XX(g).¹¹⁴ Because the Article XX exceptions did not specify limits on the range of life, health and resource protection policies for which the Article XX exceptions could be invoked, it would be best for the CONTRACTING PARTIES to implement such regulations — not by interpreting these exceptions, but instead by amending, supplementing, or waiving the obligations of the GATT.¹¹⁵ In so doing, the CONTRACTING PARTIES could impose specific limits on the range of policy differences and develop criteria to prevent abuse.¹¹⁶

The panel concluded therefore, that adoption of this report would not affect the rights of CONTRACTING PARTIES to pursue their domestic environmental policies and to cooperate with one another in harmonizing their policies,¹¹⁷ nor affect the right to act jointly to amend the GATT to address international environmental problems that can only be resolved through measures in conflict with the present rules of GATT.¹¹⁸ Finally, the panel recommended that the CONTRACTING PARTIES request the United States to bring the MMPA measures into conformity with its GATT obligations.¹¹⁹

110. *Id.* ¶ 6.2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* ¶ 6.3.

115. *Id.*

116. *Id.*

117. Harmonization of environmental standards, however, has been criticized as a mechanism to pull national standards down to the lowest common denominator. See *Hearing, supra* note 48, at 66 (testimony of Ralph Nader).

118. Panel Report, *supra* note 32, ¶ 6.4.

119. *Id.* ¶ 7.1(c).

V. IMMEDIATE CONSEQUENCES OF THE PANEL DECISION

Typically, contracting parties are expected to comply with any recommendations put to them by the full Council on the basis of the panel's report.¹²⁰ A failure to do so subjects the country to political pressure from the other contracting countries.¹²¹ In addition, Article XXIII:2,¹²² which gives force to the recommendations in the panel reports, provides for retaliatory measures by other contracting parties.¹²³ Such measures can include sanctions, reciprocal trade regulation and monetary damage awards to the country requesting the other to act.¹²⁴ Moreover, the CONTRACTING PARTIES can oversee any matter for which they have made recommendations, and if the recommended action is not taken, the contracting party that initiated the action may ask to intervene to find an appropriate solution.¹²⁵

Thus, once a panel decision has been approved by the full GATT council, refusal to follow its directives may well result in disciplinary measures. In this case, if the panel decision is adopted and Congress refuses to eliminate the MMPA provisions, the United States could face countervailing trade sanctions or fines.¹²⁶ It should be extremely difficult for the United States to refuse compliance in light of its own criticisms of other nations who defy the GATT provisions.¹²⁷

As of this writing, however, adoption of the panel decision is doubtful. At the time of the panel decision, Mexico and the United States were negotiating the North American Free Trade Agreement (NAFTA).¹²⁸ In order to facilitate those talks, Mexico postponed calling for the full GATT Council to rule on the U.S. embargo.¹²⁹ Instead,

120. LONG, *supra* note 2, at 85.

121. *Id.*

122. GATT, *supra* note 14, art. XXIII:2 at 671.

123. LONG, *supra* note 2, at 77.

124. *Hearing, supra* note 48, at 57 (testimony of David Phillips, Executive Director of Earth Island Institute).

125. LONG, *supra* note 2, at 78.

126. *Hearing, supra* note 48, at 73 (testimony of Ralph Nader).

127. See Keith Bradsher, *U.S. Ban on Mexico Tuna Is Overruled*, N.Y. TIMES, Aug. 23, 1991, at D1. The United States, for example, threatened unilateral retaliatory action against the European Community (EC) when the EC refused to implement a 1985 GATT dispute panel ruling against the EC. The panel found in favor of the U.S. position that the EC's lower tariff benefits for Mediterranean citrus producers offset fair access for U.S. citrus shippers. See *U.S., EC Call Truce in Escalating Tariff War, Set October Deadline to Settle Citrus Dispute*, 2 Int'l Trade Rep. (BNA) No. 30, at 949-50 (July 24, 1985).

128. The text of NAFTA can be found in LEXIS, Genfed Library, Extra:4 File.

129. *Bowing to U.S. Pressure, Mexico to Have Observers on Tuna Boats, Delays*

Mexico promised to step up protection of dolphins, pledging that by 1994 there will be a total moratorium on fishing for yellowfin tuna using the current nets.¹³⁰ In return, the Bush administration proposed amending the MMPA to provide for a five-year moratorium on the practice of setting purse-seine nets on dolphins beginning March 1, 1994.¹³¹ The U.S. would then lift the embargo for those nations that commit to implementing the moratorium.¹³² At the end of five-year moratorium, the countries would again be subject to embargo unless they conformed with the MMPA criteria.¹³³

The GATT threat to the MMPA, however, is far from over. Subsequent to the panel decision, the U.S. District Court in San Francisco reaffirmed the MMPA secondary embargo provisions.¹³⁴ Angered by this court decision and Mexico's refusal to pursue the panel report, the European Community (EC), which is affected by the secondary embargo, demanded that the GATT Council adopt the panel decision.¹³⁵ Since adoption will not occur without Mexico's request, however, the EC then requested that another GATT dispute panel be formed to again look into the legality of the embargo provisions of the MMPA.¹³⁶

GATT Action, 8 Int'l Trade Rep. (BNA) No. 38, at 1411-12 (Sept. 25, 1991).

130. See *EC Urges Adoption of Tuna Report but U.S., Mexico Claim Accord is Near*, 9 Int'l Trade Rep. (BNA) No. 13, at 524-25 (Mar. 25, 1992).

131. *Id.*

132. *Id.*

133. *Id.* This proposal — not law as of this writing — has been criticized by environmentalists as failing to secure a permanent end to setting purse-seine nets on dolphins and containing numerous loopholes. For example, Representative Barbara Boxer (D-Calif.) stated: "In my view the primary motivation of the [proposal] is to assuage the concerns of the Mexican government as a way of furthering negotiations for the North American Free Trade Agreement." *Id.* at 525. Indeed, before Congress adopted the fast track for NAFTA negotiations, many members of Congress predicted the clash between free trade and environmental protection. Environmentalists had tried to block fast track approval of the negotiations, but the Bush administration assured Congress that environment, health and safety laws would not suffer as a result of the agreement. See 137 CONG. REC. H5217 (daily ed. June 27, 1991) (statement of Rep. Collins). Many, however, still fear that the free trade agreement is an indirect way of forcing environmental backsliding that could not be achieved directly. Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A21 [hereinafter Mathews].

134. *Earth Island Inst. v. Mosbacher*, 785 F. Supp. 826 (N.D. Cal. 1992).

135. *GATT: EEC Urges Council to Adopt Panel Ruling on US Tuna Ban*, EUR. ENV., Mar. 3, 1992 [hereinafter *EEC Urges*].

136. See *Panelists Being Selected for Second GATT Panel on Tuna*, 9 Int'l Trade Rep. (BNA) No. 36, at 1552-53 (Sept. 2, 1992) [hereinafter *Second GATT Panel*]. The EC asserts that it does not oppose the U.S. environmental objectives, but feels the best way to protect the dolphin is through multilateral rules. *EEC Urges*, *supra* note

This request was agreed to July 14, 1992.¹³⁷

VI. IMPLICATIONS OF THE PANEL DECISION

Not only is the MMPA threatened by potential GATT action, but other environmental acts are endangered as well. Instead of narrowing the decision to the MMPA, the first panel report announced a potentially devastating interpretation of the exceptions of Article XX(b) and Article XX(g),¹³⁸ and the requirements of Article III. The panel report reached two conclusions.¹³⁹ First, environmental laws cannot extend beyond national boundaries.¹⁴⁰ Under the GATT, no nation can enact a law protecting the global commons or the species inhabiting them if the law adversely impacts on trade.¹⁴¹ Second, the GATT does not allow a nation to consider how products or commodities are produced or harvested in determining equal treatment under Article III.¹⁴² If a product is not itself dangerous to the environment, and the measure does not concern the characteristics of the product itself, any import ban is an illegal non-tariff barrier.¹⁴³ Thus the United States is obligated to treat imports equally, regardless of how they are harvested. These holdings apply regardless of identical requirements for domestically produced products.¹⁴⁴ The panel report also required the challenged party to show that the law at issue is the least trade restrictive means of enacting its policy goals. This requirement places a heavy burden on the party who is trying to defend environmental policies and ultimately increases the likelihood of striking down environmental laws.¹⁴⁵

Critics of the decision have listed many U.S. environmental laws that are potentially threatened should the GATT decision ever be adopted.¹⁴⁶ A few of the numerous laws threatened are the African El-

135.

137. *Second GATT Panel*, *supra* note 136, at 1552.

138. *Hearing*, *supra* note 48, at 68 (testimony of Ralph Nader).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.* at 56 (testimony of David Phillips, Executive Director of Earth Island Institute).

143. *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).

144. *See also Hearing*, *supra* note 48, at 1 (opening statement of Henry A. Waxman, Chairman of Subcommittee on Health and the Environment).

145. *See id.* at 69 (testimony of Ralph Nader).

146. *See Hearing*, *supra* note 48, at 59 (testimony of David Phillips, Executive Director of Earth Island Institute).

elephant Conservation Act,¹⁴⁷ the Magnuson Fisheries Conservation and Management Act,¹⁴⁸ and the Lacey Act.¹⁴⁹

Additionally, U.S. obligations under international environmental agreements could conflict with the panel decision. Because most international treaties are applied through national laws, any agreement that employs trade measures is implicated as well.¹⁵⁰ Without trade measures, however, few tools are left with which to influence the behavior of other countries.¹⁵¹ Even within a broad treaty, trade sanctions are an effective tool to discourage countries from enjoying a treaty's benefits without conforming to its requirements.¹⁵² Without such sanctions, a country's attempts to protect the environment would be limited to the protections of its own finite portion of the ocean or global commons, a somewhat futile endeavor in a world of *global* ecosystems.¹⁵³

These concerns about the destruction of environmental laws and obligations are not hypothetical: many nations have begun to challenge environmental laws as contrary to free trade agreements. For example, Canadian asbestos manufacturers and the Canadian government sued to overturn the U.S. ban on asbestos, arguing that it was an unfair trade barrier under the GATT and the Canada Free Trade Agreement.¹⁵⁴ Although the court dismissed the case, holding that Canada had no standing, the court found that the EPA failed to bring forth

147. 16 U.S.C. §§ 4202-4245 (1988). "This Act effectively banned the import of elephant ivory in 1989 and helped trigger the international trade ban by the Convention on International Trade and Endangered Species." *Hearing, supra* note 48, at 59 (testimony of David Phillips, Executive Director of Earth Island Institute). The GATT ruling would thwart a nation's efforts to put up unilateral trade barriers to natural resources taken in an ecologically unsound manner. *Id.*

148. 16 U.S.C. §§ 1801-1882 (1988). "The [GATT] ruling could forbid [this Act's] management reach beyond the U.S. exclusive economic zone." *Hearing, supra* note 48, at 59 (testimony of David Phillips, Executive Director of Earth Island Institute).

149. 16 U.S.C. §§ 3371-3378 (1988). This Act makes it a federal crime to import, export, sell protected fish and wildlife, in contravention of law. *Hearing, supra* note 48, at 59 (testimony of David Phillips, Executive Director of Earth Island Institute). "The GATT Panel's decision affects this Act in so far as a state or foreign conservation law is itself extra-jurisdictional." *Id.*

150. Mathews, *supra* note 133, at A21. Examples of treaties in danger are the Montreal Treaty on stratospheric ozone and the treaty banning trade in endangered species. *Id.*

151. *Id.*

152. *Id.*

153. *See id.*

154. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

sufficient evidence in support of its ban.¹⁵⁵ Had the Canadian government brought its argument before the GATT, the case could have indeed turned out differently. In another challenge, German beer producers objected to a Denmark regulation that banned the sale of beer not bottled in refillable bottles.¹⁵⁶ Because most beer outside Denmark is not produced in refillable bottles, the Germans said that the regulation was an unfair restraint on trade.¹⁵⁷ In yet another challenge, Japan fought a ban on the export of raw logs by Indonesia, Malaysia, the Philippines and the United States.¹⁵⁸ Japan imports virtually all its wood and claimed the ban, which was intended to conserve forest resources, was an unfair trade measure.¹⁵⁹

Few will dispute the fact that the United States cannot directly regulate the conduct of foreign nations. Nor do most people deny the importance of free trade and the desire to bar any laws that are truly only protectionist measures.¹⁶⁰ Nevertheless, there must be coexistence between environmental protection and free trade; economic prosperity cannot take precedence over the perpetuation of life-supporting ecosystems. At the risk of simplifying the issues, a country must be able to act unilaterally when progressive multilateral agreements are simply not viable. The United States should be able to bar entry to its markets and thereby indirectly affect the conduct of vessels fishing in international waters as a means of avoiding the destruction of marine mammals.¹⁶¹ If the MMPA did not apply extrajurisdictionally, the Act

155. *Id.*

156. Clyde H. Farnsworth, *Environment v. Free Trade*, N.Y. TIMES, Feb. 11, 1991, at D4.

157. *Id.*

158. *Id.*

159. *Id.* Not only have countries challenged environmental laws, but recent GATT negotiations have also endangered a country's ability to further its environmental policies. According to drafts of the agreement from the Uruguay Round (the current round of GATT negotiations), for example, pressure could be applied on the United States to tailor certain of its health laws to meet international standards, regardless of whether those standards are lower than United States standards. *Hearing, supra* note 48, at 2 (opening statement of Henry A. Waxman, Chairman of Subcommittee on Health and the Environment). Furthermore, the panel decision has the potential to extend to non-environmental trade sanctions, such as those relating to labor rights practices, e.g., bans on products produced through child labor. *Id.* at 69 (testimony of Ralph Nader). Also challenged could be restrictions on trade from South Africa because of apartheid. *Id.* at 1 (opening statement of Henry A. Waxman, Chairman of Subcommittee on Health and the Environment).

160. *Hearing, supra* note 48, at 2 (opening statement of Henry A. Waxman, Chairman, Subcommittee on Health and the Environment).

161. Not surprisingly, many members of GATT disagree. A recent GATT report,

would do little more than disadvantage domestic harvesters relative to foreign competitors who use cheaper, non-dolphin safe methods.¹⁶²

This U.S. disadvantage reflects a broader conflict between trade and the environment that results when countries choose to enact stricter environmental regulations. Countries who do so increase costs and hurt their own competitiveness.¹⁶³ By contrast, countries that impose less restrictive environmental protection requirements are able to produce at an artificially lower cost.¹⁶⁴ These countries are then at a competitive advantage when trading with a nation that does protect the environment.¹⁶⁵

For these reasons, the need for the GATT to address these issues becomes even more pronounced. The GATT will always be fundamentally at odds with environmental protection as long as it remains unwaveringly committed to free trade. Indeed, David Woods, head of information at GATT headquarters in Geneva, acknowledged that GATT has no mechanism for making any kind of judgments about the linkages between the trade and the environment.¹⁶⁶ Thus, once GATT has ruled against a domestic law, immense pressure is applied to the offending country no matter how beneficial its policies are.¹⁶⁷ Fundamental change within GATT is necessary.

VII. RESPONSES TO THE PANEL DECISION

Many legislators and environmentalists have proposed responses to this dilemma. The proposals to the GATT/environmental conflict vary and include a combination of the following possibilities: amending the GATT to address domestic environmental regulation affecting the global commons and affecting production processes; changing the

for example, notes that unilateral action creates the potential for protectionist abuses by wealthy nations. The report asserts that if industrial nations are truly concerned with environmental protection, they should trade with developing nations. Free trade, the argument continues, will make the developing countries wealthier and eventually enable them to afford environmental controls. See Joel Havemann, *Doing Business: Recycling Law Ignites Trade-Barrier Debate*, L.A. TIMES, Apr. 7, 1992, at 7.

162. *Hearing*, *supra* note 48, at 55 (testimony of David Phillips, Executive Director of Earth Island Institute).

163. See JACKSON, *supra* note 6, at 208-10; Rubin & Graham, *supra* note 1, at 161.

164. Baucus, *supra* note 7, at S13,169.

165. *Id.*

166. Farnsworth, *supra* note 156, at D4.

167. *Hearing*, *supra* note 48, at 2 (opening statement of Henry A. Waxman, Chairman of Subcommittee on Health and the Environment).

GATT dispute resolution process;¹⁶⁸ adopting a congressional resolution rejecting any GATT or free trade agreement that might threaten American health, safety or environmental standards; and creating a GATT environmental code modeled on the subsidies code.¹⁶⁹

Amending GATT may be the most long-term solution, but the amendment procedure is difficult. Unanimity is required to amend Articles I, II, or XXX.¹⁷⁰ The other articles require a two-thirds majority.¹⁷¹ Even a two-thirds majority is difficult to achieve due to the wide diversity of interests which the GATT encompasses.¹⁷² Countries with little stake in an amendment are reluctant to make the political effort necessary to gain approval from their legislative branches.¹⁷³ Furthermore, amendments apply only to those countries that accept them.¹⁷⁴

Nonetheless, many citizen groups have proposed amendments to the GATT. One such proposal would prevent "ecological dumping."¹⁷⁵ Ecological dumping occurs when an industry is able to flood an international market with cheap goods because it has failed to pay the full costs of dealing with its pollution from production of the goods.¹⁷⁶ The ecological dumping proposal calls for such activity to be regarded as an impermissible subsidy.¹⁷⁷ A country that has internalized these costs would be entitled to impose a tariff against the product of the offending country — Mexican tuna, for example — or provide a countervailing subsidy to its own industry.¹⁷⁸

168. Ralph Nader suggests establishing freestanding environmental and consumer advocacy advisory committees. *Id.* at 74 (testimony of Ralph Nader) (the present system of advisory committees "resemble nothing more than a string of K Street lobbying firms."). Further criticism of the dispute resolution process is directed toward the secretiveness of the negotiations. In this instance, that secretiveness enabled the United States administration to put forth an unenthusiastic defense without Congress learning of its actions. *Id.* at 72 (testimony of Ralph Nader).

169. *See infra* text accompanying notes 170-99.

170. GATT, *supra* note 14, art. XXX at 677. *See also* LONG, *supra* note 2, at 16.

171. GATT, *supra* note 14, art. XXX at 677. *See also* LONG, *supra* note 2, at 16; JACKSON & DAVEY, *supra* note 13, at 310.

172. JACKSON & DAVEY, *supra* note 13, at 310.

173. LONG, *supra* note 2, at 16.

174. GATT, *supra* note 14, at 677. *See also* JACKSON & DAVEY, *supra* note 13, at 310.

175. John Hunt, *Free Traders Heading for Clash with Greens*, FIN. TIMES, Sept. 5, 1991, at 6.

176. *Id.*

177. *Id.*

178. *Id.* at 7. A similar concept has been proposed by Senator David Boren (D-Okla.), but the proposal would only change U.S. law. The International Pollution Deterrence Act, S. 984, 102d Cong., 1st Sess. (1991), would make a country's failure to

U.S. legislators have also proposed responses to the GATT environment dilemma. Some senators, for example, have called for a change in the GATT to support global environmental policy while maintaining the nondiscriminatory application of trade rules.¹⁷⁹ In a letter to President Bush, Senator Ernest Hollings (D-S.C.) and 62 of his fellow senators advocated this position and asked the President to block adoption of the panel report.¹⁸⁰ The senators urged the United States trade representatives to impress upon their trading partners the need to ensure GATT recognition of the legitimate objectives of environmental protection.¹⁸¹ The senators asked the President to refrain from entering into any agreements with any country until the issue has been fully discussed in the appropriate committees.¹⁸²

The senators also recommended immediate action, rather than waiting for the current round of negotiations to end.¹⁸³ However, they cautioned against a temporary "quick fix," such as settling the problem with Mexico in the NAFTA, since legislation implementing NAFTA will be on a fast track.¹⁸⁴ Lastly, the senators reminded the President of his commitment not to weaken environmental laws in the NAFTA.¹⁸⁵

Other congressional proposals have been more specific. Senator Max Baucus (D-Mont.) proposed a GATT environmental code

impose and enforce pollution controls on its industries a countervailing subsidy under U.S. law. *Baucus Calls for Environmental Code in GATT Modeled After Subsidies Code*, 8 Int'l Trade Rep. (BNA) No. 43, at 1568 (Oct. 30, 1991).

179. 137 CONG. REC. E3513 (daily ed. Oct. 23, 1991) (statement by Rep. Stark).

180. Letter from Senator Hollings (D-S.C.) to President Bush (Oct. 3, 1991), in 137 CONG. REC. S15,245,46 (daily ed. Oct. 25, 1991) (statement of Sen. Hollings) [hereinafter Hollings].

181. *Id.*

182. *Id.*

183. *Id.* Others caution that injecting the issue into the current Uruguay Round would constitute the last straw for the faltering discussions. Although this view has prevailed, not addressing the issue until the next Round promises years of international clashes. Mathews, *supra* note 133, at A21.

184. Hollings, *supra* note 180. Fast track allows a final Congressional vote on the agreement, but prohibits Congressional amendments.

185. *Id.* There is some dispute, however, as to whether President Bush met his commitment. President Bush announced that the NAFTA provides that no NAFTA country should lower its health, safety or environmental standards for the purposes of attracting investment. Environmentalists, however, argue that these NAFTA provisions do not provide any enforcement mechanism against countries who do lower their environmental standards. Moreover, tough U.S. standards challenged as trade barriers must meet a series of balancing tests to show that the environmental benefits are greater than potential business losses. *Public Citizen Says NAFTA Summary Falls Short on Environmental Issues*, 9 Int'l Trade Rep. (BNA) No. 35, at 1502-03 (Aug. 26, 1992) [hereinafter *Public Citizen*].

modeled on the current subsidies code.¹⁸⁶ The code would allow each nation to set its own environment protection standards.¹⁸⁷ If the imported products or the process used do not meet the importing nation's environmental standards, duties could be applied to the imported product, provided that: (1) the environmental protection standards have a sound scientific basis; (2) the same standards are applied to all competitive domestic production; and (3) the imported products are causing economic injury to competitive domestic production.¹⁸⁸ Senator Baucus argues that these three criteria help to ensure that the environmental standards are not a guise for protectionism.¹⁸⁹ Furthermore, the offsetting duties should be set at a level sufficient to counter any economic advantage gained by producing the product under less stringent environmental production regulations.¹⁹⁰

Under such a code, nations would be allowed to ban imports of goods produced in a manner that violates internationally recognized norms.¹⁹¹ Senator Baucus put forth three advantages to this code: (1) "it would help to level the playing field for U.S. businesses that are forced to meet higher environmental standards than the foreign competitors. Environmental protection would no longer necessarily have a negative impact on the competitiveness of U.S. businesses;" (2) it would "encourage nations to adopt sound environmental protection. Much of the economic advantage to maintaining lax environmental standards would be gone;" and (3) it would "correct an obvious deficiency in the GATT demonstrated by the recent dispute settlement panel ruling in the Mexican tuna case."¹⁹²

Some economists, however, disagree as to the underlying theory of an environmental code. A European Community document, for example, advocated a "polluter pays" principle instead of an environmental code, a principle that places the costs of environmental regulation on the businesses themselves.¹⁹³ It challenged the argument that such costs adversely impact on competitiveness, and warned against applying compensatory trade restrictions against developing nations who have

186. Baucus, *supra* note 7, at S13,169.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* However, at least one difficulty of side codes is that they only obligate those countries who agree to be bound. See JACKSON, *supra* note 6, at 227.

193. See *Commission Analyzes Problems Posed in Post-Uruguay Round Era*, 8 Int'l Trade Rep. (BNA) No. 38, at 1405 (Sept. 25, 1991).

less strict environmental requirements.¹⁹⁴ Such restrictions, the document warned, could result in trade tension and fragmentation of markets.¹⁹⁵

Nonetheless, the document acknowledged that in some circumstances trade restrictions will complement environmental policies.¹⁹⁶ When this is the case, the document advised, the GATT should clearly set forth when such restrictions are appropriate, taking into consideration the trade and environmental policy objectives, as well as the concerns of developing countries.¹⁹⁷

As for subsidies granted for environmental protection, the document similarly noted that the criteria for such subsidies must be established.¹⁹⁸ These criteria are necessary to prevent trade conflicts arising when a country applies countervailing duties on imports of the subsidized product.¹⁹⁹

VIII. CONCLUSION

By labelling a broad range of environmental regulations non-tariff barriers under Article XI, the 45 year-old GATT²⁰⁰ sacrifices hard-won environmental protections for the sole purpose of eliminating trade barriers.²⁰¹ The U.S. government should put immense pressure on the CONTRACTING PARTIES to amend the GATT to deal with this problem. Indeed, multilateral solutions should be the first choice, but cannot be the only choice. Often, multilateral agreements advocate harmonization of environmental standards that result in environmental objectives being reduced to the least common denominator.²⁰² Unilateral action may be the only effective means of achieving environmental progress. Without fundamental reform in the GATT, similar conflicts are inevitable and the threat of environment deterioration will increase.

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Indeed, the GATT was drafted years before the global scope of environmental problems became apparent. See 137 CONG. REC. E4209 (daily ed. Nov. 23, 1991) (statement of Rep. Pease).

201. *Hearing, supra* note 48, at 2 (testimony of Ralph Nader).

202. See *Public Citizen, supra* note 185, at 1502-03.

