

# MAKING GATT DOLPHIN-SAFE: TRADE AND THE ENVIRONMENT

## I. INTRODUCTION

A recent GATT<sup>1</sup> panel ruling has declared a United States law intended to protect dolphins to be anti-free trade.<sup>2</sup> The United States instituted an embargo of Mexican tuna products because of Mexican harvesting methods that caused incidental dolphin killings in violation of the Marine Mammal Protection Act of 1972 (MMPA).<sup>3</sup> Mexico took the case to a GATT dispute settlement panel, arguing that the ban was both an extraterritorial application of United States law<sup>4</sup> and an improper restriction on international trade cloaked as an environmental protection measure.<sup>5</sup> The GATT panel heard the complaint and found for Mexico.<sup>6</sup>

The decision calls into question the validity of numerous United States environmental protection statutes that seek to use trade measures to enforce environmental goals.<sup>7</sup> United States trade officials are concerned that the decision affects the ability of the United States to use trade measures to further such environmental goals as the protection of the ozone layer, protection of endangered species, and the regulation of whaling.<sup>8</sup> William K. Reilly, Chief of the Environmental Protection Agency (EPA), expressed his opinion that the decision could "unravel all the strings" of United States environmental policy.<sup>9</sup> The panel decision highlights a conflict between the goals of free trade and environmental protection. To be effective, environmental protection measures may require the creation of the same types of trade barriers that GATT seeks to eliminate. Reconciling this conflict may be the most important trade issue of the 1990s.<sup>10</sup>

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

2. *United States - Restrictions on Imports of Tuna, Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991) (on file with Office of the United States Trade Representative) [hereinafter *Panel Decision*]. The challenged law was the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988), as amended by 16 U.S.C.A. §§ 1361-1407 (West Supp. 1992).

3. 16 U.S.C. §§ 1361-1407.

4. See *Panel Decision*, *supra* note 2, para. 3.31.

5. *Id.* para. 3.58.

6. *Id.* para. 7.1.

7. *Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 Int'l Trade Rep. (BNA) No. 38, at 1399 (Sept. 25, 1991) [hereinafter *Members Protest*].

8. Paul Magnusson et al., *Save the Dolphins — Or Free Trade?*, BUS. WK. INDUS./TECHN. ED., Feb. 17, 1992, at 130D.

9. *Id.*

10. Mr. Michael Smith, a former Deputy United States Trade Representative, describes the conflict between free trade and environmental sanctions in these terms. Nancy Dunne, *Environment Rules Set Stage for GATT Conflicts*, FIN. TIMES, Dec. 5, 1991, at 7.

The purpose of this Note is to evaluate the panel decision in light of its effects on free trade and the environment and to suggest ways that these competing interests may be accommodated in the future. First, the events leading to the dispute are examined. Second, the embargo and the panel decision are analyzed. Third, the decision's political ramifications and its potential effects on the continuing GATT and North American Free Trade Agreement (NAFTA) negotiations are discussed. Finally, various options for addressing the conflict between free trade and the environment are explored.

## II. BACKGROUND TO THE DISPUTE: THE MMPA

In the Eastern Tropical Pacific Ocean (ETP), yellowfin tuna are often found swimming beneath schools of dolphins.<sup>11</sup> This association occurs only in the ETP.<sup>12</sup> Commercial tuna fleets exploit the phenomenon by using the "purse-seine" method of fishing.<sup>13</sup> Although purse-seining is an extremely effective method of tuna harvesting, it leads to high rates of dolphin mortality.<sup>14</sup> In the early 1970s the United States tuna fleet was killing more than 300,000 dolphins annually.<sup>15</sup>

In 1972, Congress responded to this problem by passing the MMPA.<sup>16</sup> The primary purpose of the MMPA was to reduce the number of marine mammals incidentally killed during commercial fishing operations to "insignificant levels approaching a zero mortality and serious injury rate."<sup>17</sup> The MMPA deals specifically with the taking of tuna in the ETP, and contains numerous provisions covering the activities of persons subject to United States jurisdiction in that area.<sup>18</sup>

Section 1371(a) of the MMPA allows limited "takings" by United States fishermen of marine mammals in connection with tuna harvesting, if a permit is obtained from the National Marine Fisheries Service (NMFS).<sup>19</sup> The NMFS has issued only one such permit, to the American Tuna-boat Association.<sup>20</sup> Under the terms of the permit, the

11. *Panel Decision, supra* note 2, para. 2.2. The reasons for this association are unknown. David M. Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549, 562 (1979).

12. *Panel Decision, supra* note 2, para. 2.2.

13. Purse-seine fishing involves the use of a weighted net that is attached at either end to a fishing vessel and a motorboat. The motorboat encircles a school of dolphins with the net, then returns and attaches its end to the fishing vessel. A cable running along the bottom of the net is winched in, drawing the bottom of the net closed ("pursing") and trapping inside the net both tuna and dolphin. In this way, the entire school of tuna may be taken. *Id.* para. 2.1.

14. *See* Levin, *supra* note 11, at 562-65.

15. 134 CONG. REC. S16,336, S16,344 (daily ed. Oct. 14, 1988) (statement of Sen. Breaux).

16. 16 U.S.C. §§ 1361-1407.

17. *Id.* § 1371(a)(2).

18. *Id.* § 1371(a)(2)(B).

19. *Id.* §§ 1371(a)(2), 1374.

20. *Panel Decision, supra* note 2, para. 2.4.

Association is permitted to incidentally kill 20,500 dolphins per year during its tuna harvesting operations.<sup>21</sup> The permit covers all domestic tuna fishing in the ETP.<sup>22</sup>

The MMPA requires the Secretary of the Treasury to ban imported fish and fish products from third countries, if such commodities were harvested using methods that lead to incidental marine mammal deaths or injuries in excess of United States levels.<sup>23</sup> The Act also requires the United States to impose an embargo on imports from intermediary nations that buy such products for re-export to the United States.<sup>24</sup> Special provisions of the MMPA deal with the ETP and third-country takings of dolphins. The average incidental taking rate for individual third countries may not exceed 1.25 times the incidental taking rate of United States vessels in the period being measured.<sup>25</sup> If a country exceeds this limit, a mandatory embargo of that country's fish products will be instituted.<sup>26</sup>

In April 1990, the three largest United States tuna canners announced that in the future, in response to pressure from animal-rights groups, they would buy only "dolphin-safe" tuna.<sup>27</sup> Subsequently, Congress passed the Dolphin Protection Consumer Information Act.<sup>28</sup> Under the provisions of this Act, tuna products cannot be labelled dolphin-safe if, during tuna harvesting, purse-seine nets were used to encircle dolphins.<sup>29</sup> The United States tuna fleet reacted to this development by moving nearly all of its operations to the western Pacific, where tuna and dolphins do not associate.<sup>30</sup>

The United States fleet's departure from the ETP had important effects on other nations' tuna harvesting operations. As stated earlier, the tuna/dolphin phenomenon is observed only in the ETP, and the special tuna/dolphin provisions in the MMPA are limited to that area.<sup>31</sup> With the United States tuna fleet gone from the ETP, United States dolphin takings in that area should, theoretically, approach zero. Since the third-country taking allowances set forth in the MMPA are based on

21. *Id.*

22. *Id.*

23. 16 U.S.C. § 1371(a)(2).

24. *Id.* § 1371(a)(2)(B)(ii)(V)(C).

25. *Id.* § 1371(a)(2)(B)(ii)(II).

26. *Id.* § 1371(a)(2).

27. TUNA: COMPETITIVE CONDITIONS AFFECTING THE U.S. AND EUROPEAN TUNA INDUSTRIES IN DOMESTIC AND FOREIGN MARKETS, REPORT TO THE COMMITTEE ON FINANCE, U.S. SENATE, AND THE COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, INVESTIGATION NO. 332-291 UNDER SECTION 332 OF THE TARIFF ACT OF 1930, USITC PUBLICATION 2339, 31 (1990) (on file with United States International Trade Commission) [hereinafter COMPETITIVE CONDITIONS].

28. 16 U.S.C.A. § 1385. The Dolphin Protection Consumer Information Act is a 1990 amendment to the MMPA.

29. *Id.* §§ 1385(d)(1)(B)-(d)(2).

30. *Panel Decision, supra* note 2, paras. 3.14-3.15.

31. 16 U.S.C. § 1371(a)(2)(B).

a percentage comparison to United States taking levels rather than on a numerical limit,<sup>32</sup> a third country whose fleet incidentally takes any dolphins in the ETP may now be subject to an import ban.<sup>33</sup> Third countries are faced with the choice of violating the MMPA or altogether ceasing purse-seine fishing in the ETP.<sup>34</sup>

This result leaves countries like Mexico with few alternatives. The Mexican tuna fleet will have to stop purse-seining in the ETP if it wishes to comply with the MMPA. However, the ETP encompasses the whole of the Mexican west coast,<sup>35</sup> so compliance effectively prohibits them from purse-seining in their own exclusive economic zone (EEZ).<sup>36</sup> One alternative is to follow the United States example and fish only in areas where dolphins and tuna do not associate, such as the western Pacific. However, Mexican fishing vessels are unable to make the long trips required to fish in such areas.<sup>37</sup> Another alternative is to fish for smaller tuna. Dolphins tend to associate only with large tuna,<sup>38</sup> so Mexican fishermen should be able to catch the smaller fish in the ETP without dolphins in their nets.

There are problems, however, with pursuing smaller tuna. First, processing costs are higher for small tuna than for large tuna.<sup>39</sup> This would put the Mexican tuna fleet at a competitive disadvantage with regard to those fleets not fishing in the ETP. Second, concentrating on younger tuna runs the risk of exhausting ETP tuna stocks. The Inter-American Tropical Tuna Commission (IATTC) recently adopted a recommendation that urges members to preserve tuna stocks by concentrating their fishing on adult tuna, despite the fact that such tuna swim with dolphins.<sup>40</sup> Thus, if the Mexicans continue purse-seine tuna harvesting activities in the ETP, they are destined to violate either the IATTC or the MMPA requirements.

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32. See *supra* note 25 and accompanying text.

33. *Panel Decision, supra* note 2, para. 3.22.

34. *Id.* para. 4.28. This choice was made especially difficult after a recent National Research Council study concluded that there is no real alternative to the use of such nets in the ETP. See Michael Parrish, *Dolphin Study Rejects Ban On Tuna Nets*, L.A. TIMES, Feb. 28, 1992, at A1.

35. See *Panel Decision, supra* note 2, para. 3.14.

36. A coastal state may establish an exclusive economic zone, or EEZ, extending up to 200 nautical miles from its coast. Within the zone, the coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing" its natural resources. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 56, 21 I.L.M. 1261, 1280.

37. *Atchison Enters Mexico Tuna War*, San Diego Daily Transcript, Oct. 29, 1991, available in LEXIS, Nexis Library, Omni File.

38. COMPETITIVE CONDITIONS, *supra* note 27, at 33.

39. *Id.*

40. *Panel Decision, supra* note 2, para. 4.26. The IATTC is a multilateral treaty organization of which the United States is a member. Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, 1 U.S.T. 230.

### III. THE EMBARGO AND ITS AFTERMATH

On August 28, 1990, a United States District Court ordered the United States to impose an embargo on importation of Mexican tuna products.<sup>41</sup> The embargo went into effect on February 22, 1991.<sup>42</sup>

The Mexican government responded by accusing the United States of enacting protectionist measures under environmental pretexts.<sup>43</sup> First, Mexico noted that the embargo was instituted only after the United States fleet had left the ETP.<sup>44</sup> This, in Mexico's view, demonstrated the protectionist nature of the ban and exposed the true motivations behind the embargo — to close Mexican tuna out of the United States market.<sup>45</sup> Second, the Mexican government charged that the United States was applying the trade restrictions in order to pressure Mexico into allowing the United States fleet access to Mexican waters.<sup>46</sup> These accusations were echoed by some of the third parties that made submissions to the panel.<sup>47</sup> Moreover, the Mexican press circulated a theory charging that the embargo was being used to force Mexico to open its oil monopoly to foreign companies.<sup>48</sup>

On January 25, 1991, Mexico requested the creation of a panel<sup>49</sup> under Article XXIII(2) of GATT.<sup>50</sup> That panel was formed on February

41. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 975-76 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). The order mandated an embargo of tuna products from Mexico, Venezuela, Vanuatu, Panama, and Ecuador. *Id.* Panama and Ecuador were exempted from the embargo after they ordered their fleets to cease encircling dolphins. *Panel Decision, supra* note 2, para. 2.7. Vanuatu was exempted on January 23, 1992, after it demonstrated that ETP purse-seining operations by its nine-vessel tuna fleet were relatively small in scale. *Government Asks Appeals Court to Overturn Tuna Embargo and Stay Order Pending Appeal*, 9 Int'l Trade Rep. (BNA) No. 6, at 234, 235 (Feb. 5, 1992).

On March 15, 1991, the NMFS announced that the ban would be extended to intermediary nations that imported Mexican and Venezuelan tuna for re-export to the United States, pursuant to § 1371(a)(2)(B)(ii)(V)(C) of the MMPA. *Panel Decision, supra* note 2, para. 2.11. Although the NMFS announced that the ban would commence on May 24, 1991, it actually was not imposed until January 10, 1992. *See infra* notes 87-93 and accompanying text for the international response to the United States action.

42. *Panel Decision, supra* note 2, para. 2.7.

43. *Id.* para. 3.58.

44. *Id.*

45. *See id.*

46. *Id.*

47. *E.g., id.* para. 4.15 (Indonesia); *id.* para. 4.24 (Thailand); *id.* para. 4.29 (Venezuela).

48. Laurence Iliff, *Conservation or Conspiracy?*, *Bus. Mex.*, Apr. 1991, available in LEXIS, Nexis Library, Omni File.

49. The panels function as part of the GATT dispute settlement machinery. When two parties have a dispute, a panel is created to hear the complaints. The panel conducts a hearing, reaches a conclusion, and then submits its findings to the GATT Council. The Council adopts the panel decision (it has never rejected a panel report), thereby giving the report's recommendations legal force, and requests the losing party to take appropriate steps to settle the dispute. OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 77* (1985).

50. *Panel Decision, supra* note 2, para. 1.1. Article XXIII is the primary section for dispute

6, 1991.<sup>51</sup> It held hearings on May 14-15 and June 17, 1991, and submitted its conclusions to the parties on August 16, 1991.<sup>52</sup>

Mexico requested the panel to find that the embargo provisions contained in the MMPA were inconsistent with GATT prohibitions of quantitative restrictions under Article XI of GATT,<sup>53</sup> and discriminatory in violation of Article XIII.<sup>54</sup> Mexico also alleged a violation of the "like products" requirement of Article III<sup>55</sup> and violations of Articles I and IX.<sup>56</sup> Mexico asked the panel to recommend that the contracting parties request the United States to bring its regulations into conformity with GATT requirements.<sup>57</sup> The United States requested that the panel find that the United States measures either did not violate GATT provisions, or else fell under Article XX exceptions,<sup>58</sup> and asked the panel to reject

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settlement under GATT. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 62 (1990). The treaty emphasizes consultation, and recourse to the dispute settlement machinery is allowed only after bilateral and/or multilateral consultations between the aggrieved parties have failed. *Id.*

51. *Panel Decision, supra* note 2, para. 1.1.

52. *Id.* para. 1.3.

53. *Id.* para. 3.1(a). Article XI states that no contracting party may impose "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures . . . on the importation of any product . . . of any other contracting party . . ." GATT, *supra* note 1, art. XI, 61 Stat. at A32-33, 55 U.N.T.S. at 224-26. The article contains limited exceptions at XI(2), but the United States did not claim these to be applicable.

54. *Panel Decision, supra* note 2, para. 3.1(a). Article XIII mandates nondiscriminatory administration of quantitative restrictions. GATT, *supra* note 1, art. XIII, 61 Stat. at A40, 55 U.N.T.S. at 234. Mexico alleged that the ban and the MMPA provisions ran contrary to Article XIII because they only affected yellowfin tuna from the ETP, and did not address yellowfin from other regions. It was alleged that this would benefit the United States tuna fleet, which had moved out of the ETP. *Panel Decision, supra* note 2, para. 3.14.

55. Article III requires a state to accord no less favorable treatment to the products of another contracting party than it does to like products of national origin. GATT, *supra* note 1, art. III, 61 Stat. at A18, 55 U.N.T.S. at 206. Mexico alleged that Mexican tuna products were being treated differently than like United States tuna products; the United States countered that all ETP purse-seine harvested tuna was treated similarly. See *Panel Decision, supra* note 2, paras. 3.16, 3.20.

56. *Panel Decision, supra* note 2, para. 3.3. These complaints were directed at the Dolphin Protection Consumer Information Act. Article IX of GATT mandates nondiscriminatory application of product marking requirements. GATT, *supra* note 1, art. IX, 61 Stat. at A29-30, 55 U.N.T.S. at 220-22. Article I calls for equal treatment for products from all contracting parties. *Id.* art. I, 61 Stat. at A12, 55 U.N.T.S. at 196-98.

57. *Panel Decision, supra* note 2, para. 3.5.

58. *Id.* paras. 3.6-3.8. The United States argued that, even if the measures were otherwise inconsistent with GATT provisions, they were covered by Article XX(b) and XX(g) exceptions. *Id.* para. 3.6(b). Article XX states that certain measures may be excepted from GATT so long as they "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." GATT, *supra* note 1, art. XX, 61 Stat. at A60-61, 55 U.N.T.S. at 262. Article XX(b) excepts those measures that are "necessary to protect human, animal or plant life or health." *Id.* art. XX(b), 61 Stat. at A61, 55 U.N.T.S. at 262. Article XX(g) addresses those measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Mexico's complaint.<sup>59</sup>

On August 16, 1991, the panel issued its decision, concluding that the United States tuna import restrictions are contrary to certain GATT provisions. The panel stated that the MMPA violated Article XI of GATT and that a determination of the Article XIII issue was therefore unnecessary.<sup>60</sup> The United States measures were also found to violate Article III.<sup>61</sup> The panel stated that Article III does not allow a party to discriminate against another party's products on the basis of the method of production.<sup>62</sup>

The panel also addressed the United States' arguments concerning Article XX exceptions. In what is perhaps the most important part of the ruling, the panel stated that the Article XX exceptions serve to protect only those conservation measures that do not have extrajurisdictional effect.<sup>63</sup> A country, the panel stated, "may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."<sup>64</sup> Accordingly, the United States was faulted for having tried unilaterally to effect conservation measures that the panel felt could better have been achieved through multilateral agreements.<sup>65</sup> The panel recommended that the contracting parties ask the United States to take the necessary steps to bring the provisions of the MMPA and the United States import restrictions into conformity with GATT requirements.<sup>66</sup>

#### IV. THE REACTION TO THE PANEL DECISION

The decision produced a strong reaction among many members of Congress and environmental protection groups. The congressional reaction stems from the perceived impact of the decision on both United States environmental laws and international treaties. Under the language of the decision, any law or treaty using trade measures to encourage third-country compliance with domestic or international environmental standards may be invalidated.<sup>67</sup>

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*Id.* art. XX(g), 61 Stat. at A61, 55 U.N.T.S. at 262.

59. *Panel Decision, supra* note 2, para. 3.9.

60. *Id.* paras. 5.18-5.19.

61. *Id.* para. 5.15.

62. *Id.*

63. *Id.* para. 5.32.

64. *Id.* para. 6.2.

65. The panel said the United States should have tried to negotiate "international cooperative arrangements" to accomplish its environmental objectives. If the United States had done so and had been rebuffed, the panel suggests that the ban might have been allowable. *Id.* para. 5.28.

66. *Id.* para. 7.1(c).

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

Representative Barbara Boxer, in letters that she and sixty-two of her colleagues sent to President Bush and United States Trade Representative Carla Hills, noted that the ruling could potentially invalidate trade measures that the United States applies to promote conservation outside of United States jurisdiction.<sup>68</sup> Some of the measures subject to invalidation under the decision, according to Representative Boxer, are those protecting rain forests, whales, and African elephants.<sup>69</sup> The members of Congress who signed the letters stated that GATT procedures must be reformed to provide protections for such environmental protection measures.<sup>70</sup>

Representative Boxer's group was not alone in calling for changes to GATT. A resolution was introduced in the House of Representatives which calls on Congress to reject any future GATT agreement that threatens to undermine United States environmental protection laws.<sup>71</sup> Subcommittee Chairman Henry Waxman stated that it is GATT, rather than United States law, that must be changed to accommodate United States environmental protection statutes.<sup>72</sup> The Senate reacted similarly to the panel decision.<sup>73</sup>

The environmentalist reaction has been equally strong. Ralph Nader charged that "today's GATT is anti-democratic and anti-consumer in the most profound sense."<sup>74</sup> Jessica Mathews, Vice President of the World Resources Institute, called the panel decision "legally sound, but . . . environmental nonsense."<sup>75</sup> Others have criticized the GATT dispute

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68. Letter from Representative Barbara Boxer et al., United States House of Representatives, to Carla A. Hills, United States Trade Representative (Sept. 18, 1991) [hereinafter Boxer Letter] (on file with author); *Members Protest*, *supra* note 7, at 1399. Representative Boxer herself labeled the decision "inhumane," and stated that the United States has a "fundamental right" to engage in conservation measures like those challenged in the panel decision. *Id.*

69. *Members Protest*, *supra* note 7, at 1399.

70. *Id.*

71. H.R. Con. Res. 246, 102d Cong., 1st Sess. (1991); *Gejdenson Says NAFTA Must Address Both Trade and Environmental Issues*, 8 Int'l Trade Rep. (BNA) No. 49, at 1822-23 (Dec. 11, 1991).

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

73. Sixty-three senators signed a letter from the Senate Committee on Commerce, Science, and Transportation to President Bush, urging the President to block adoption of the panel report. *The General Agreement on Tariffs and Trade (GATT) Panel Report on Tuna-Dolphins*, 137 CONG. REC. S15,245-46 (daily ed. Oct. 25, 1991) (letter by the Committee on Commerce, Science, and Transportation introduced by Sen. Hollings). The senators expressed a willingness to investigate any bilateral or multilateral agreements that might be needed to make application of the MMPA possible, and urged the President not to act without Senate consultation. *Id.* In remarks on the Senate floor, Senator Ernest Hollings (D-SC) called for immediate action to resolve the conflict, and stated that the administration should not wait for the conclusion of the current GATT round to do so. *Id.*

74. *Members Agree to Develop Proposal on GATT Changes to Protect Environment*, *supra* note 72, at 1428-29.

75. Mathews, *supra* note 67, at A21.



settlement machinery, complaining that the panels' behind-closed-doors decision-making process is secretive and undemocratic.<sup>76</sup>

### A. The Effect of the Panel Decision on NAFTA Negotiations

The controversy is affecting the ongoing NAFTA<sup>77</sup> negotiations. In a press release, Representative Boxer cited the talks (which are currently being conducted between Mexico and the United States), and suggested that the Mexican actions with GATT may imperil that agreement.<sup>78</sup> Senator Hollings reminded President Bush of his commitment not to allow NAFTA to weaken domestic environmental standards.<sup>79</sup> Private parties already are proposing that NAFTA should include explicit environmental protection provisions.<sup>80</sup>

Neither the Mexican nor the United States government wants to see NAFTA fail. The two sides have responded to the criticism by attempting to settle the dispute bilaterally, so as to make adoption of the panel report unnecessary.<sup>81</sup> President Salinas has announced that Mexico will defer enforcement of the GATT ruling.<sup>82</sup> The Bush administration has proposed that Congress should end the tuna embargo in exchange for a five-year moratorium on purse-seine fishing to begin in 1994.<sup>83</sup> Mexico and the United States have expressed to the GATT Council their belief that a bilateral approach is the best way to settle the

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76. See, e.g., Nancy Dunne, *Fears over "Gattzilla the Trade Monster"*, FIN. TIMES, Jan. 30, 1992, at 3; David Dodwell, *Trade Row Looms Over U.S.'s Dolphin-Friendly Tuna Policy*, FIN. TIMES, Jan. 30, 1992, at 22.

77. Joint Statement Announcing Canada-Mexico-United States Trilateral Free Trade Negotiations, 27 WEEKLY COMP. PRES. DOC. 133 (Feb. 5, 1991).

78. Rep. Boxer wondered whether Mexico's actions cast doubts upon its environmental protection credentials and noted that President Bush told Congress that NAFTA would not compromise the United States' abilities to protect the environment. *Members Protest*, supra note 7, at 1399.

79. *The General Agreement on Tariffs and Trade (GATT) Panel Report on Tuna-Dolphins*, supra note 73, at S15,246.

80. *Groups Call for Environmental Clauses in North American Free Trade Agreement*, 14 Int'l Envtl. Rep. (BNA) No. 18, at 497 (Sept. 11, 1991).

81. *EC, Others Pressure U.S., Mexico to Accept GATT Yellowfin Tuna Report*, Int'l Trade Daily (BNA), Mar. 19, 1992, available in LEXIS, Nexis Library, Omni File.

82. *Salinas Woos US Dolphin Activists; Having Won in GATT, He Seeks Voluntary Lifting of Ban*, Latin Am. Wkly. Rep., Oct. 10, 1991, at 11, available in LEXIS, Nexis Library, Omni File. Salinas announced the creation of a dolphin protection plan, the "Programa de Protección al Delfin." The plan visualizes strict sanctions for activities that harm dolphins, and includes provisions for stationing independent observers on tuna boats. *Id.* In the meantime, Salinas hopes the United States and Mexico will be able to reach a bilateral settlement of the dispute. United States environmental groups immediately denounced the plan as insufficient. *Id.*

83. Larry B. Stammer, *White House Urges End to Ban on Mexican Tuna*, L.A. TIMES, Mar. 5, 1992, at A3. Under such a proposal, affected nations would have to agree to the moratorium and work in the interim to reduce dolphin kills. *Id.*

problem.<sup>84</sup> It remains to be seen whether these attempts will be successful.<sup>85</sup>

Ironically, while the United States and Mexico try to settle the issue, third countries continue to press for adoption of the panel decision.<sup>86</sup> As stated above, the MIMPA contains provisions calling for intermediary nation embargoes.<sup>87</sup> On January 10, 1992, pursuant to a court order, the United States was instructed to institute such an embargo.<sup>88</sup> The Bush administration tried and failed to have the ruling stayed.<sup>89</sup> The intermediary nation embargo took effect on January 31, 1992, and affects tuna imports from Italy, France, Spain, and other countries.<sup>90</sup>

In response to the United States action, the Venezuelan government, whose tuna fleet's exports were also affected by the ban, announced its intention to prepare its own complaint for presentation to GATT if either Mexico fails to enforce its ruling or the United States fails to cancel its embargo.<sup>91</sup> Like Venezuela, the European Community (EC) has threatened to launch an independent complaint if the decision is not adopted.<sup>92</sup> Although Venezuela's concerns might be allayed if the United States lifts the embargo, the EC and twelve other nations have asked the GATT Council to adopt the decision even if a bilateral settlement is reached.<sup>93</sup>

## V. POSSIBLE UNITED STATES RESPONSES TO THE PANEL DECISION

If a bilateral settlement proves unworkable, Mexico may still decide to present the panel decision to the GATT Council. Alternatively, the EC and others may push the Council to adopt the decision even if Mexico

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84. *EC, Others Pressure U.S., Mexico to Accept GATT Yellowfin Tuna Report*, *supra* note 81.

85. The Administration's plan has been criticized by some members of Congress and by environmentalists. *Tuna: US Plan to Lift Embargo Draws Fire*, Greenwire, Mar. 19, 1992, available in LEXIS, Nexis Library, Omni File.

86. *Trade: GATT Keeps Tuna Fish Dispute Alive*, Inter Press Service, Mar. 19, 1992, available in LEXIS, Nexis Library, Omni File.

87. See *supra* note 24 and accompanying text.

88. See *supra* note 41.

89. *Appeals Court Lets Tuna Embargo Stand*, WASH. TIMES, Feb. 16, 1992, at A2.

90. Randall Palmer, *EC and Others Attack U.S. Tuna Embargo at GATT Council*, The Reuter Lib. Rep., Feb. 18, 1992, available in LEXIS, Nexis Library, Omni File.

91. Alejandro Kirk, *Venezuela: Offensive on All Fronts Against U.S. Tuna Embargo*, Inter Press Service, Jan. 29, 1992, available in LEXIS, Nexis Library, Omni File.

92. *GATT Postpones Controversial Fishing Decision*, UPI, Feb. 18, 1992, available in LEXIS, Nexis Library, Omni File.

93. *EC, Others Pressure U.S., Mexico to Accept GATT Yellowfin Tuna Report*, *supra* note 81. The twelve nations were Argentina, Canada, India, Peru, Japan, Colombia, Senegal, South Korea, New Zealand, Pakistan, Brazil, and Hong Kong. *Id.* An EC representative said the issues raised by the ruling are "too important to be set aside." *Id.*

and the United States reach a bilateral agreement.<sup>94</sup> In either case, the United States will have to decide how to respond. There are three principal options. First, the United States may join the consensus in adopting the decision.<sup>95</sup> Second, it may use a unilateral veto to block a consensus and thereby prevent the decision from being adopted.<sup>96</sup> Third, it may take steps to amend or otherwise modify GATT.<sup>97</sup> It is unlikely that the United States would adopt the decision, given the domestic political difficulties that the Bush administration would encounter in attempting to amend the MMPA.<sup>98</sup> It is equally unlikely that the United States would use a unilateral veto to block its adoption, as the United States is one of the strongest proponents of GATT and would probably not want to risk weakening the system.<sup>99</sup> The remaining option — amending or modifying the treaty — will be discussed in the following section, which discusses the inherent conflict between trade and the environment.<sup>100</sup> It is important to note that even if the United States and Mexico reach a settlement and the decision is not adopted, the issues raised by the decision will remain. Conflicts between GATT and environmental laws are sure to reoccur in future years,<sup>101</sup> and the tuna/dolphin dispute provides a model for examining this larger problem.

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94. See *supra* note 93 and accompanying text.

95. *Members Agree to Develop Proposal on GATT Changes to Protect Environment*, *supra* note 72. These alternatives were set forth by Joshua Bolten, general counsel for the Office of the United States Trade Representative. He noted that the options are not mutually exclusive, and that there are many different variants that might be considered. *Id.*

96. *Id.* GATT relies on consensus voting in adopting panel decisions. JACKSON, *supra* note 50, at 22-23. Thus, a country dissatisfied with a decision may block its adoption by withholding consent. *Id.* at 66. In effect, this gives every contracting party a unilateral veto. *Id.* at 23.

97. *Members Agree to Develop Proposal on GATT Changes to Protect Environment*, *supra* note 72.

98. At the March 18, 1992, meeting of the GATT Council, United States Ambassador Rufus Yerxa stated that the United States would not currently be able to allow adoption of the report. Randall Palmer, *U.S. Tuna Embargo May Be Lifted*, *The Reuter Bus. Rep.*, Mar. 18, 1992, available in LEXIS, Nexis Library, Omni File.

99. Mathews, *supra* note 67.

100. See *infra* parts V.A.2.-4.

101. For example, a number of states and localities in the United States have enacted statutes requiring that a certain percentage of recycled paper be used in the production of newsprint. Canada is rich in timber and has few recycling facilities. Under the panel decision, the United States statutes may violate GATT by placing Canada at a competitive disadvantage with respect to newsprint manufacturing. C. Foster Knight, *Effects of National Environmental Regulation on International Trade and Investment—Selected Issues*, 10 UCLA PAC. BASIN L.J. 212, 214 (1991). See also Bertrand Marotte, *Environmental Worries Build Walls to World Trade*, OTTAWA CITIZEN, Feb. 23, 1992, at E2 (environmentalists in Europe have been pressing for a ban on Canadian paper products manufactured using chlorine bleach; the ban might be GATT-violative under the panel decision).

## A. Resolving the Tension Between Trade and the Environment

There are several possible approaches for reconciling the conflict between trade and the environment. One option, advocated by the GATT panel itself, is the use of a multilateral process to achieve the results that the United States currently is attempting to achieve unilaterally.<sup>102</sup> Another approach is to amend, modify, or waive GATT provisions. A third strategy may be to use consumer power to force producers to change production methods when those methods have detrimental environmental effects.<sup>103</sup> Each of these approaches will be considered separately.

1. *A Multilateral Treaty Regime.* In contrast to the widespread opposition toward the panel decision in the United States, the international community is virtually unanimous in its support for the initial position taken by Mexico. Eleven nations submitted third-party statements in the proceedings, none of which supported the United States position.<sup>104</sup> Many countries are uncomfortable with the unilateral nature of the MMPA provisions, and instead suggest addressing the tuna/dolphin issue through international consultation, multilateral agreement, or amendment of GATT.<sup>105</sup> The panel itself echoed these sentiments, stating that multilateral agreements could best address problems of this type.<sup>106</sup>

When a majority of countries agree that a particular practice is undesirable, multilateral efforts to address the problem can be quite successful. An example of this is the recent decision by the United Nations to ban driftnet fishing worldwide by the end of 1992.<sup>107</sup> The driftnet issue had been vexing environmentalists for years, and until recently they had made little progress in convincing the fishing fleets of Japan, South Korea, and Taiwan (the countries performing the majority of driftnet fishing) to abandon the practice. Then, in 1989, the United Nations passed a resolution calling for a moratorium on the practice.<sup>108</sup>

102. See *supra* note 65 and accompanying text. The recent victory by environmentalists in securing a worldwide ban in driftnet fishing will be instructive in this regard.

103. This approach was valuable in helping halt United States dolphin killings in connection with the "Dolphin-safe" campaign. See *infra* notes 170-76 and accompanying text.

104. *Panel Decision, supra* note 2, paras. 4.1-4.30. Third parties submitting statements included Australia, Canada, the EC, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela. *Id.*

105. See *id.*

106. The decision specifically referred to "international cooperative arrangements." *Id.* para. 5.28. If parties remain intent upon addressing these issues through GATT, however, the Panel suggests that amendment of the treaty might be necessary. *Id.* para. 6.3.

107. G.A. Res. 44/225, U.N. GAOR, 44th Sess., Agenda Item 82(f), at 147, U.N. Doc. A/44/746/Add.7, at 21 (1989).

108. *Id.*

On August 2, 1991, the United States Senate passed a bill calling for product sanctions on countries violating the United Nations resolution.<sup>109</sup> Groups in Japan hinted at possible retaliation.<sup>110</sup> Then, on November 26, Japan reversed course and announced its intention to abide by the resolution.<sup>111</sup> The Japanese foreign ministry stated that they had "no alternative" but to adhere to the United Nations resolution in the face of almost unanimous world-wide opposition to driftnet fishing.<sup>112</sup> Taiwan had already announced its intention to discontinue driftnetting, and South Korea followed suit within days of Japan's announcement.<sup>113</sup> The threatened United States sanctions were never imposed, and the Japanese did not complain to GATT.

The success of the driftnet ban suggests that multilateral agreements may provide a solution to the conflict between trade and environmental measures. Unfortunately, there are complications with pursuing a multilateral approach. First, concluding multilateral agreements is a slow process which often requires flexibility and a willingness to compromise on the part of the parties involved. The driftnet ban, for example, worked only because the driftnetting nations bowed to international political and moral pressure.<sup>114</sup> Had Japan chosen to challenge the ban under GATT, it is likely that it would have prevailed in light of the panel decision.<sup>115</sup> This need for compromise has spawned congressional fears that a multilateral approach to reconciling the conflict between trade and environmental goals will lead to dilution of United States environmental standards.<sup>116</sup>

Second, while multilateral approaches can be effective where there is widespread condemnation of a practice or recognition of a problem,

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109. S. 884, 102d Cong., 1st Sess. (1991).

110. Alan Macnow, a representative for the Japanese Fisheries Association, warned that Japan might bar United States fish products. He admitted, however, that he was not speaking for the Japanese government. *Japan Fishery Group Warns of Retaliation if U.S. Action on Driftnets "Unjustified"*, 8 Int'l Trade Rep. (BNA) No. 40, at 1464 (Oct. 9, 1991).

111. Carol Emert, *U.S. Lawmakers Claim Credit for Japan's Ban on Driftnets*, States News Serv., Nov. 26, 1991, available in LEXIS, Nexis Library, Omni File.

112. Vibeke Laroi, *Japan Bows to Pressure, Bans Driftnet Fishing from End of 1992*, The Reuter Bus. Rep., Nov. 26, 1991, available in LEXIS, Nexis Library, Omni File.

113. *South Korea Urged to Join "Wall of Death" Driftnet Ban*, TORONTO STAR, Nov. 27, 1991, at A4. An example of the speed of the about-face is the reaction of South Korea. On November 27, 1991, the day after the Japanese announcement, the South Korean embassy in Washington disclaimed any plans to emulate the Japanese action. *Id.* By December 4, 1991, however, they had announced their intention to join the ban. See Albert M. Manville, *U.N. Passes Global Driftnet Ban; Reprieve for the Marine Environment, At Last*, U.S. Newswire, Dec. 20, 1991, available in LEXIS, Nexis Library, Omni File; *South Korea Likely to Follow Japan and Halt Driftnet Fishing*, The Reuter Lib. Rep., Dec. 4, 1991, available in LEXIS, Nexis Library, Omni File.

114. See Laroi, *supra* note 112; *South Korea Likely to Follow*, *supra* note 113.

115. The ban on driftnet-harvested products imposed by the Senate would presumably have been declared by the GATT panel to be discriminatory because it focused on the means of production, as do the MMPA provisions. See *Panel Decision*, *supra* note 2, para. 5.15.

116. See *supra* notes 67-73 and accompanying text.

the approach is inadequate when this level of consensus is absent. In the tuna/dolphin dispute, for example, there was widespread disapproval of the unilateral nature of the United States embargo.<sup>117</sup> At present, it is not clear that a sufficient consensus exists that would make possible the creation of an international agreement halting the use of purse-seine nets.

Third, enforcement presents a problem. Countries do not always abide by the spirit of international agreements, sometimes pursuing prohibited activities under the guise of permissible activities.<sup>118</sup> This undermines the intentions of treaty signatories. Declining economic conditions in some countries are encouraging noncompliance with, and even abandonment of, multilateral environmental agreements.<sup>119</sup> Such developments threaten to roll back previous gains made in environmental conservation. Most importantly, multilateral treaties invariably accrue free-rider problems, with nonobserving nations attempting to enjoy the treaties' benefits without observing their restrictions.<sup>120</sup> After the panel decision, if observing nations cannot resort to trade measures to enforce treaty provisions against such parties, the effectiveness of such treaties will be hampered. Under the current GATT framework, this problem may be unavoidable.<sup>121</sup>

2. *Amending GATT.* If a multilateral treaty approach is inadequate under the current GATT framework, it may be necessary to consider amending the General Agreement. The GATT panel suggested that if members intend to use the GATT framework to determine allowable trade measures for environmental protection, they should do so by amending or supplementing GATT provisions, or waiving obligations thereunder, rather than by interpreting Article XX.<sup>122</sup> This preference for amendment or modification of GATT over reliance on the existing Article XX language reflects the panel's opinion that Article XX does not provide adequate guidelines for limiting the applicability of its exceptions.<sup>123</sup> This, in turn, raises the question of whether the conflict

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117. See *supra* notes 91-93 and accompanying text.

118. For example, despite agreeing to observe a worldwide ban on whaling, the Japanese continue to catch whales for "scientific purposes." Laroi, *supra* note 112.

119. For example, Iceland recently announced its intention to withdraw from the International Whaling Commission, a move expected to result in a resumption of Icelandic whaling. Also, several African countries are lobbying for revocation of the treaty banning the sale of ivory. These actions reflect a willingness on the part of some countries to sacrifice environmental imperatives in the face of economic necessity. See Keith Schneider, *Balancing Nature's Claims and International Free Trade*, N.Y. TIMES, Jan. 19, 1992, § 4, at 5.

120. Mathews, *supra* note 67, at A21.

121. A recent speech by GATT Director-General Arthur Dunkel suggested that even environmental measures reached under multilateral agreements may run afoul of GATT provisions. Dunne, *supra* note 76, at 3.

122. See *Panel Decision*, *supra* note 2, para. 6.3.

123. See *id.*

between trade and the environment can be solved by amending GATT Article XX to provide such guidelines.

The problem with Article XX stems from its generality. As the panel noted, the article lists various exceptions to the agreement, but provides no guidelines for limiting their applicability.<sup>124</sup> To remedy this, the Contracting Parties could amend Article XX to add a provision setting out such limitations. These might allow nations to restrict or ban importation of certain products pursuant to international agreement. For example, the provision might state that import restrictions will be applied only in those instances where the products in question have been specifically addressed in treaties drafted under United Nations auspices. Parties would then be free to set their own standards for those products, including import bans.<sup>125</sup>

This approach is already used outside of the GATT framework. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer, sponsored by the United Nations, regulates the amount of ozone-depleting chemicals that signatory nations may produce.<sup>126</sup> In order to encourage nonsignatories to sign the treaty, the protocol provides for bans on the importation of ozone-depleting substances from nonparty nations.<sup>127</sup> Further, the protocol envisions the extension of these bans to products that contain ozone-depleting substances, and the possible ban of products produced with such substances.<sup>128</sup>

After the panel decision, the latter provision appears to be challengeable under GATT. Banning products that are produced using ozone-depleting substances is analogous to banning tuna produced using methods that harm dolphins. In both cases, products are banned because of the way they are produced, rather than because they are harmful in and of themselves. Because the decision also stated that countries cannot impose import restrictions on products merely because they originate in countries with different environmental policies than their own,<sup>129</sup> the remainder of the Montreal Protocol may be challengeable, as well. Free riders may be able to ignore an agreement's prescriptions, then complain under GATT if their actions are challenged

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124. *Id.* See GATT, *supra* note 1, art. XX, 61 Stat. at A60-61, 55 U.N.T.S. at 262.

125. Representative Donald Pease has introduced legislation in the House calling on President Bush to initiate negotiations to amend Article XX to provide exceptions for those trade measures having environmental protection intent. H.R. Con. Res. 247, 102d Cong., 1st Sess. (1991). Representative Pease's proposal suggests that such exceptions should be especially allowable in those situations when the U.N. and other international organizations have already set minimum standards. *Id.*

126. Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 4, 26 I.L.M. 1541, 1554-55 [hereinafter Montreal Protocol].

127. *Id.* art. 4(4), 26 I.L.M. at 1555.

128. *Id.*

129. Panel Decision, *supra* note 2, para. 6.2.

by signatory nations. Amending Article XX to allow enforcement of such bans within a GATT context should remedy this problem.

Amending Article XX, however, will require approval by two-thirds of the GATT signatories.<sup>130</sup> This may not be possible. The developing nations are not likely to be enthusiastic about a new GATT provision providing for enforcement of developed-world environmental norms.<sup>131</sup> The developing world is suspicious of the growing debate over trade and the environment, fearful that they may become subject to protectionist embargoes cloaked as environmental measures.<sup>132</sup> As previously discussed, the Mexican government accused the United States of doing exactly this in the tuna/dolphin dispute.<sup>133</sup> These accusations ignore the fact that the Bush Administration went on the record as opposing the embargo and imposed the ban only after being ordered to do so by a federal judge.<sup>134</sup> Nevertheless, while these suspicions continue, gathering the necessary two-thirds vote needed for amendment of GATT will be difficult.

3. *Modifying GATT: An Environmental Code.* As the GATT membership has expanded, and the diversity of views increased, it has become increasingly difficult to amend GATT.<sup>135</sup> Therefore, a better approach might be to negotiate a "side agreement."<sup>136</sup> Such an agreement, negotiated in the context of GATT, would exist as a "stand-alone" treaty that would obligate only signatory nations.<sup>137</sup> This approach may be useful in resolving the trade/environment conflict.

In response to the panel decision, and in recognition of the effects that inconsistent international environmental standards may have on the "level playing field," Senator Max Baucus has proposed the creation of a GATT Environmental Code similar to the GATT Subsidies Code.<sup>138</sup>

130. GATT, *supra* note 1, art. XXX(1), 61 Stat. at A74, 55 U.N.T.S. at 282.

131. Developing nations are concerned with what is sometimes labelled "environmental imperialism." See Note, *Promoting International Environmental Protections Through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65, 66 (1991). For a discussion of the concerns of developing nations with developed world attempts to impose environmental constraints upon them that the developed world did not themselves observe when they were first industrializing, see *infra* notes 155-58 and accompanying text.

132. Alexander MacLeod, *GATT Report Draws Fire from Environmentalists in Runup to Key Summits*, CHRISTIAN SCI. MONITOR, Feb. 18, 1992, at 4 (quoting Marina Elana Hurtado, London Director of the World Development Movement).

133. See *supra* note 43 and accompanying text.

134. See *supra* notes 88-89 and accompanying text.

135. Indeed, "[i]t is generally considered today almost impossible to amend GATT because of the stringent vote and procedural requirements, coupled with the wide divergence of interests among the . . . membership." JOHN H. JACKSON & WILLIAM J. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 310-11 (1986).

136. *Id.* at 311.

137. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 56 (1989).

138. 137 CONG. REC. S13,169 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus). The



Senator Baucus' proposal relies on imposition of countervailing duties<sup>139</sup> on imports from countries whose environmental standards (and thus compliance costs) are lower than those in the importing country.<sup>140</sup> A dispute settlement panel would be created to settle disputes over the operation of the code, and countries would be allowed to ban completely importation of certain goods that violate international agreements.<sup>141</sup>

Senator Baucus sees his plan as having three effects. First, as stated above, it would serve to "level the playing field" for those industries operating in countries with high environmental standards.<sup>142</sup> Second, the plan would remove the economic incentive for lower standards and thereby encourage nations to raise their own levels of environmental protection.<sup>143</sup> Third, Baucus asserts that it would remedy the problems created by the panel decision.<sup>144</sup> The last point is subject to challenge.

Unfortunately, Senator Baucus' plan will not solve the tuna/dolphin issue. Under his proposal, the United States at most would be able to place import duties on tuna products from those countries engaging in purse-seine fishing. Complete import bans would be limited to those products violating "internationally recognized norms."<sup>145</sup> As noted above, purse-seine fishing does not yet fit that category.<sup>146</sup>

For that matter, it is not even certain that the United States would be allowed to impose duties. Senator Baucus' proposal requires that the environmental standards imposed have a "scientific basis."<sup>147</sup> It is questionable whether the MMPA provisions meet this test. In the

GATT Subsidies Code permits imposition of countervailing duties by an importing country to offset subsidies by exporting countries. The Code requires a showing of injury to domestic industries before imposition of duties is allowed. General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI and XXIII, *entered into force* Jan. 1, 1980, 31 U.S.T. 513.

139. Countervailing duties are tariffs imposed on the products of an exporting country by an importing country to offset the exporting country's subsidies. GARY HUFBAUER & JOANNA SHELTON ERE, *SUBSIDIES IN INTERNATIONAL TRADE* xiv (1984).

140. The proposal envisions each country setting its own environmental standards, with countervailing duties being available under certain controlled conditions. First, the protection standards would have to have a sound scientific basis. (The term "scientific basis" is not defined in the proposal.) Second, the standards would have to be equally applied to all domestic production. Third, there would have to be a showing of injury to domestic industries before imposition of duties would be allowed. 137 CONG. REC., *supra* note 138, at S13,169.

141. For example, products taken with driftnets could be completely banned. *Id.* The latter provision would solve the problem raised in the previous section, i.e., the possibility that the Japanese, rather than observe the driftnet ban, could have gone to GATT and won under the reasoning of the panel decision.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See *supra* note 117 and accompanying text.

147. 137 CONG. REC., *supra* note 138, at S13,169.

tuna/dolphin dispute, Mexico claimed that, according to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)<sup>148</sup> and the IATTC, ETP dolphins are not in danger of extinction.<sup>149</sup> If the only basis for the MMPA provisions is moral, the United States will have no recourse to countervailing duties.

At any rate, a United States proposal to draft an environmental code is likely to be controversial. In a recent report on trade and the environment,<sup>150</sup> GATT challenges the idea that differing environmental standards in different countries constitute unfair trade practices.<sup>151</sup> The report labels as "highly divisive" any scheme that would impose duties on countries with "lower" environmental standards than those of the imposing country.<sup>152</sup> GATT claims that differences between countries in levels of environmental protection are little different from differences in tax, immigration, or education policies, and provide no more sufficient a basis upon which to impose duties.<sup>153</sup>

Further problems arise when the Baucus plan is applied to the developing nations. Senator Baucus' code proposal would use countervailing duties to nudge countries toward adopting higher environmental policies.<sup>154</sup> It is not clear that developing nations have the financial resources necessary to enact such measures.<sup>155</sup> Considering the precarious state of many of these states' economies, it is not even clear that this should be a first priority.<sup>156</sup> The developing nations accuse the developed nations of holding them to a double standard by condemning them for practices the developed nations themselves engaged in when they were first industrializing.<sup>157</sup> Because the code would apply only to signatories, its effectiveness would be significantly diluted if the developing nations refused to join the agreement.<sup>158</sup>

148. Convention on International Trade in Endangered Species of Wild Flora and Fauna, July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243.

149. *Panel Decision*, *supra* note 2, para. 3.44.

150. *Trade and the Environment*, GATT Doc. 1529 (Feb. 3, 1992) (on file with Office of the United States Trade Representative) [hereinafter *GATT Report*].

151. *Id.* at 16-21.

152. *Id.* at 19.

153. *Id.* at 20.

154. *See supra* notes 138-39 and accompanying text.

155. Stephen L. Kass & Michael B. Gerrard, *International Trade*, N.Y. L.J., Jan. 24, 1992, at 29.

156. *Id.*

157. *See* Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259 (1992).

158. Senator David Boren has introduced legislation that could serve to encourage accession. International Pollution Deterrence Act of 1991, S. 984, 102d Cong., 1st Sess. (1991). This proposed Act would impose countervailing duties much like those envisioned by the Baucus Code, but it would use the receipts from the duties to finance transfer of pollution control technology to the developing nations. Dunne, *supra* note 10, at 6. With this plan,

A final problem with an environmental code is its potentially broad scope. The United States should consider carefully the possible reach of such an agreement. It may easily be imagined that low United States gasoline taxes, for example, could be declared an unfair trade subsidy, in which case countervailing duties could be imposed against a wide range of United States products. It seems improbable that the United States is prepared to accept such a result.<sup>159</sup>

4. *Waiver of GATT obligations.* Article XXV of GATT provides for waiver of GATT obligations under "exceptional circumstances not elsewhere provided for" in the agreement.<sup>160</sup> If amending the General Agreement proves impossible, and the drafting of a side agreement is unworkable, the waiver provisions may yet provide a method within the existing GATT framework for accommodating trade measures with environmental concerns.

Under Article XXV, a two-thirds majority of votes cast is sufficient to grant a waiver of GATT obligations.<sup>161</sup> The GATT report on trade and the environment asserts that parties to multilateral environmental agreements will be able to avoid challenges to the consistency of the trade agreements with GATT through use of the waiver provisions.<sup>162</sup> Theoretically, this provides a method for addressing the free-rider problem discussed earlier — if the consistency of a particular trade measure is challenged by a nonsignatory to a multilateral agreement, the signatory nations will be able to secure a waiver of GATT obligations with regard to that agreement.<sup>163</sup>

It is unlikely that the United States would be able to secure a waiver for the MMPA, considering the extent of international opposition to its unilateral nature.<sup>164</sup> It may be possible, however, for the United States to negotiate a multilateral agreement providing for the protection of dolphins or the abolition of purse-seine fishing, and then to secure a waiver of GATT obligations with regard to that agreement. In its third-party submission to the tuna/dolphin panel, the EC, for example, stated that it was "ready to offer its full support to . . . reinforce international cooperation on the problems raised by the incidental kill of migratory

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developing nations could improve their environmental regimes with duties paid by developed world consumers. If a nation opts not to join the code, however, it will not receive these benefits. See JOAN E. TWIGGS, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: A CASE STUDY IN BUILDING DOMESTIC SUPPORT FOR DIPLOMACY* 77 (1987). This should serve as an incentive to adopt the code.

159. See Kass & Gerrard, *supra* note 155, at 29.

160. GATT, *supra* note 1, art. XXV(5), 61 Stat. at A68, 55 U.N.T.S. 272-74.

161. *Id.* The majority must include more than half of all contracting parties. *Id.*

162. GATT Report, *supra* note 150, at 12.

163. *Id.*

164. See *supra* notes 104-05 and accompanying text.

species."<sup>165</sup> It is even possible that Mexico might join such a multilateral agreement since, as discussed earlier, Mexico has already signalled its willingness to join in imposing a moratorium on the use of purse-seine nets.<sup>166</sup>

A question remains as to whether the Article XXV waiver provisions will provide a long-term solution to the trade/environment conflict. The fact that a waiver requires a two-thirds vote by a majority of the contracting parties inherently limits its usefulness.<sup>167</sup> While it is true that this requirement will "ensure that the proposed trade policy actions would . . . have broad support among the GATT membership,"<sup>168</sup> it will also ensure that only the least controversial of measures are likely to gain waivers. By disallowing the use of trade sanctions to enforce treaty compliance against nonsignatories, the panel decision increases the temptation to free ride and reduces the incentive to sign. This reduces the likelihood that any given multilateral agreement will obtain the majority of nations needed to secure a waiver.

Furthermore, waivers are viewed as exceptional remedies intended for only short-term application.<sup>169</sup> As conflicts between trade and the environment are expected to increase in the future, one must question whether this remedy will prove adequate. Finally, under the waiver approach, trade measures imposed for environmental protection purposes would provisionally be invalid until a waiver is obtained. This suggests a hierarchy, with trade paramount and the environment secondary, that may well be subject to challenge.

5. *Consumer Power as Environmental Protector.* Thus far, each of the options discussed requires some measure of multilateral consensus to be successful. This may well leave the tuna/dolphin issue unresolved, since it remains unclear how countries can protect those environmental concerns that lack this level of consensus. The panel decision may have left open a way to achieve this end — through the harnessing of consumer forces.

Although the panel ruled against the United States in most respects, one United States measure with extraterritorial effect was found not to violate GATT. The Dolphin Protection Consumer Information Act<sup>170</sup> provides guidelines for marking tuna products as being dolphin-safe. The Act's provisions are such that purse-seine harvested tuna do not meet the labeling requirements.<sup>171</sup> Although the Mexican government

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165. *Panel Decision, supra* note 2, para. 4.10.

166. *See supra* notes 81-85 and accompanying text.

167. *See supra* note 161 and accompanying text.

168. *GATT Report, supra* note 150, at 12.

169. *Id.*

170. 16 U.S.C.A. § 1385.

171. *Id.* § 1385(d)(1)(B).

challenged the Act in its complaint,<sup>172</sup> the labeling scheme was upheld.<sup>173</sup> The panel noted that the law does not require the dolphin-safe label; tuna products may be sold freely with or without it.<sup>174</sup> The effectiveness of the conservation effort depends entirely upon consumer preference and therefore does not constitute a government-imposed advantage.<sup>175</sup>

This suggests an approach for protecting these special environmental concerns. When an environmental protection measure important to the United States lacks the level of international consensus needed to secure an international agreement, private consumer boycotts can be organized against the offending products. Meanwhile, the United States could continue to advocate the creation of an international agreement. Such efforts would not appear to run afoul of GATT.

The utility of this approach is limited. Although it has been successful, the dolphin-safe scheme only halted dolphin killings by the United States tuna fleet and by those countries' fleets that sought to avoid the United States embargo. Other countries have continued the killings leading to the imposition of the embargo by the United States. Furthermore, the success of the dolphin-safe labeling scheme is at least partly due to the high degree of public sympathy aroused by dolphins. It is unlikely that this approach would be as effective for issues that have less positive images,<sup>176</sup> for success requires consumers to boycott offending products to the extent that noncompliance becomes economically unfeasible. Still, labeling schemes may be the only non-GATT violative methods available under the current GATT regime for extraterritorial enforcement of United States environmental standards.

## VI. CONCLUSION

Reconciling GATT with environmental protection goals promises to be an arduous task. Although many in the United States believe that the United States has the right to enforce its conservation policies worldwide, much of the international community disagrees. This ensures that future efforts to engage in such actions are likely to result in further conflicts. Though Mexico decided not to push for adoption of the panel decision, this was largely due to recognition of the effect that

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172. *Panel Decision, supra* note 2, para. 3.3.

173. *Id.* para. 5.42.

174. *Id.*

175. *Id.*

176. For example, the United Nations, in a report on driftnetting, noted that the practice leads to the deaths of large numbers of sharks. Because sharks are viewed less positively than marine mammals, this fact is largely ignored. *Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas, Report of the Secretary-General, 45th Sess., Agenda Item 79, para. 59, U.N. Doc. A/45/663 (1990).*

its adoption would have on the continuing NAFTA negotiations. These special circumstances are unlikely to recur.

Unfortunately, the panel decision, if adopted, would render inadequate existing multilateral approaches for dealing with the conflict between trade and the environment. Multilateral environmental agreements will be greatly weakened if signatories are unable to use trade measures to protect against free riders, and the panel decision increases the incentive for nations to free ride. Though the GATT report on trade and the environment suggests that this problem may be remedied by use of GATT waiver provisions, the high voting requirements needed for obtaining waivers makes this only a partial solution. Indeed, the panel decision's prohibition of trade measures decreases the likelihood that waivers will be secured.

This suggests that changes to GATT will be necessary. Amending GATT is extremely difficult, and it is unlikely that this is a realistic option. At the same time, an environmental code approach is inherently limited by the fact that it is applicable only to signatories. Moreover, an environmental code would be a double-edged sword that could well affect the United States in politically unacceptable ways. It remains to be seen whether other options will surface.

In the meantime, careful drafting of legislation can limit future GATT violations. For example, there are certain steps that may be taken to lessen the GATT-violative nature of the MMPA. Applying a numerical ceiling for dolphin takings to foreign tuna fleets, similar to the 20,500 ceiling applied to the United States tuna fleet, would lessen charges of discriminatory treatment. Expanding the ban beyond the ETP to cover all of the world's oceans should have a similar effect. If it is true that dolphins associate with tuna only in the ETP, this should have no effect on the United States fleet.

Despite the controversy caused by the United States ban, it clearly led many nations to change their fishing methods to abandon purse-seining. This suggests that unilateral action by the United States will remain an option to be considered where the benefits to be gained outweigh the international political costs. Extraterritorial application of United States laws is likely to cause resentment, however, and may well prove counterproductive. Further, if this practice became widespread, it would eventually weaken GATT. A clear solution to the conflict between trade and environmental protection remains elusive.

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