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ARTICLE

Dolphins and Tuna: An Analysis of the Second GATT Panel Report

by Steve Charnovitz

Editors' Summary: On May 20, 1994, a three-member dispute panel of the General Agreement on Tariffs and Trade (GATT) held that the U.S. Marine Mammal Protection Act (MMPA), which provides authority for the United States to embargo tuna from other countries, violates GATT. The ensuing debate has focused on two issues: (1) the decision's effect on the intersection of domestic environmental protection/conservation measures and international trade law in the context of GATT; and (2) how the United States should respond in light of diplomatic pressure, public perception that the United States might be relinquishing sovereignty, and efforts to maintain GATT's integrity. The author describes the background of the dispute and the panel's decision, including relevant MMPA provisions and GATT processes and provisions. He also comments in detail about the panel's decision with respect to the MMPA-based tuna embargoes in light of a prior GATT panel decision that held that a U.S. embargo on Mexican tuna and tuna products harvested in the eastern tropical Pacific violated GATT. The author also delves into the GATT review process and considers whether it is optimal for environmental disputes. Finally, the author makes several recommendations, including suggested changes to GATT review of domestic environmental laws, and advice that the United States alter the MMPA to conform with GATT and strongly oppose the adoption of the panel decision by the GATT Council.

On May 20, 1994, a dispute panel of the General Agreement on Tariffs and Trade (GATT)[1] issued a long-awaited decision,[2] the *Dolphin II* report, in an action that the European Union (EU)[3] and the Netherlands brought against the United States alleging that the U.S. Marine Mammal Protection Act (MMPA)[4] violated GATT. The panel determined that portions of the MMPA are inconsistent with GATT rules.

The GATT Council began to consider the *Dolphin II* report in July 1994, and may adopt it in October 1994.[5] The Clinton Administration has objected to the panel decision on substantive and procedural grounds. U.S. Trade Representative (USTR) Mickey Kantor announced in May 1994 that he "will ask that the case be reheard before a panel [to] which non-governmental organizations can make presentations and hear arguments. . . ."[6] Several members of the U.S. Congress have urged the Clinton Administration to oppose adoption of the *Dolphin II* decision.[7]

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, General Agreement on Tariffs and Trade, TEXT OF THE GENERAL AGREEMENT (July 1986) [hereinafter GATT]. In 1948, GATT Article III was amended. GATT is an international agreement governing trade restrictions and distortions.
2. GATT, UNITED STATES—RESTRICTIONS ON IMPORTS OF TUNA, *Restricted* (June 16, 1994) 33 I.L.M. 839 (1994) [hereinafter *Dolphin II* REPORT]. The decision was released to the litigants on May 20, 1994.
3. The term "EU" will also be used for actions the European Economic Community took before the name was changed in 1994.
4. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-309.
5. Under current GATT practice, a consensus is required to adopt a report. Without the acquiescence of the Clinton Administration, the Council cannot adopt the *Dolphin II* report. *See* Hilary F. French, *The Tuna Test*, WORLD WATCH, Sept./Oct. 1994, at 9.
6. *See USTR Kantor to Challenge GATT Panel's Failure to Provide Open Hearings and Due Process Regarding U.S. Tuna Embargoes*, USTR Press Release No. 94-34, May 23, 1994; *see* Frances Williams, *GATT Shuts Door on Environmentalists*, FIN. TIMES, July 21, 1994, at 6.
7. *See Lawmakers Push for New GATT Rules to Protect the U.S. Tuna-Dolphin Law*, INSIDE U.S. TRADE, June 17, 1994, at 11 [hereinafter *Lawmakers Push*]; *House Lawmakers Push Administration to Block Tuna-Dolphin Panel*, INSIDE U.S. TRADE, July 8, 1994, at 18.

The new decision is significant for several reasons. First, if adopted, the report will set important precedent for how GATT deals with environmental challenges. The *Dolphin II* report differs from a GATT panel report issued in an identical lawsuit, *Dolphin I*, which Mexico filed in 1991 against the United States.[8] Although both the *Dolphin I* and *Dolphin II* reports found the MMPA GATT-illegal, some of the rationales employed in the *Dolphin II* report are new, and may indicate how future GATT panels will apply trade measures to such clashes. Second, the report demonstrates how slowly GATT is adapting itself to environmental realities. This sluggish response may lead the U.S. Congress to push harder for GATT reform.[9] It may also make the U.S. public more skeptical about the wisdom of yielding American sovereignty to international institutions. Third, any action the U.S. government takes to block the report would weaken the integrity of the GATT dispute settlement process.[10] Fourth, the report has put the Clinton Administration under renewed diplomatic pressure to amend the MMPA.[11]

This Article analyzes the *Dolphin II* report. First, the Article reviews the dispute's background. Next, the key issues surrounding the *Dolphin I* report are highlighted and the findings of the *Dolphin II* panel are presented. The author then comments on the *Dolphin II* report with respect to the two embargoes being addressed—the "intermediary" embargo on the EU and the primary embargo on Mexico. Next, the author explores the GATT panel procedure from a process perspective. Finally, discussing some ecological aspects of the dispute, the author makes several recommendations. Most significantly, the USTR should use the *Dolphin II* decision to argue in the GATT Council that the *Dolphin I* decision was in error and should be officially rejected.

Background

GATT Adjudicatory Process

GATT imposes numerous disciplines, or international rules, that govern what types of trade measures a nation can use. A GATT member may request GATT to convene a panel to review laws or regulations that it believes violate these disciplines. A panel consists of three individuals who are selected from the GATT community. Many panelists have legal training, but that is not a prerequisite. Current government officials from GATT-member countries are commonly panelists.

The GATT judicial process is highly insular. Panel hearings are closed to the public, and only governments may present arguments. Nongovernmental organizations may not intervene before the panel, even with amicus briefs, and environmental groups have no way to influence the GATT Council's consideration of a panel report. Depending on the country, government environmental officials may have little opportunity to provide input to their country's delegation to GATT.

A GATT panel cannot "strike down" U.S. laws like the MMPA. But if the panel finds that the trade measure is inconsistent with a GATT rule, it can report that finding to the GATT Council. The GATT Council can then recommend, by consensus, that the defendant country, whose law is challenged, change the law to conform with GATT. If the defendant country does not fix the law, the plaintiff country can request that the Council, by consensus, authorize the plaintiff country to impose retaliatory trade sanctions. Such authorization has only happened once in GATT's 47-year history.

Import Controls, Sanctions, and Standards

Central to a GATT panel's analysis of trade measures should be a determination of the type of measure challenged. *Import controls* are one type of trade measure. They apply exclusively to foreign-made products.[12] They can be nondiscriminatory or discriminatory. An example of a nondiscriminatory import control is the U.S. ban on the import of certain assault weapons. A discriminatory import control is the U.S. ban on cigars from Cuba, but not from the Dominican Republic.

Import controls can involve both product and process distinctions. Some examples of product controls are the Convention on the Conservation of European Wildlife and Natural Habitats, which calls on parties "to strictly control the introduction of non-native species,"[13] and the EU's ban on the importation of endangered species, including some species that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[14] does not protect.[15] An example of a production process control is the EU ban, effective January 1996, on furs from nations that do not prohibit the use of leghold traps or meet internationally accepted humane trapping standards.[16]

A second type of trade measure is a trade *sanction*. Trade sanctions penalize unrelated products. Although

8. The GATT panel in *Dolphin I* found that the MMPA violated GATT. GATT, UNITED STATES—RESTRICTIONS ON IMPORTS OF TUNA, BASIC INSTRUMENTS AND SELECTED DOCUMENTS BISD 39S/155 [hereinafter BISD], *reprinted in* 30 I.L.M. 1594 (Sept. 3, 1991) [hereinafter *Dolphin I* REPORT]. The GATT Council, however, never adopted the *Dolphin I* decision, in part because the world environmental community roundly criticized the decision and, in part because Mexico chose to drop the matter temporarily in favor of securing the North American Free Trade Agreement (NAFTA). Now that NAFTA has been secured, however, Mexico has asked that the *Dolphin I* report be placed before the GATT Council.

9. *See Lawmakers Push, supra* note 7, at 11.

10. *See Dolphins and Free Trade*, WASH. POST, May 27, 1994, at A24; *Dolphins and the GATT*, WASH. POST, Apr. 26, 1992, at C6.

11. *See U.S. Considers Changing Tuna-Dolphin Law at Mexican Urging*, INSIDE U.S. TRADE, July 1, 1994, at 1-2.

12. A regulation that has no effect in the absence of imports is an import control.

13. Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, E.T.S. 104, art. 11.2(b).

14. Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

15. *See* PAUL DEMARET, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community, in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 315, 326-31, 385-87 (M. Maresceau ed., 1993). Mr. Demaret observes that "in trade matters, the Community behaves, at times, not unlike the United States." *Id.* at 387.

16. Council Regulation No. 3254/91, L 308/1, art. 3. The regulation provided for a one-year delay in implementation, which was approved. The Russian, U.S., and Canadian governments are among the countries not in compliance with this unilateral legislation. Canada, which exports 90 percent of its wild fur production, has initiated a complaint to GATT. *See* Brian McAndrew, *Ottawa Trying to Scotch Fur Ban*, TORONTO STAR, June 3, 1994, at A5.

commonly characterized as sanctions, the MMPA's trade provisions do not constitute a "sanction." Because tuna vessels stalk dolphins in order to find tuna and then cast nets on dolphins, controlling tuna imports is closely related to dolphin conservation.

A third type of trade measure is a *standard*, which applies both to domestic and imported products. For example, a law mandating pollution controls for automobiles is a standard. When such a standard is applied to a foreign automobile, it may be considered a nontariff barrier, but it is not, technically, an import control. Thus, the MMPA's primary embargo provision is not a standard, but rather an import control. The U.S. regulations on U.S. fishing vessels control the ability to "take" dolphins, and hence the ability to fish for, but not the ability to sell, tuna. By contrast, the U.S. provisions for foreign vessels limit importation and, hence, the ability to sell tuna.

Standards can be subdivided into two types—product standards and process standards.[17] Product standards focus on product characteristics. For example, the U.S. law prohibiting the sale of small lobsters is a product standard.[18] Process standards focus on how a product is made.[19] For example, a 1992 amendment to the MMPA prohibits the sale, transportation, or shipment of any tuna or tuna product that is not dolphin-safe.[20] That is a process standard.

Process distinctions can be further broken down into three categories. The first is an item-specific determination not predicated on the country of origin. For example, since June 2, 1994, U.S. law has prohibited the sale of dolphin-unsafe tuna from any source. The second is a country-specific determination based on the production practices in that country. For example, the MMPA primary embargo provision is based on the average dolphin kill rate for the fishing fleet of each country. The third is a country-specific determination based on the government policies in that country. For example, the EU fur regulation is based on whether the foreign government prohibits leghold traps. The latter two process determinations apply across the board, even to products harvested in an unobjectionable way.

GATT Rules Relevant to the Dolphin I *and* Dolphin II *Decisions*

The *Dolphin I* and *Dolphin II* disputes involved application of GATT Articles III, XI, and XX. GATT Article III imposes the national treatment rule on domestic taxes or standards applied to imports. Under the national treatment rule, products from other countries must be treated no less favorably than products produced domestically.[21] Article XI prohibits quantitative restrictions on imports.

Article XX provides public policy exceptions to these and other GATT disciplines, preserving the ability of nations to impose unilateral and multilateral trade restrictions for approved purposes. GATT Article XX comprises two segments—the headnote and a list of 10 specific public policy exceptions.

Under Article XX's headnote, which contains two criteria that restrict the use of the Article's public policy exceptions, a trade measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Also, the trade measure cannot constitute "a disguised restriction on international trade." These criteria are intended to prevent abuse of the exceptions. To date, no GATT panel considering an environmental dispute has employed these criteria.[22]

The Article XX public policy exceptions cover many topics,[23] but there are at least three that have relevance to environmentally related trade measures. GATT Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health." Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Article XX(d) provides an exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent . . . [with GATT] including those relating to customs enforcement. . . ."

Marine Mammal Protection Act

The MMPA, originally enacted in 1972, provides a comprehensive U.S. program for the protection of marine mammals, including protection from injuries incidental to commercial fishing.[24] The law regulates U.S. vessels and bans the importation of fish from any country whose nationals caught the fish with commercial fishing technology that results in the incidental kill or serious injury of ocean mammals "in excess of U.S. standards."[25] Continued harm to marine mammals and a desire to prevent U.S. vessels from skirting the stringent regulations by reflagging as foreign vessels led Congress to amend the MMPA in 1984. That law requires each nation exporting tuna to the United States

17. It is becoming increasingly difficult to distinguish between product and process standards. For further discussion, see Steve Charnovitz, *The Regulation of Environmental Standards by International Trade Agreements*, 16 Int'l Envtl. Rep. (BNA) No. 17, at 631-32 (Aug. 25, 1993).

18. 16 U.S.C. §1857(1)(J)(i).

19. When a producer is directly regulated, the process standard can apply to the process itself, e.g., pollution. But any process standard related to an import must be applied to a particular product or service.

20. 16 U.S.C. §1417(a)(1), ELR STAT. MMPA §307.

21. Several issues arise in adjudication under the national treatment principle. First, is the foreign product allegedly being mistreated "like" a reference domestic product? This determination involves considering how much tariff or regulatory specialization GATT Article III permits. Second, assuming the domestic product and the foreign product are "like," is the domestic product treated more favorably de jure? Third, is the domestic product treated more favorably de facto?

22. *See* GATT SECRETARIAT, GUIDE TO GATT LAW AND PRACTICE 521 (1994). The *Dolphin I* panel lamented the absence of criteria for applying Article XX, but failed to use the ones available. *Dolphin I* REPORT, *supra* note 8, para. 6.3.

23. For example, GATT provides an exception for trade measures necessary to protect "public morals." GATT, *supra* note 1, art. XX(a), at 37.

24. For related laws of other countries, see Sadat Marashi, COMPENDIUM OF NATIONAL LEGISLATION ON THE CONSERVATION OF MARINE MAMMALS, vol. I, pt. 1.3 (Cetacea) (Rome: FAO/UNEP, 1986).

25. 16 U.S.C. §1371, ELR STAT. MMPA §101(a)(2), §102(c)(3). The law also bans the importation of any fish caught in a manner proscribed for persons subject to the jurisdiction of the United States. *Id.* §1372(c), ELR STAT. MMPA §102(c)(3). These provisions apply worldwide.

to document that it has adopted a dolphin conservation program comparable to that of the United States.[26]

The U.S. government imposed under the MMPA several import bans on tuna to safeguard marine mammals.[27] The United States embargoed tuna from Mexico in 1981,[28] and in other instances embargoed tuna from The Congo, El Salvador, Peru, Senegal, the Union of Soviet Socialist Republics, and Spain.[29] The United States also occasionally imposed bans on tuna imports for the purpose of promoting tuna conservation. For example, in 1975, the United States embargoed tuna from Spain[30] because overfishing by Spanish fishing vessels was undermining the effectiveness of the Inter-American Tropical Tuna Commission's (IATTC's)[31] conservation programs.[32]

In 1988, Congress again amended the MMPA, this time making the import ban more specific by requiring that the incidental dolphin take rate for foreign nations in the eastern tropical Pacific (ETP)[33] be no more than 125 percent of the take rate of U.S. vessels in the ETP during the same period.[34] The law focused on the ETP because dolphins and tuna were known to aggregate regularly in this area of the world. The law included foreign vessels in the program because failure to do so would have rendered the intended dolphin conservation efforts ineffective. In 1986, U.S. vessels in the ETP were responsible for 20,692 known dolphin deaths, while non-U.S. vessels in the region were responsible for 112,482 dolphin deaths.[35]

Mexico's Complaint to GATT: Dolphin I

The 1988 legislation and a court order[36] led the U.S. Customs Service to bar tuna imports from Mexico, Panama, and Ecuador in September 1990. The embargo hit Mexico the hardest because Mexico had more vessels fishing in the ETP than any other country. In January 1991, Mexico asked GATT to convene a panel to adjudicate GATT's conformity of the MMPA's import provisions.

The *Dolphin I* panel found that the provisions violate GATT. Specifically, the panel found that the ban (1) did not qualify as a GATT Article III internal regulation that applied equally to imports, (2) was a quantitative restriction violative of GATT Article XI, and (3) did not fit within any of the GATT Article XX general exceptions.

Reaction to the *Dolphin I* panel's report was varied.[37] Some commentators agreed with the panel's interpretation of GATT and found GATT's rules appropriate. Others declared the panel's interpretation correct, and stated that GATT itself needed to be amended to reflect environmental concerns. Still others declared that the panel's interpretation of GATT was incorrect.

International Cooperation

The Dolphin I panel concluded that one major defect of the MMPA was that it allowed the United States to act unilaterally.[38] Yet this conclusion took no account of the fact that the MMPA requires the United States to seek interna-

26. *Id.* §1371, ELR STAT. MMPA §101.

27. 41 Fed. Reg. 21782-83 (May 28, 1976).

28. 46 Fed. Reg. 10974 (Feb. 5, 1981). At the time, Mexico was already under embargo in retaliation for having seized U.S. fishing vessels.

29. 53 Fed. Reg. 8911 (Mar. 18, 1988); 53 Fed. Reg. 50420 (Dec. 15, 1988). None of these bans triggered complaints to GATT from The Congo, Peru, Senegal, or Spain, who all were GATT members.

30. For a discussion of this episode, see DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 518-20 (1975). Spain did not lodge a complaint with GATT.

31. The Commission was created in the Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, 80 U.N.T.S. 3.

32. The authority for the embargo was the Tuna Conventions Act, not the MMPA.

33. The ETP is an eight million square-mile area of ocean stretching from southern California to Chile and extending westward from its eastern land mass perimeter for nearly 3,000 miles. *See* 50 C.F.R. §216.3.

34. 16 U.S.C. §1371(a)(2)(B)(II), ELR STAT. MMPA §101(a)(2)(B)(II).

35. MARINE MAMMAL COMMISSION, ANNUAL REPORT TO CONGRESS, at 94 (1991). The numbers for foreign vessels are based on extrapolation.

36. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 21 ELR 20259 (N.D. Cal. 1990), 929 F.2d 1452 (9th Cir. 1991) (affirming subsequent preliminary injunction).

37. *See, e.g.*, Belinda Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751 (1993); Betsy Baker, *Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT*, 26 VAND. J. TRANSNAT'L L. 437, 455-60 (1993); K. Gwen Beacham, *International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 65 (1992); Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229 (1992); Dorothy J. Black, *International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna*, 24 LAW & POL'Y INT'L BUS. 123 (1992); Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 INTER-AM. L. REV. 569 (1991-1992); Jeffrey L. Dunoff, *Reconciling International Trade With Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992); Mark T. Hooley, *Resolving Conflicts Between the General Agreement on Tariffs and Trade and Domestic Environmental Laws*, 18 WM. MITCHELL L. REV. 483 (1992); Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ELR 10233 (1992); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1239-45 (1992); Peter L. Lallas et al., *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271 (1992); Erik Coulter Luchs, *Maximizing Wealth With Unilaterally Imposed Environmental Trade Sanctions Under the GATT and the NAFTA*, 25 LAW & POL'Y INT'L BUS. 727 (1994); John P. Manard Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment–The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373 (1992); Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397 (1993); Ted. L. McDorman, *Protecting Marine Living Resources With Trade Measures* (Apr. 1994) (unpublished manuscript on file with author); Ted L. McDorman, *The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts*, 17 N.C. J. INT'L L. & COM. REG. 461 (1992); R. Kenton Musgrave, *The GATT–Tuna Dolphin Dispute: An Update*, 23 NAT. RESOURCES J. 957 (1993); David J. Ross, *Making GATT Dolphin-Safe: Trade and Environment*, 2 DUKE J. COMP. & INT'L L. 345 (1992); Philippe Sands, *Danish Bottles and Mexican Tuna*, 1 REV. EUR. COMMUNITY & INT'L ENVTL. L. 28 (1992); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700 (1992); Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455 (1993); Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385 (1993); Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992).

38. *Dolphin I* REPORT, *supra* note 8, at paras. 5.27 & 5.32.

tional cooperation. MMPA §108[39] directs the U.S. government to pursue negotiations for bilateral and multilateral agreements with other nations engaged in commercial fishing unduly harmful to marine mammals.[40] In accordance with this provision, the United States has frequently led the charge to forge international agreements to protect dolphins.

The United States first sought an international agreement for dolphin protection in the early 1970s. The U.S. government had proposed a new protocol to the International Convention for the Regulation of Whaling and sought a ministerial meeting on marine mammals.[41] These efforts, however, were unsuccessful. The U.S. government also urged the IATTC to develop regulatory programs addressing tuna-dolphin interactions.[42] This effort was eventually successful, but it occurred only after the United States imposed tuna embargoes. The U.S. government also provided technical assistance to other countries attempting dolphin-safe fishing and provided most of the financial support for the IATTC's tuna-dolphin program.

The Dolphin I panel's distress about U.S. unilateralism is even less credible in light of the fact that in January 1991, while Mexico was pursuing its GATT complaint, the United States was working actively in an IATTC meeting in La Jolla, California, to develop a dolphin-safe fishing agreement. There the participating countries agreed to a program that would both require qualified observers on all large ships and reduce dolphin mortalities during 1991.[43] Mexico refused to join this agreement. Indeed, Mexico had quit the IATTC in 1978, not long after the Commission began to study tuna-dolphin interactions.[44] Mexico has pledged to rejoin the IATTC, but to date has not.

In April 1992, the IATTC agreed to a quota system for dolphin mortality in the ETP.[45] Under the system, each participating government receives a "dolphin mortality limit" for its fishing vessels.[46] Once those limits are reached, that vessel may not fish for tuna the rest of the year. Because Mexico and a few other countries were not parties to the IATTC, an identical intergovernmental agreement was drawn up to include every country in the ETP that had vessels engaged in tuna fishing.[47] So far, this regime has worked.[48]

As part of its efforts to secure the January 1991 and the April 1992 agreements, the Bush Administration promised to seek legislation lifting the tuna import ban. The Bush Administration, however, was unable to persuade Congress,[49] and the ban against Mexico has not been lifted. Currently, there is also a primary embargo against Venezuela and Panama.

Under the International Dolphin Conservation Act of 1992 (the MMPA amendments of 1992), Congress provided for lifting the import ban on a primary embargo country, such as Mexico, if that country commits to a five-year moratorium, starting in 1994, on setting nets on dolphins to harvest tuna.[50] To date, no country under an embargo has exercised this option.

Intermediary Embargo

The MMPA amendments of 1988 also require an "intermediary" embargo—a ban on tuna from countries that import tuna from countries that are subject to a primary embargo by the United States.[51] Despite the Bush Administration's attempts to interpret this provision narrowly as a tuna "laundering" provision,[52] to deal with primary embargo tuna being transshipped through another country,[53] a U.S.

39. 16 U.S.C. §§1378, 1381(c), ELR STAT. MMPA §§108, 111(c); *see Dolphin II* REPORT, *supra* note 2, para. 3.69.

40. 16 U.S.C. §1378(a)(2), ELR STAT. MMPA §108(a)(2). *See also* James A.R. Nafziger, *The Management of Marine Mammals After the Fisheries Conservation and Management Act*, 14 WILLAMETTE L.J. 153 (1978).

41. *See Report of the Secretary of Commerce to the Congress on the MMPA*, 38 Fed. Reg. 20564-69 (July 26, 1973).

42. *See, e.g., Reports of the Secretary of Commerce to the Congress on the MMPA*, 39 Fed. Reg. 12051-53 (Apr. 2, 1974); 40 Fed. Reg. 30678-85 (July 22, 1975); 41 Fed. Reg. 30152-59 (July 22, 1976); 42 Fed. Reg. 38982-90 (Aug. 1, 1977).

43. Resolution of Intergovernmental Meeting in La Jolla (Jan. 1991), *reprinted in* ANNUAL REPORT OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION 264 (1991). *See also* MARINE MAMMAL COMMISSION, *supra* note 35, at 99, 103. The parties never consummated the agreement.

44. Mexico had joined the IATTC in 1964. Its announced reason for leaving was a conflict over fishing rights. The Commission began to work on the dolphin-tuna interaction in 1976. *See* Margaret Palmer Gordon, *International Aspects of the Tuna-Porpoise Association Phenomenon: How Much Protection for Poseidon's Sacred Messengers?*, 7 CAL. W. INT'L L.J. 639, 656 (1977); Stephen M. Boreman, *Dolphin-Safe Tuna: What's in a Label? The Killing of Dolphins in the Eastern Tropical Pacific and the Case for an International Legal Solution*, 32 NAT. RESOURCES J. 425 (1992).

45. IATTC Resolution (April 1992). This is a nonbinding recommendation. The Resolution also provides for: An international review panel to report on fishing vessel compliance and to recommend harmonization of sanctions, nonvoting participation by nongovernmental organizations on this panel, and a scientific board that includes environmentalists.

46. The dolphin mortality limit for 1994 is 9,300. Each vessel is allowed 127 dolphin kills.

47. Agreement to Reduce Dolphin Mortality in the Eastern Tropical Pacific Tuna Fishery, Apr. 23, 1992, *reprinted in* THE MARINE MAMMAL COMMISSION COMPENDIUM OF SELECTED TREATIES, INTERNATIONAL AGREEMENTS, AND OTHER RELEVANT DOCUMENTS ON MARINE RESOURCES, WILDLIFE, AND THE ENVIRONMENT, vol. II, at 1369. According to the U.S. Department of State, this agreement is in effect for the United States. It is interesting to note that this is a sole executive agreement not approved by the Congress or consented to by the Senate. It appears to be the only multilateral fishery agreement that the United States has entered into as an executive agreement rather than as a treaty approved by the Senate. For examples of multilateral fishery agreements entered into as treaties consented to by the Senate, see the Convention for the Establishment of an Inter-American Tropical Tuna Commission, 1 U.S.T. 230, the International Convention for the Conservation of Atlantic Tunas, 20 U.S.T. 2887, the Convention for the Conservation of Salmon in the North Atlantic, T.I.A.S. 10789, and the Treaty on Fisheries, T.I.A.S. 11100.

48. *See* James Joseph, *The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biologic, Economic, and Political Impacts*, 25 OCEAN DEV. & INT'L L. 1, 13 (1994).

49. *See Administration Backs Down on Amendment to Repeal Mexican Tuna Ban*, INSIDE U.S. TRADE, Feb. 28, 1992, at 20.

50. 16 U.S.C. §1415, ELR STAT. MMPA §305. Although the IATTC agreement and the parallel intergovernmental agreement of 1992 called for reduced dolphin mortalities, they did not ban setting nets on dolphins.

51. *Id.* §1371(a)(2)(C), ELR STAT. MMPA §101(a)(2)(C).

52. A provision that deals only with tuna laundering is one where the intermediary country would not be able to sell tuna that is under primary embargo, but the intermediary country would be able to import such tuna for its own consumption.

53. Compare the initial rulemaking, 54 Fed. Reg. 9439 (Jan./Feb. 1989), to the embargo as implemented. 56 Fed. Reg. 12367 & 37606 (Mar. 25 & Aug. 7, 1991). *See Dolphin II* REPORT, *supra* note 2, para. 2.13. It might have been more accurate for the MMPA to have labelled the intermediary embargo a "secondary" embargo since the provision is broader than transshipped tuna. *See Dolphin I* REPORT, *supra* note 8, para. 5.35.

federal district court held this interpretation untenable in light of MMPA §101(a)(2)(C)'s language and associated legislative history.[54] The court ordered the United States to enforce the intermediary ban in January 1992.[55]

The subsequent intermediary embargo on yellowfin tuna applied to 20 countries and prompted strong protests because the U.S. government required foreign governments to enact laws forbidding the import of primary embargo tuna, even when they were not importing any.[56] In the International Dolphin Conservation Act of 1992, Congress softened this requirement on foreign governments, requiring only that they certify that they were not importing tuna from countries implicated in the primary embargo.[57]

The Ninth Circuit of the U.S. Court of Appeals dismissed the lawsuit involving the intermediary ban.[58] The court held that the Court of International Trade has exclusive jurisdiction over cases involving embargoes that are based on reasons unrelated to protection of health and safety.[59] As of June 1994, three nations remain tangled in the intermediary embargo.[60]

The MMPA's Dolphin-Safe Tuna Requirements

The International Dolphin Conservation Act of 1992 included a new provision, effective June 2, 1994, banning the sale, shipment, or importation into the United States of any tuna or tuna product that is not "dolphin safe."[61] The Act's "dolphin safe" definition is complex, but includes among other factors that a fishing vessel may not intentionally deploy nets on dolphins during the entire voyage,[62] and that observers must certify this situation.[63] The new U.S. law is significant vis-a-vis international trade rules because GATT's discipline applies to discrimination among countries. The U.S. law relies on a ship-by-ship determination rather than a country-by-country determination. Nevertheless, the new provision does not replace the 1988 amendments; it supplements them. Thus, a nation under a primary embargo, such as Mexico, cannot ship any yellowfin tuna from the ETP to the United States, even when such tuna is caught using dolphin-safe practices.

54. *See* Earth Island Inst. v. Mosbacher, 785 F. Supp. 826, 22 ELR 20990 (N.D. Cal. 1992); S. REP. No. 100-592, 100th Cong., 2d Sess. 25 (1988); H.R. REP. No. 100-970, 100th Cong., 2d Sess. 30 (1988).

55. *Mosbacher*, 785 F. Supp. 826, 22 ELR 20990.

56. *See Dolphin Deal*, J. COM., Feb. 7, 1992, at 4A; Lee J. Weddig, *Battling Over Tuna and Trade*, J. COM., Feb. 19, 1992, at 10A. For the list of countries, see *Dolphin II* REPORT, *supra* note 2, paras. 2.13-.14.

57. 16 U.S.C. §1362(17), ELR STAT. MMPA §3(17).

58. Earth Island Inst. v. Brown, 24 ELR 21263 (9th Cir. June 28, 1994). *See also* Earth Island Inst. v. Christopher, 6 F.3d 648, 23 ELR 21553 (9th Cir. 1993).

59. *Earth Island*, 24 ELR 21263; *see also* 28 U.S.C. §1851(i)(3).

60. The three countries are Costa Rica, Italy, and Japan.

61. 16 U.S.C. §1417, ELR STAT. MMPA §307. For a discussion of this law, see Steve Charnovitz, *Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities*, 27 J. WORLD TRADE, Apr. 1993, at 37.

62. 16 U.S.C. §1417(d), ELR STAT. MMPA §307(d).

63. Some environmentalists suggest that this foreign certificate may be meaningless because it is difficult to assure that only dolphin-safe tuna is sold, especially when the same producer cans both dolphin-safe and dolphin-unsafe tuna.

The EU-Netherlands Complaint: Dolphin II

In July 1992, the EU and the government of the Netherlands (on behalf of the Netherlands Antilles) lodged a complaint in GATT challenging the intermediary embargo on tuna. Although the *Dolphin I* panel had reviewed the intermediary embargo and found it GATT-illegal, the GATT Council never adopted the decision and, thus, the affected countries were unable to obtain relief.

In November 1992, the EU requested that the panel pause its deliberations to await the pending U.S. legislation—the International Dolphin Conservation Act of 1992. In February 1993, after reviewing the International Dolphin Conservation Act's primary embargo termination provisions, the EU requested that the panel resume its deliberations. Normally, GATT panels must issue decisions within six months from when they are established.[64] The *Dolphin II* panel, however, took over 18 months, not counting the pause, to issue its decision.[65]

The *Dolphin I* and *Dolphin II* Panel Reports

The Dolphin I *Panel Report*

The *Dolphin I* decision alarmed environmentalists because the principles the panel espoused could interfere with numerous environmental laws and treaties. In order to understand the importance of the differences between the *Dolphin I* and *Dolphin II* reports, it is necessary to review the key components of the *Dolphin I* report.

☐ *Article III.* GATT conformity of trade measures is reviewed under either Article III, which imposes the national treatment rule on domestic taxes or standards applied to imports, or Article XI, which prohibits quantitative restrictions on imports,[66] but not both. Because the MMPA clearly violated Article XI, the U.S. government argued in *Dolphin I* that the MMPA embargo was a domestic standard that met the national treatment discipline. Although the MMPA imposed a regulatory regime regarding the number of dolphins that U.S. vessels could kill while fishing for tuna,[67] a different regime applied to imports. For imports, the MMPA requires the U.S. Secretary of Commerce to decide whether each country meets the comparability requirements. A country-specific embargo is distinguishable from an internal standard,[68] and thus does not come within the scope of Article III.

The *Dolphin I* panel, however, did not adhere to this line of reasoning. Instead, it devised an entirely new scheme to block recourse to Article III. According to the panel, Article

64. The *Dolphin I* panel wrapped up its analysis in a little over five months.

65. Many observers believe the decision was purposefully delayed for political reasons.

66. *See* GATT, *supra* note 1, Ad art. III headnote; GATT, CANADA—ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT, para. 5.14 (adopted Feb. 7, 1984) BISD 30S/140. For example, a ban on the sale of all tuna would be considered an Article III measure even though it would have the effect of discouraging imports.

67. 16 U.S.C. §1371(a)(1), ELR STAT. MMPA §101(a)(1). A permit provided for a maximum of 20,500 dolphin kills annually. Because U.S. vessels have been substantially below that level since 1988, they had guaranteed access to the U.S. market, but foreign vessels did not. *See Dolphin II* REPORT, *supra* note 2, para. 4.7.

68. *See Dolphin I* REPORT, *supra* note 8, para.3.17 (Mexico's argument).

III could only be used to justify trade measures affecting products "as such."[69] Thus, the panel distinguished between a regulation regarding product characteristics and a regulation regarding a production process. The panel held that Article III covered the former, but not the latter. According to the panel, the incidental taking of dolphin "could not possibly affect tuna as a product."[70]

The panel also noted that by retroactively imposing a dolphin mortality rate on Mexican fishing vessels for purposes of determining Mexico's conformity with U.S. law, the MMPA treated Mexican tuna less favorably than U.S. tuna. U.S. fishing vessels knew how many dolphins they could kill, but Mexican vessels did not know until the end of the year because their mortality quota was based on the number per "set," i.e., setting of nets, that U.S. vessels actually killed.[71] Although many countries can, and indeed do, meet the U.S. standard, its retroactive application is unfair.[72] But the *Dolphin I* panel did not rule this regulation an Article III violation because it had determined that the entire U.S. regime for dolphin conservation did not come within the scope of GATT Article III.

The *Dolphin I* panel's decision regarding Article III is troubling. If Article III applies only to products and not to processes, then some food safety standards may be GATT-illegal.[73] Moreover, if Article III cannot justify regulations regarding a method of production, then a nation may be forced to accept products that it believes are chemically or morally tainted.

☐ *Article XI.* The panel next considered Article XI's prohibition on quantitative restrictions on imports. The substance of the MMPA regulation prevented the U.S. government from contesting the alleged Article XI violation. The panel ruled that the MMPA violated Article XI because all import bans are quantitative restrictions.

☐ *Article XX.* The U.S. government argued that two of Article XX's exceptions, Article XX(b) and XX(g), justified the MMPA. The *Dolphin I* panel found that neither of these exceptions applied to the MMPA. Addressing these exceptions, the panel introduced the concept of "extrajurisdictionality,"[74] suggesting for the first time in GATT's history that Article XX places geographic limits on international trade measures. "Extrajurisdictionality"[75] is apparently meant to describe regulations that, while not actually extraterritorial,[76] relate or apply to activities outside the lawmaker's jurisdiction.[77] The panel declared that neither Article XX(b) nor XX(g) can exempt extrajurisdictional laws. The MMPA does not fit within these two exceptions because it attempts to safeguard dolphins in the Pacific Ocean. This ruling has very significant environmental implications. If Article XX cannot apply extrajurisdictionally, then many import controls, for example, the ban on African elephant ivory, would probably be GATT-illegal.[78]

The panel also considered whether the MMPA would qualify for the exception if Article XX did permit extrajurisdictionality. The panel concluded that the Act did not meet the "necessary" test of Article XX(b) because the United States had not "exhausted all options reasonably available to it . . . in particular through the negotiation of international cooperative arrangements. . . ."[79] The panel stated that an international agreement "would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas."[80] Yet the panel did not comment on either the long-time U.S. effort to obtain such an agreement or Mexico's decision to use GATT to attack the MMPA rather than to use the IATTC for developing cooperative arrangements to protect dolphins.[81]

The panel also noted that because of MMPA retroactive calculation procedures, "the Mexican authorities could not know whether, at a given point in time, their policies conformed to the United States' dolphin protection standards."[82] Yet the panel did not evaluate this situation in connection with the "arbitrary" discrimination criterion in the Article XX headnote. Instead, the panel stated that the unpredictable nature of the standard could disqualify it from being considered "necessary" under Article XX(b).

The panel also considered the intermediary embargo provision. The U.S. government argued that Article XX(d) justified it, assuming the primary embargo was consistent with GATT. Having ruled that the primary embargo was not GATT-consistent, the panel held that Article XX(d) could not apply to the intermediary embargo.

The Dolphin II *Panel Report*

The reasoning the *Dolphin II* panel used in finding that the primary and intermediary embargoes violate GATT differs

69. *Id.*, para. 5.11.

70. *Id.*, para. 5.14. Notably, over a year before the panel issued this finding, the major U.S. tuna canners had switched to exclusively dolphin-safe tuna. Thus, the functionaries on the *Dolphin I* panel considered what could affect tuna "as a product" without regard either to market realities or to the actions that American, and later Italian and Spanish, tuna canners took.

71. 50 C.F.R. §216.24(e)(5)(v)(F). Foreign fleets are permitted to have a 25 percent higher mortality level than the U.S. fleet.

72. Foreign fishing vessels are not the only parties subject to retroactive U.S. requirements; the U.S. Congress imposes retroactive requirements on U.S. citizens too. *See* Linda Greenhouse, *High Court Backs Closing Tax Loophole Retroactively*, N.Y. TIMES, June 14, 1994, at D1.

73. It is often impractical to test food for purity at the U.S. border because testing would spoil the product. Thus, inspectors often examine processing methods.

74. *Dolphin I* REPORT, *supra* note 8, paras. 5.28, 5.30, 5.32, & 5.33.

75. Mexico had characterized the MMPA as "extraterritorial." *See id.*, para. 3.31.

76. The regulations do not apply to persons in other countries. There are two reasons why imposing of a tariff or import restriction does not constitute extraterritorial application. First, both are imposed on the U.S. border, which is within U.S. jurisdiction. Second, both apply only to persons who choose to export to the United States and thus they can be avoided.

77. The panel did not define extrajurisdictionality. An alternative definition to that suggested might contrast "jurisdictional" (one's own country), "inter-jurisdictional" (transborder concerns), and "extrajurisdictional" (the high seas, or the atmosphere). Since no country has jurisdiction over the global commons, characterizing measures to protect the commons as extrajurisdictional would be unenlightening. *See* Daniel C. Esty, GREENING THE GATT TRADE, ENVIRONMENT, AND THE FUTURE 105-06 n.5 (1994).

78. A country might be able to enact a law banning the sale of any fresh ivory and justify that law under GATT Article III. The United States, however, does not have such a law. Instead, it bans the importation of ivory under the African Elephant Conservation Act 16 U.S.C. §4222, and the Endangered Species Act, 16 U.S.C. §1538(c), ELR STAT. ESA §9(c).

79. *Dolphin I* REPORT, *supra* note 8, para. 5.28.

80. *Id.*

81. Mexico told the panel that it had proposed in the United Nations Food and Agriculture Organization that a conference be held to examine the dolphin-tuna interaction. *Id.*, para. 3.34. If true, Mexico failed to pursue this idea.

82. *Id.*, para 5.28.

in significant ways from the *Dolphin I* panel's reasoning. These differences are important because countries may rely on the *Dolphin II* panel's reasoning as they formulate their laws to comply with GATT.

☐ *Article III.* The *Dolphin II* panel found that Article III did not apply to the complaint. The panel used a line of reasoning nearly identical to that of the *Dolphin I* panel when that panel addressed Article III's application to the MMPA. The EU and the Netherlands[83] had argued that the disputed provision in the MMPA was an import control, and, therefore, that Article XI, not Article III, applied to their complaint. The United States did not defend the MMPA as an Article III measure. The panel could have simply agreed with the EU about Article III's inapplicability. Instead, the panel sought to build on Article III case law.

The panel declared that Article III calls for a comparison between the treatment accorded domestic and imported "like" products, not for a comparison of the policies or practices of the country of origin with those of the importing country. Therefore, Article III could only permit the enforcement of laws "that affected or were applied to imported and domestic products considered *as* products."[84] Because the MMPA related to harvesting methods, and because "none of these practices, policies, and methods could have any impact on the inherent character of tuna as a product," the panel found that Article III did not apply.[85]

☐ *Article XI.* The U.S. government did not assert that the MMPA was consistent with Article XI. The *Dolphin II* panel held that the MMPA violated Article XI. The panel used a line of reasoning identical to that on which the *Dolphin I* panel relied.[86]

☐ *Article XX(g).* The panel determined that Article XX(g) adjudication should follow a three-step process.[87] First, the panel had to decide whether the *policy* underlying the trade measure at issue fit within the range of policies meant to conserve exhaustible natural resources and whether the policy was made effective in conjunction with domestic restrictions. Second, it had to decide whether the trade measure was "related to" the conservation of exhaustible natural resources. Third, it had to determine whether the measure conformed to the Article XX headnote.

Addressing the first step, the panel rejected the EU's argument that because dolphins are not an "economic" resource,[88] they are not an exhaustible resource. The panel concluded that dolphins are an exhaustible natural resource.[89]

The EU also argued that under Article XX(g), a country could not apply a measure to conserve an exhaustible natural resource located outside that country's territorial jurisdiction.[90] The United States remonstrated that GATT's text does not support such a reading. It appears that the panel concluded that GATT Article XX(b) and XX(g) do not forbid extrajurisdictionality. This seems to have implicitly rejected the *Dolphin I* panel's determination regarding extrajurisdictionality.

The *Dolphin II* panel reached its conclusion in the following way. First, the panel noted that the text of Article XX(g) does not delimit the location of the resources to be conserved. Second, the *Dolphin II* panel pointed out that the two GATT panels before *Dolphin I* that addressed Article XX(g) had not suggested such a limitation.[91] (The EU had explained that the previous panels had no need to decide this question.[92]) Third, the *Dolphin II* panel argued that other GATT provisions—such as Article XX(e) relating to the products of prison labor—clearly apply to actions occurring outside the territory of the party applying the trade measure.

Fourth, the panel observed that under general international law, states are not in principle barred from regulating the conduct of their nationals outside their territory. The panel also considered the treaty interpretation rules of the Vienna Convention on the Law of Treaties.[93] With regard to the "general rules of interpretation" (Article 31), the panel found that the bilateral and plurilateral environmental treaties that the United States noted were inapplicable in demonstrating subsequent agreements among the parties or GATT practice.[94] With regard to the "supplementary means of interpretation" (Article 32), the panel found that the conservation treaty precedents which the United States adduced were unhelpful in elucidating GATT because "it appeared to the Panel on the basis of the material presented to it that no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments."[95]

The panel's conclusion that Article XX(g) may permit extrajurisdictional application of trade measures rests on very thin ground. The United States marshaled many points based on GATT's negotiating history to support the argument that a country can use trade measures to protect resources outside of its boundaries. But the panel was not persuaded. Instead, the panel based its conclusion mainly on semantics—namely, the text of this exception does not specify a geographic application.

In the second step of its analysis—whether the trade measure was "related to" the conservation of exhaustible natural re-

83. For simplicity, all future references to the plaintiffs will include only the EU.

84. *Dolphin II* REPORT, *supra* note 2, para. 5.8.

85. *Id.*, para. 5.9.

86. *See supra* p. 10573.

87. *Id.*, para. 5.12.

88. *Id.*, para. 3.52. The EU argued that because CITES ensured that there was no international trade in dolphins, dolphins were not a resource. This is a rather restrictive interpretation. There is no trade in the ozone layer, but that does not mean that it is not a resource.

89. *Id.*, para. 5.13. In *Dolphin I*, the panel ignored Mexico's argument that Article XX(g) did not apply to any living resource, such as a dolphin. *Dolphin I* REPORT, *supra* note 8, paras. 3.43 & 3.45.

90. *Dolphin II* REPORT, *supra* note 2, paras. 3.35, 3.42, & 5.14.

91. *Id.*, para. 5.15.

92. *See id.*, para. 3.37.

93. May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. The Vienna Convention on the Law of Treaties does not apply to treaties that predate it, such as GATT. Nor is the United States presently a party to the Convention, although the United States did agree to the panel's reference to the Vienna Convention on the Law of Treaties. *See Dolphin II* REPORT, *supra* note 2, para. 3.17.

94. *Dolphin II* REPORT, *supra* note 2, para. 5.19. For the U.S. argument on post-GATT practice, see *id.*, para. 3.23.

95. *Id.*, para. 5.20. The Havana Charter is the Charter of the International Trade Organization (ITO). A United Nations conference drafted this charter in 1947-48. GATT was drafted in 1947 during a preparatory session. The ITO Charter is far broader than GATT and was intended to replace it. *See* GATT, *supra* note 1, art. XXIX, at 49. But the ITO never came into being. The ITO negotiating history is commonly used to explicate GATT.

sources—the *Dolphin II* panel noted that a previous GATT panel, the Canada Herring and Salmon panel, had defined the words "relating to" in Article XX(g) to mean "primarily aimed at."[96] Applying this latter phrase, which is a tighter test, the *Dolphin II* panel first examined the U.S. intermediary embargo. The panel found that the United States was prohibiting the importation of any tuna from intermediary countries "whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and policies that harmed or could harm dolphins. . . ."[97]

The panel declared that this prohibition "could not, by itself, further the United States' conservation objectives."[98] Moreover, the panel reasoned, the embargo "could achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna [e.g., Italy] to the United States, but in third countries [e.g., Mexico] from which the exporting country [e.g., Italy] imported tuna."[99] The panel did not explain why pressuring intermediary countries could not further the United States' overall conservation objectives.

Applying this step two to the primary embargo, the panel noted that tuna from certain countries was prohibited "whether or not the particular tuna was harvested in a way that harmed or could harm dolphins."[100] According to the panel, the primary embargo "could not possibly, by itself, further the United States conservation objectives" because the embargo "could achieve its desired effect only if it were followed by changes in policies and practices in the exporting countries."[101] The panel did not explain why relying on foreign conservation could not further U.S. environmental objectives.

The panel hypothesized that both the primary and intermediary embargoes "were taken so as to force other countries to change their policies with respect to persons within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins."[102] Without attempting to substantiate its hypothesis, the panel then examined whether Article XX permits such force. The panel stated that if Article XX "were interpreted to permit contracting parties [e.g., GATT members] to take trade measures so as to force other contracting parties to change their policies within their jurisdiction. . . . the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired."[103] Indeed, GATT "could no longer serve as a multilateral framework for trade among contracting parties."[104] This argument is similar to that which the *Dolphin I* panel offered.

The *Dolphin II* panel concluded that the Article XX(g) exception does not apply to the MMPA. Because the MMPA did not satisfy step two, the panel did not proceed to step three of its analysis to test conformity with the Article XX headnote.

☐ *Article XX(b).* The panel used the same three-step approach in analyzing whether the MMPA qualifies for the Article XX(b) exception. The EU again argued that a country could not protect living things that are located outside the territorial jurisdiction of the country applying the measure. The United States again countered that there is no basis for presuming such a requirement in Article XX. Implicitly rejecting the applicable portion of the *Dolphin I* decision, the panel referred to its decision on Article XX(g) and concluded that GATT does not prohibit extrajurisdictionality.

In step two, the panel employed the stringent test that the Thailand Cigarette GATT panel developed a few years ago. The test defined "necessary" in Article XX(b) to mean that a country "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[105] Following the same line of reasoning that it presented for Article XX(g), the *Dolphin II* panel viewed both the intermediary and primary embargoes as attempts to "force other countries to change their policies within their jurisdiction. . . ."[106] The panel concluded that such force cannot be considered "necessary" within the meaning of Article XX(b).

Because the MMPA did not satisfy step two, the panel did not proceed to step three of its analysis.

☐ *Article XX(d).* The U.S. government argued that assuming the primary embargo was GATT-legal, Article XX(d) could justify the intermediary embargo. The EU argued that Article XX(d) could only apply to measures fully consistent with GATT, and that measures that violate Article XI but that qualify for one of the Article XX exceptions are not "consistent" with GATT, but rather "only excusable."[107] The panel agreed with the EU, but did not provide evidence that GATT's authors meant to restrict Article XX(d) in this manner.[108]

☐ *1992 MMPA Amendments.* The panel also reviewed the new provisions in MMPA §305.[109] These provisions require the United States to terminate a primary embargo against countries that make certain conservation commitments. The provisions also authorize the United States to impose new import bans and sanctions against countries that fail to honor their commitments.

The U.S. government argued that the panel should not consider these provisions because they could only be imposed in the context of international agreements that had yet to be negotiated.[110] Nevertheless, the panel concluded that these provisions violate GATT.[111] The panel did not address the important U.S. observation regarding ripeness and provided no specific rationale for prejudging such provisions to be GATT-illegal.

96. GATT, CANADA—MEASURES AFFECTING EXPORTS OF UNPROCESSED HERRING AND SALMON, para 4.6 (adopted Mar. 22, 1988) BISD 35S/98.
97. *Dolphin II* REPORT, *supra* note 2, para. 5.23.
98. *Id.*
99. *Id.*
100. *Id.*, para. 5.24.
101. *Id.*
102. *Id.*
103. *Id.*, para. 5.26. The panel offers no evidence for this prediction.
104. *Id.*
105. GATT, THAILAND—RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES, para. 74 (adopted Nov. 7, 1990) BISD 37S/200. Mr. Rudolf Ramsauer, a Swiss government official, served both on this panel and the *Dolphin I* panel.
106. *Dolphin II* REPORT, *supra* note 2, para. 5.38.
107. *Id.*, para. 3.80.
108. *Id.*, para. 5.41.
109. 16 U.S.C. §1415, ELR STAT. MMPA §305. The panel apparently considered the entire section. *See Dolphin II* REPORT, *supra* note 2, paras. 1.4(b), 2.11 & 5.4; *see also id.*, Annex A.
110. *Dolphin II* REPORT, *supra* note 2, paras. 3.2(d) & 3.97.
111. *Id.*, para. 6.1. The panel refers to MMPA §305(a), which references §305(b).

Commentary

Intermediary Embargo

The logic the *Dolphin II* panel employed in addressing the intermediary embargo is the most incisive. A following section will consider the panel's judgment on the primary embargo as well as several points that relate to both embargoes.

☐ *Trade Force.* The intermediary embargo applied to tuna from countries *importing* tuna from a country under a primary embargo. Under this regulation, the United States embargoed tuna whether or not it was harvested in a dolphin-safe manner and whether or not the exporting country pursued dolphin-safe practices. The panel concluded that the intermediary embargo could not, by itself, further U.S. conservation objectives, and that it could achieve these objectives only if the country under the primary embargo changed its polices and practices.

The panel considered whether GATT Article XX(g) permits "measures taken so as to force other countries to change their policies with respect to persons or things within their own jurisdictions. . . ."[112] Although the word "force" seems inapt ("pressure" would be more accurate), the question is a good one.[113] The United States was trying to convince the EU to change its policy on whether consumers in Europe could buy Mexican tuna.

The panel relied on three arguments to deal with this issue. The panel determined that permitting countries to use such "force" would upset "the balance of rights and obligations among contracting parties, in particular the *right* of access to markets."[114] This line of argument, however, rests on the fallacy of assuming what one tries to prove.[115] The legal issue is whether Article XX permits the use of such leverage. If it does, then the right of the United States to protect animals should trump the right of the EU to access the U.S. market. In other words, the debate over Article XX concerns the delineation of GATT's obligations. It is circular to assume certain rights of exporters, and then use that assumption to clarify the obligations.[116]

It was also incorrect for the panel to characterize Article XX as giving GATT members the "right" to use trade measures to protect life or health.[117] Such rights are not derived from GATT. They are aspects of national sovereignty. GATT's original members did not surrender such powers in establishing GATT in 1947.

The panel's second rationale was related to trade policy and paralleled a similar argument that the *Dolphin I* panel made when it addressed the U.S. embargo on Mexico.[118] The *Dolphin II* panel suggested that if countries were allowed to use trade force, GATT "could no longer serve as a multilateral framework for trade."[119] Neither panel, however, offered empirical support for this proposition. The available evidence would seem to negate the point since GATT remains vibrant despite the long-time use of such environmental trade measures. Moreover, as the United States noted, a panel should not base its report on policy considerations.[120] One cannot have a rules-based trading system if panelists rewrite the rules to match their individual policy preferences.[121]

The panel also determined that a country's use of a trade measure to change a policy in another country cannot be "primarily aimed" at the conservation of an exhaustible natural resource.[122] The panel offered no rationale for this view. It might have reached a different conclusion if it were examining the MMPA against the actual language in Article XX(g), which requires only that a measure be "related" to the conservation of an exhaustible natural resource.

The panel report does not consider the most questionable aspect of the intermediary embargo, namely, conformity with the Article XX headnote rules regarding arbitrary and unjustifiable discrimination. Is it "justifiable" for the United States to ban tuna from a country based on what tuna that country imports? Even if it were justifiable for the United States to ban tuna from the EU to encourage the EU to embargo Mexican tuna, would it be justifiable for the United States to ban tuna from Canada to encourage Canada to ban tuna from the EU in order to encourage the EU to ban tuna from Mexico? GATT must draw a line somewhere. The *Dolphin II* panel missed the opportunity to draw a useful line between the primary and the intermediary embargoes.

Primary Embargo

☐ *Article III.* The *Dolphin II* panel concurred with the *Dolphin I* panel's holding that Article III applies only to product standards. According to the *Dolphin II* report, a country cannot justify distinguishing among tuna products by the "practices, policies and methods" used in producing them.[123] There are several flaws in this reasoning. First, the text of Article III refers to measures "requiring the mixture, processing or use of products in specified amounts or proportions. . . ."[124] It is true that the MMPA embargo provision is an import control and, therefore, does not fit Article III.[125] But by indicating that Article III does not apply to process standards, the panel would preclude other environmental measures, such as the new U.S. law forbidding the sale of dolphin-unsafe tuna, from coverage under Article III.[126]

112. *Id.*, para. 5.25; *see also id.*, para. 5.38.

113. When trade sanctions are imposed, the term "force" has some validity. For example, the MMPA amendments of 1992 provide for a trade sanction against nations that violate a dolphin conservation treaty. *See* 16 U.S.C. §1415(b)(2), ELR STAT. MMPA §305(b)(2). These sanctions have never been imposed.

114. *Dolphin II* REPORT, *supra* note 2, para. 5.26 (emphasis added).

115. Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 211-21 (1992).

116. *Dolphin II* REPORT, *supra* note 2, para. 3.34.

117. *Id.*, para. 5.42.

118. *Dolphin I* REPORT, *supra* note 8, para. 5.27.

119. *Dolphin II* REPORT, *supra* note 2, paras. 5.26 & 5.38. For similar views of other countries, see *id.*, paras. 4.3, 4.12, & 4.34.

120. *Dolphin II* REPORT, *supra* note 2, para. 3.19 (U.S. argument). For examples, see *Dolphin I* REPORT, *supra* note 8, paras. 5.25 & 6.3.

121. *See Dolphin II* REPORT, *supra* note 2, para. 3.65 (U.S. argument).

122. *Id.*, para. 5.27.

123. *Id.*, para. 5.8. Such an approach might preclude an item-specific standard.

124. GATT, *supra* note 1, at 6. In using the term "processing," GATT's authors probably meant the degree of processing rather than the method of processing.

125. *See Dolphin II* REPORT, *supra* note 2, paras. 4.6-.7 (Australia's statements).

126. Some analysts might object to this reasoning on the ground that dolphin-unsafe tuna is not a product. For Mexico's views, see *Dolphin I* REPORT, *supra* note 8, para. 3.16. Attempts to define products in this manner have never been tested in a GATT dispute settlement.

Second, the *Dolphin II* panel presumed that similar products made in environmentally different ways are "like" products.[127] Yet neither the negotiating history of GATT[128] nor recent GATT jurisprudence[129] justify this conclusion. For example, in the U.S. Alcoholic Beverages decision, a GATT panel declared that the regulatory purpose of a trade measure was one consideration in determining the likeness of two products.[130] Moreover, many countries treat similar products as unlike products with different rates of tariff depending on whether the products, carpets for example, are hand-made or machine-made.[131] If similar products may be distinguished by the technological "inputs" to their production, then they may also be distinguished by their natural resource inputs.[132]

Third, the *Dolphin II* panel stated that the safety of dolphins in tuna harvesting cannot have any impact on "the inherent character of tuna as a product."[133] Yet the panel offers no evidence to support this conclusion and did not ask the parties to submit data from surveys of attitudes of U.S. tuna consumers.

The *Dolphin I* and *Dolphin II* panels are the only GATT panels to perceive such broad exclusions in Article III. In recent years, many environmental groups have raised concerns about standards based on "processes or production methods," known as PPMs. They want GATT to permit trade measures based on PPMs.[134] To date, the GATT Council has never ruled against a trade measure because it was a PPM,[135] and countries have been using PPMs for environmental and health reasons long before GATT existed. But if the GATT Council adopts the *Dolphin II* report, the Council would establish a clear GATT rule against such measures. This would be unfortunate since process measures are highly useful for regulating via an ecosystem approach rather than a single species approach.

☐ *Article XX Headnote.* The *Dolphin II* panel's three-part approach to address GATT conformity seems reasonable. By putting the headnote in the final analytical step, however, the panel never reached the disciplines in the Article XX headnote. Given the widespread recognition of the importance of combating nontariff barriers, it would be very useful for panels to consider whether trade measures are "arbitrary" discrimination, "unjustifiable" discrimination, or "disguised" protectionism. Knowing the ability of the Article XX disciplines to function might make developing countries less suspicious about legitimate environmental measures.

☐ *Article XX Tests.* By employing a new test—that trade measures cannot be taken "to force other countries to change their policies"—the *Dolphin II* panel continued the GATT panel tradition of devising new tests for Article XX.[136] The panel also endorsed some of the tests that prior GATT panels invented, including the "least GATT inconsistent" test. Under this test, a measure is deemed "necessary" under Article XX(b) only if it is the least GATT inconsistent approach that is reasonably available.[137] As the U.S. government pointed out, this test has no basis in the text or drafting history of GATT.[138] Moreover, since the test is inherently subjective, lawmakers cannot predict in advance how a panel might rule.

The EU supported the "least GATT inconsistent" test. Its statement that the test does not require a panel to substitute its judgment for that of the plaintiff country, however, is mystifying.[139] The unwillingness of the panel to reconsider the appropriateness of this test is disappointing. As one commentator noted, the "least GATT inconsistent" test "sets an almost impossibly high hurdle for environmental policies because a policy approach that intrudes less on trade is almost always conceivable and therefore in some sense *available*."[140]

The panel also followed the recent GATT practice of interpreting Article XX exceptions "narrowly."[141] Although perhaps appropriate for certain Article XX exceptions, such as the "moral" exception in Article XX(a), the rationale for a narrow interpretation of the environmental exceptions seems weak. In light of the Precautionary Principle,[142] the panel might have championed an expansive interpretation

127. If they are not like products, then the Article III discipline would not apply.

128. *See* Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 8 TUL. ENVTL. L.J.__ (1994) (forthcoming).

129. *See* Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 75-76, 87 n.135 (1992). *See also* GATT, JAPAN—CUSTOMS DUTIES, TAXES, AND LABELLING PRACTICES ON IMPORTED WINES AND ALCOHOLIC BEVERAGES, para. 5.7 (adopted Nov. 10, 1987) BISD 34S/83 (discussing objective and subjective criteria for likeness); GATT, CANADA/JAPAN: TARIFF ON IMPORTS OF SPRUCE, PINE, FIR (SPF) DIMENSION LUMBER, paras. 5.8-5.10 (adopted July 19, 1989) BISD 36S/167 (discussing tariff differentiation).

130. GATT, UNITED STATES—MEASURES AFFECTING ALCOHOLIC AND MALT BEVERAGES, para. 5.25 (adopted June 19, 1992) BISD 39S/206.

131. For example, see HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, §5702.51.20 & .40 (1994). *See also* CUSTOMS COOPERATION COUNCIL, HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM, §5804 (1987) (regarding mechanically made versus hand-made lace).

132. Neither machines nor dolphins are ingredients. They are not physically incorporated into the carpets or tuna. But their use is intrinsic to the production process. Note that inputs are often capable of substitution. For example, one can imagine that a sonar machine sensing when tuna swim near a fishing vessel could replace the "service" that dolphins provide.

133. *Dolphin II* REPORT, *supra* note 2, para. 5.9.

134. The Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade both apply new disciplines to PPMs "related" to the product. Neither would apply to laws like the MMPA.

135. In 1952, GATT did rule against a tax that was based on the government policy of the exporting country. *See* GATT, BELGIAN FAMILY ALLOWANCES (adopted Nov. 7, 1952) BISD 1S/59. In 1992, GATT ruled against a tax credit based on a brewery's size. *See* GATT, UNITED STATES—MEASURES AFFECTING ALCOHOLIC AND MALT BEVERAGES para. 5.19 (adopted June 19, 1992) BISD 39S/206. That panel declared that even if the tax credit were available to foreigners, beer that a small brewery produces is a "like" product to beer that a large brewery produces.

136. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE, Oct. 1991, at 48-51.

137. *Dolphin II* REPORT, *supra* note 2, para. 5.35.

138. *Id.*, para. 3.64. Ironically, it was the Bush Administration that originally advocated this test for Article XX(b).

139. *Id.*, para. 3.73. According to the EU, the reasonableness inherent in the interpretation of "necessary" is not a test of what was reasonable for a government to do, but of what a reasonable government would do.

140. *See* ESTY, *supra* note 77, at 48, 222.

141. *Dolphin II* REPORT, *supra* note 2, paras. 5.26 & 5.38. The panel did not explicitly assign the burden of proof to the United States.

142. The "precautionary principle" suggests that in the face of scientific uncertainty and potentially great environmental harm, policymakers should err on the side of too much protection rather than too little. James Cameron & Julie Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L. & COMP. L. REV. 1 (1991).

of Article XX(b) and XX(g). Alternatively, the panel might have shunned both extremes and sought to interpret these exceptions cogently.

☐ *Extrajurisdictionality.* The panel approached the extrajurisdictionality question properly.[143] Since the text of Article XX does not suggest any geographical limit, and since other parts of GATT presume extrajurisdictionality,[144] the panel presumed that GATT does not prohibit extrajurisdictionality. The panel then commendably brought the norms of international law into GATT, using the tools of treaty interpretation to validate or negate this presumption.

In contrast to the *Dolphin I* panel, which read too much into GATT's negotiating history,[145] the *Dolphin II* panel read too little. The panel easily could have given itself more reasons to support its decision. Indeed it should have teased far more from the historical record than it did.

For example, the Vienna Convention's general rules of interpretation state that a treaty shall be interpreted "in light of its object and purpose."[146] Exception clauses exist in trade treaties to permit certain practices that would otherwise violate such treaties. In determining an exception's scope, it seems reasonable to examine the laws in effect[147] at the time the trade treaty was written. For example, the Netherlands enacted a law in 1936, prohibiting the importation of certain European wild birds,[148] and in 1937, Great Britain enacted the Quail Protection Act to prohibit the importation of live quail.[149] Both laws were in force when GATT was written, violate GATT Article XI, and could only be GATT-consistent if Article XX were extrajurisdictional. The panel, however, seems to have viewed Article XX as detached from the political realities surrounding GATT's inception in 1947. This is an odd way to interpret any treaty. It is especially odd for a set of treaty exceptions.

The panel failed to appreciate several of the U.S. arguments that relied on the Vienna Convention's general rules of interpretation. The Convention states that one context for interpretation is any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation.[150] The United States noted that notwithstanding GATT, many GATT members have negotiated numerous international environmental agreements that call for extrajurisdictional trade measures without drawing any objections from GATT members.[151]

The EU countered that many of the environmental treaties the United States pointed to were not extrajurisdictional.[152] The EU did not claim that CITES was not extrajurisdictional, but instead argued that it might supersede GATT as *lex posterior*, or as *lex specialis*.[153] The panel found that the treaties the United States cited could not be taken as "practice" under GATT.[154]

There is another example of GATT practice that the United States could have brought to the panel's attention. In 1972, GATT created a Group on Environmental Measures and International Trade whose purpose was to examine "any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment. . . ."[155] Later that year, the United States enacted the MMPA, which contained an import ban. Over the next 18 years, numerous environmental laws and treaties that contained extrajurisdictional trade measures went into force.[156] Yet no GATT member sought to convene the Group to discuss any of these, and no GATT member pursued a formal complaint until Mexico did in 1991. If it had been clear to all GATT members that Article XX was exclusively jurisdictional, one might think that as each new law or treaty was approved, at least one GATT member would have raised concerns; yet none did.

The Vienna Convention's supplementary rules of interpretation state that a treaty may be interpreted in accordance with its preparatory work to determine meaning when the general rule of interpretation "leaves the meaning ambiguous or obscure."[157] The United States traced the history of GATT Article XX and showed that the Article was well-anchored in similar exceptions in previous trade treaties.[158] In particular, the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927 had provided an exception for import bans to prevent "extinction."[159] The United States also noted that several environmental treaties in the decades before GATT had employed trade measures to protect migratory animals or animals living in the global commons.

In response, the EU argued that the exception in the 1927 treaty was a "normal" phytosanitary provision and that measures to protect extrajurisdictional resources were not "regarded

143. The *Dolphin II* panel did not use the word "extrajurisdictional" in its findings.

144. *See Dolphin II* REPORT, *supra* note 2, para. 3.16. As the United States noted, there are no GATT Articles that support a jurisdictional limitation. *See id.*, para. 3.18. For the EU response, see *id.*, para. 3.35.

145. *See* Stephen J. Porter, *The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?* 5 GEO. INT'L ENVTL. L. REV. 91 (1992). Mr. Porter notes that "the panel rewrote Article XX so as to be surplusage." *See id.* at 10; Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEGAL STUD. 273, 285 (1994) (criticizing the panel's conclusion that Article XX contains geographic limits).

146. Vienna Convention on the Law of Treaties, *supra* note 93, art. 31(1).

147. For a discussion of some of these laws, see Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1 (1993).

148. Birds Act, 1936, art. 7 (on file with author).

149. The Quail Protection Act, 1937, 1 & 2 Geo. 6, ch. 5, §§1-2 (repealed) (Eng.).

150. Vienna Convention on the Law of Treaties, *supra* note 93, art. 31(2b).

151. For example, CITES, did not ring any alarms in GATT even though CITES protects species in countries that are not party to CITES. Since CITES has the words "international trade" in its title, one can presume that GATT members had taken note of it.

152. *Dolphin II* REPORT, *supra* note 2, para. 3.39. The EU's argument is plausible with regard to the Convention Relative to the Preservation of Fauna and Flora in their Natural State, Nov. 8, 1933, 172 L.N.T.S. 241, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 161 U.N.T.S. 193.

153. *Dolphin II* REPORT, *supra* note 2, para. 3.41. The EU did not address the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649. The extrajurisdictional trade measures in this treaty apply only to nonparties. Thus, the trade measures it contains cannot supersede GATT as a subsequent agreement among states.

154. *Dolphin II* REPORT, *supra* note 2, para. 5.19.

155. GATT Doc. L/3622/Rev. 1. (Jan. 14, 1972).

156. For example, in 1983, the EU banned the importation of baby seal skins. Council Directive 83/129, 1983 O.J. (L 91) 30.

157. Vienna Convention on the Law of Treaties, *supra* note 93, art. 32.

158. For background on this history, see Charnovitz, *supra* note 136, at 37-40.

159. Nov. 8, 1927, 97 L.N.T.S. 405, art. IV and Protocol Ad art. IV.

at that time as normal."[160] With regard to pre-GATT bilateral and multilateral environmental treaties, the EU suggested that these were merely "mutual help" treaties with "no intent expressed to protect resources outside the importing party's territory."[161]

Evidence rebutting the EU's claim is abundant. There were several pre-GATT treaties that included extrajurisdictional trade measures. For example, the Convention of 1902 for the Protection of Birds Useful to Agriculture banned imports of listed species.[162] The Convention of 1911, which provided for the Preservation and Protection of Fur Seals, banned fur imports taken from the North Pacific Ocean.[163] The Convention of 1946 for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish banned the landing of certain fish that were shorter than the prescribed size.[164]

Regarding post-GATT treaties, the EU stated that there was no "clear indication" that the International Convention (of 1950) for the Protection of Birds[165] applied to imports from all sources.[166] Yet this treaty applies to "all birds."[167] The United States also pointed to other conservation agreements to buttress its argument that there were several treaties contemporary to GATT that required trade restrictions to safeguard resources beyond the border of the importing country. The EU argued that the panel should disregard the conservation agreements the United States listed on the ground that these agreements did not contain measures "that other countries had not agreed to."[168] The EU confuses whether a treaty applies to nonparties, as CITES does, with whether a treaty is extrajurisdictional, such as the Bird Treaty.

The panel held that the pre-GATT treaties that the United States cited were of little assistance because neither the International Trade Organization (ITO) Charter nor the GATT preparatory work directly referenced them.[169] But the ITO Charter does refer to intergovernmental agreements that relate "solely to the conservation of fisheries resources, migratory birds or wild animals."[170] Moreover, the preparatory work includes several direct discussions of "international fisheries or wildlife conservation agreements."[171] It is unclear why the panel did not draw inferences from these discussions. Perhaps the panel was unaware of this history.[172] But this seems unlikely because the panel had an unusually long period of time to examine GATT's documentary history. Since the GATT Secretariat is responsible for assisting the panel on the legal and historical aspects of any dispute,[173] it would be helpful for the GATT Council to inquire what legal advice the Secretariat gave the panel.

In summary, the panel reached the proper conclusion about the extrajurisdictionality of Article XX. This was a brave stance for the panel since virtually all of the trade policy community holds to the opposite conclusion. But because the panel discounted the historical evidence that the United States presented, did not fully substantiate its decision, and instead based its decision on the thinnest of reasons, a future panel could find it easy to render the opposite ruling.

☐ *Alternative Interpretation of the Panel's Decision on Extrajurisdictionality.* Suppose that U.S. law banned tuna from countries that did not require their fishing vessels to follow the standards of the International Labour Organization regarding health measures for crews.[174] A scofflaw country would be able to argue that the health of its seamen is a matter for its own government's jurisdiction. By contrast, the dolphins in the ocean do not belong to any country. Therefore, a country affected by an MMPA primary embargo is on weak ground in arguing that its killing of dolphins on the high seas is a matter for its own government's jurisdiction.

According to the panel, the MMPA aims "to force other countries to change their policies with respect to persons and things within their own jurisdiction. . . ."[175] This is a peculiar description for a law designed to protect dolphins in the ocean. While some of the ETP lies within the territorial limits of surrounding countries, over 70 percent of it is in the global commons, i.e., the high seas.

It is difficult to understand the panel's apparent confusion about where the dolphins were being killed. Perhaps the panel did not mean to contradict *Dolphin I.* The *Dolphin II* panel observed that under international law, states may regulate the conduct of "their" nationals or vessels with respect to natural resources outside of their territory.[176] Therefore, perhaps the panel was simply saying that with regard to extrajurisdictionality, the United States may regulate harvesting by American fishing vessels on the high seas and may ban "imports" from U.S. fishermen or fishing vessels.[177]

160. *Dolphin II* REPORT, *supra* note 2, para. 3.45. The EU offered no evidence for its view of normality.

161. *Id.*, paras. 3.39-.40. The United States responded that all treaties are mutual help agreements. *See id.*, para. 3.22.

162. Mar. 19, 1902, 191 C.T.S. 91, art. II.

163. July 7, 1911, 214 C.T.S. 80, art. III. *See Dolphin II* REPORT, *supra* note 2, para. 3.29. The treaty also banned the import of seal skins taken on land unless officially certified.

164. Apr. 5, 1946, 231 U.N.T.S 200. Of the 11 signatories to the treaty, five were original members of GATT. Note that this treaty was concluded and ratified contemporaneously with GATT's creation.

165. Oct. 18, 1950, 638 U.N.T.S. 187.

166. *Dolphin II* REPORT, *supra* note 2, para. 3.39.

167. Oct. 18, 1950, 638 U.N.T.S. 187, art. 2. *See Dolphin II* REPORT, *supra* note 2, paras. 3.21-.22.

168. *Dolphin II* REPORT, *supra* note 2, para. 3.40.

169. *Id.*, paras. 5.20 & 5.33. For the U.S. arguments, see *id.*, para. 3.22.

170. ITO Charter, Mar. 24, 1948, arts. 45(1)(a)(x) & 70(1)(d), U.N. Doc. E/CONF. 2/78. For an examination of treaties that GATT's authors might have been referring to, see the section on marine resources in *Experience Under Intergovernmental Commodity Agreements, Exhibit XIII, Hearings on the International Trade Organization Before the Senate Committee on Finance*, 80th Cong., 1st Sess. 1327-41 (1947).

171. *See, e.g., U.N. Conference on Trade and Employment, Summary Record of the Fifth Committee, Seventh Meeting*, 2-4, U.N. Doc. E/Conf.2/C.5/SR.7 (1947), where the delegate from Norway explained that "fisheries and wildlife agreements were regional and often bilateral in character, and entered into by the interested nations on the basis of biological and oceanographic evidence that the resources were declining." *See also Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment, Commission B, Summary Record*, at 14, U.N. Doc. E/PC/T/B/SR/27 (1947). These documents are referred to in an article cited in the First Submission of the United States to the panel, at note 82 (on file with the USTR).

172. *Dolphin II* REPORT, *supra* note 2, para. 5.20. The panel stated that no "direct" references were made to such treaties in the preparatory work.

173. *See* GATT, Ministerial Declaration of Nov. 29, 1982, Decision on Dispute Settlement, para. iv, BISD 29S/13.

174. *See, e.g.*, ILO Convention Concerning Crew Accommodation on Board Ship No. 92, June 18, 1949, 160 U.N.T.S. 223.

175. *Dolphin II* REPORT, *supra* note 2, para. 5.24. This is not just a loosely written sentence. Similar language can be found in paragraphs 5.25-.26, 5.37-.38 & 5.42 of the *Dolphin II* report.

176. *Id.*, paras. 5.17 & 5.32.

177. *See id.*, paras. 5.20 (last sentence) & 5.33 (same).

If so the extrajurisdictionality allowed under the *Dolphin II* report is empty. An import embargo designed to protect a species in the ocean or in another country's forest could never be GATT-legal. Such an interpretation, however, would be "manifestly absurd"[178] because no country would need Article XX to justify a regulation on the landing of fish by its own nationals.[179] The GATT Council should ask the panel to clarify its point in the upcoming debate.

☐ *Intermediary Versus Primary.* As with the intermediary embargo, the *Dolphin II* panel perceived the existence of trade "force" in the primary embargo and criticized it on the same basis. As a pivotal point in the report, the panel's analysis deserves close examination.

After correctly noting that the U.S. embargo on Mexico might also extend to some tuna that was caught in a dolphin-safe way, the panel stated that "*as in* the case of the intermediary nation embargo," the primary embargo "could not possibly, by itself, further the United States conservation objectives."[180] Yet this analogy to the intermediary embargo is flawed. Even assuming that the intermediary embargo could not possibly further U.S. conservation objectives, this would not be a logical inference for the primary embargo. It is true that the embargo does not necessarily further U.S. conservation objectives. But in view of the sharp drop in dolphin deaths since 1991, it seems reasonable to infer that the MMPA program played a positive role and that the panel's statement that the primary embargo could not possibly work is wrong.

Perhaps the panel was trying to make a philosophical point—namely that the embargo could not, "by itself," achieve conservation. It is easy to imagine an environmental trade measure that does, by itself, achieve a health effect. For example, if diseased meat or a polluting car is stopped at the border, that will prevent harm to human health and the environment. But if the panel was suggesting that those are the only kinds of environmental trade measures that can qualify under Article XX, then its judgment has profound implications. Consider an embargo on the importation of animal "trophies," feathers, or skins. By itself, such an embargo cannot have any ecological impact since the animal is already dead. The panel offered no explanation for why it seeks to unlink actions from their consequences.

The panel neglected other significant differences between the intermediary and primary embargoes. For example, while the intermediary embargo might be described as a attempt to get "other countries to change their policies within their jurisdiction [e.g., their customs laws],"[181] the primary embargo should not be described in this way.[182] Many of the dolphins at issue live in the high seas and thus are in no country's jurisdiction. Had the panel been more careful in distinguishing the intermediary and primary embargoes, its report would have been more useful.

☐ *Trade Force.* The panel hypothesized that the primary embargo was "taken so as to force other countries to change their policies. . . ."[183] The United States pointed out that this is a mischaracterization.[184] Certainly, the MMPA does not involve force in a military sense; the United States did not board Mexican ships to stop dolphin killing.[185] Nor is it force in a regulatory sense;[186] the United States did not attempt to apply American law extraterritorially.[187] What the primary embargo does aim to do is prevent U.S. consumers from aggravating the dolphin problem by buying tuna from Mexico.[188]

Perhaps the most far-reaching argument in the panel's report is that a trade measure must be *effective* to qualify for the Article XX exceptions. To have a positive impact, an embargo must change foreign policy. By inference the panel suggests that since the effectiveness of an embargo depends on foreign behavior, the embargo cannot be "primarily related to" conservation or "necessary" to protect health.[189]

The notion that trade measures have to be effective to be GATT-consistent is a novel one for GATT jurisprudence (and a new Article XX test). It would certainly have a salutary effect if applied to other GATT provisions—such as Article II;7, which permits ineffective tariffs; Article VI:1, which permits ineffective antidumping laws; and Article XI:2(c), which permits ineffective agricultural quotas.[190] But it is a bit chimerical for GATT to apply the effectiveness test only to environmental measures and to wink at so many fruitless, protectionist trade measures.

It is evident that MMPA embargoes have proven effective in reducing dolphin mortality in the ETP.[191] The panel took no notice of that. Rather, it wanted the United States to dismantle its law because the law's effectiveness is linked to other countries' responses. The panel failed to consider how its decision may be self-fulfilling. By encouraging nations to resist environmental trade measures, the panel's report will prove counterproductive. For example, remember that Mexico appeared more interested in lodging a legal challenge in GATT in 1991, than in cooperating with other countries to erect a new dolphin protection regime.[192]

178. *See* Vienna Convention on the Law of Treaties, *supra* note 93, art. 32(a).

179. GATT rules do not apply to domestic commerce.

180. *Dolphin II* REPORT, *supra* note 2, para. 5.24 (emphasis added); *see also id.*, para. 5.37.

181. *Id.*, para. 5.38.

182. *Id.*, paras. 5.24, 5.37, & 5.42.

183. *Id.*, para. 5.24.

184. *Id.*, para. 3.12.

185. By contrast, Canada is currently raiding foreign fishing vessels, including U.S. vessels, outside of its 200-mile limit to prevent salmon fishing. *See* Charles Truehart, *American or Canadian? Whose Salmon Is It Anyway?*, WASH. POST, Aug. 14, 1994, at A29. Ironically, Canada persistently objects to the "unilateralism" of the MMPA tuna embargoes.

186. *See Dolphin II* REPORT, *supra* note 2, para. 3.18 (last sentence).

187. *See* Betsy Baker, *Eliciting Non-Party Compliance With Multilateral Environmental Treaties: U.S. Legislation and the Jurisdictional Bases for Compliance Incentives in the Montreal Ozone Protocol*, 35 GERMAN Y.B. INT'L L. 333, 355-56 (describing the jurisdictional basis for the MMPA as territorial and prescriptive).

188. "It is the policy of the United States to . . . ensure that the market of the United States does not act as an incentive to the harvest of tuna caught in association with dolphins or with driftnets." 16 U.S.C. §1411(b)(3), ELR STAT. MMPA §301(b)(3).

189. *Dolphin II* REPORT, *supra* note 2, paras. 5.27 & 5.39.

190. One might imagine Haiti, which is the only GATT member that has ever accepted its obligations definitively, protesting as GATT-illegal the sanctions that the United Nations has recently imposed on the ground that they are ineffective in changing that rogue government's domestic policies and practices.

191. *Id.*, para. 3.69. Mexico reduced its kill rate by 85 percent between 1986 and 1992. *See Must Try Harder*, THE ECONOMIST, Aug. 21, 1993, at 22. *See also* Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 U. COLO. L. REV. 513, 521 (1993).

192. *See supra* text accompanying notes 36-48.

The panel's interpretive approach is unsound when one considers that as global interdependencies increase, all national policies will increasingly depend on sympathetic responses from other countries.[193] It is already hard enough to secure international environmental agreements.[194] The panel's dictum would make it harder by outlawing trade measures that have proven instrumental in promoting environmental cooperation.[195]

The panel declared that employing trade measures to get "other countries to change their policies" is illegitimate under GATT.[196] The notion that GATT does not permit countries to use economic "force" to change policies in other countries is a surprising one. Many provisions in GATT involve such economic pressure. For example, GATT permits countervailing duties to offset subsidies that foreign governments grant.[197] The purpose of such unilateral action is to dissuade foreign governments from granting subsidies and to provide a level trading field.

Many trade measures can engender changes in foreign behavior. Virtually every product standard has an element of "force" to it. For example, a standard requiring catalytic converters may "force" foreign automakers to retrofit their assembly lines. A standard requiring that apples be free of harmful pesticides may "force" foreign farmers to switch the pesticides they spray. Countries can also use import bans to change foreign behavior. For example, a ban on the importation of animal skins is intended to provoke changes in the wildlife conservation practices of individuals in exporting countries. This ban can only be effective if it elicits changes in the foreign country. A ban on the importation of chlorofluorocarbons (CFCs) from countries that are not parties to, or do not comply with, the Montreal Protocol's[198] rules might also be viewed as aiming to secure changes in the policies of other governments regarding CFC production that are clearly within their jurisdiction. Since such import bans violate GATT Article XI, the panel's logic suggests that they are GATT illegal because they could not qualify for Article XX.

Process standards can also elicit changes in policies and practices followed in other countries. For example, New Zealand bans the landing of "any fish or marine life taken using a driftnet."[199] The panel's logic suggests that such a process standard is illegal. Consider the new U.S. law forbidding the sale of dolphin-unsafe tuna. The panel correctly noted that the primary embargo forbids imports of any tuna from certain countries "whether or not the particular tuna was harvested in a way that harmed or could harm dolphins."[200] But the new law does not suffer that fault. Some commentators believe that this law comes close[201] to being GATT-legal.[202] But under *Dolphin II*, a GATT panel would probably disallow it as a measure designed to change practices in other countries.

This ambiguity[203] in the report has already been subject to different interpretations.[204] Certainly, the panel was objecting to measures that are based on government policies, such as the intermediary embargo.[205] In addition, it seems that the panel was objecting to measures that are based on industry production practices, such as the MMPA embargo on Mexico.[206] It is unclear whether the panel also would have objected to item-specific standards that might lead to changes in the production of or characteristics of products. If not, the new ban on the sale of dolphin-unsafe tuna could pass GATT muster.

Environmental Separatism

In its concluding observations, the panel suggested that the "validity" of the U.S. environmental objectives was not at issue.[207] In reality, however, the panel did question the validity. Existing U.S. legislation indicates that the United States wants to protect dolphins and to prevent fishers from setting nets on them. The panel stated that the U.S. Congress can seek this objective from U.S. nationals, but not from others. Since countries share the ETP, however, the United States cannot possibly achieve its dolphin safety objectives if it ignores the fishing practices of other countries. The recent physical clashes over depleted fisheries highlight the impracticality of divided governance of the oceans.[208]

In addition, the panel implied that problems in the global commons can be addressed by having each nation regulate the conduct of its own nationals. Such a view was considered quaint 25 years ago. Yet it seems more outdated today, when the production process for tradable goods is often subcontracted among many different countries and corporations transcend any one nationality. Even if the *Dolphin II* report represented sound trade law, it would be unresponsive to the realities of global production.

193. *See* Steve Charnovitz, *We Can Abide by Global Rules*, L.A. TIMES, July 18, 1994, at A11.

194. Recently Japan proposed that the International Commission for the Conservation of Atlantic Tunas (ICCAT) ban bluefin tuna imports from non-ICCAT nations. But the EU opposed this since some of its member countries have not joined the ICCAT. *See* Peter Weber, *Net Loss: Fish, Jobs, and the Marine Environment*, 120 WORLD WATCH (unpublished paper), 49-50 (1994).

195. Some would say that these measures are permitted only to reestablish a commercial equilibrium. But GATT has no provisions for reestablishing an environmental equilibrium.

196. *See, e.g., Dolphin II* REPORT, *supra* note 2, paras. 5.25, 5.27 & 5.37-.39.

197. GATT, *supra* note 1, arts. II:2b and VI:3, at 3, 10.

198. Montreal Protocol on Substances That Deplete the Ozone Layer, art. IV, Sept. 16, 1987, 26 I.L.M. 1541 and 30 I.L.M. 157.

199. An Act to Prohibit Driftnet Fishing Activities and to implement the Convention to Prohibit Driftnet Fishing With Long Driftnets in the South Pacific, Apr. 19, 1991, 31 I.L.M. 218, §8.

200. *Dolphin II* REPORT, *supra* note 2, para. 5.24.

201. The definition of "dolphin-safe tuna" raises potential GATT problems because the fishing and observer rules vary for different oceans. *See* 16 U.S.C. §1417(d), ELR STAT. MMPA §307(d). A panel would have to determine whether such geographic distinctions are in accord with GATT Article I:1 or the Article XX headnote.

202. Australia seems to imply that the new law might be GATT-legal. *See Dolphin II* REPORT, *supra* note 2, para. 4.5.

203. One reason for the confusion is the *Dolphin II* panel's vague use of the word "country." The report is often unclear as to whether the panel is referring to an action by a government or by private producers.

204. *See, e.g.*, Donald M. Goldberg, *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash With Free Trade*, CIEL BRIEF, June 1994; GATT Secretariat, *Report on the GATT Symposium on Trade, Environment, and Sustainable Development*, June 10-11, 1994, GATT DOC. TE/008, at 9, 13.

205. *See Dolphin II* REPORT, *supra* note 2, paras. 5.25-.27, 5.38-.39 & 5.42 (regarding policies). In assessing the GATT legality of government policy measures, one must consider how much conditional most-favored nation treatment is permitted under Article XX.

206. *See id.*, paras. 5.23-.24, 5.36-.37 (regarding policies and practices).

207. *Id.*, para. 5.42. For a similar remark, see *Dolphin I* REPORT, *supra* note 8, para. 6.1.

208. Anne Swardson, *Net Losses: Fishing Decimating Oceans "Unlimited" Bounty*, WASH. POST, Aug. 14, 1994, at A1.

Multilateralism

Although some commentators have suggested that the *Dolphin II* judgment should be read as upholding multilateral trade measures while criticizing unilateral measures, such reasoning is not in the report. It appears that the *Dolphin II* panel abandoned the argument made in the *Dolphin I* report that the MMPA was not "necessary" because an international treaty would have done the job. Without even offering a rationale, the *Dolphin II* panel rejected new MMPA provisions that provide trade penalties for violations of international agreements.[209] The argument that an environmental trade measure should not be trying to change foreign policies or practices is just as apt (actually inapt) for a multilateral trade measure as for a unilateral one. Thus, the *Dolphin II* report did not turn on the issue of unilateralism.[210]

Summary

The *Dolphin II* report is unconvincing in its application of historical precedent, GATT negotiating history, and the facts of the dispute. On some issues, its standard of proof seems too low, e.g., whether the primary embargo could not possibly further the objective of dolphin safety. On other issues, its standard of proof seems too high, e.g., whether the diplomats who wrote GATT were aware of conservation treaties in existence at the time. The report is often prone to exaggeration.[211]

Some may perceive the *Dolphin II* report as representing significant progress. But such an assessment seems unwarranted. In fact, the inadequate judgments of two successive panels lead one to question whether there might be something fundamentally wrong with GATT's adjudicatory process.

Environmental Disputes and GATT

GATT Panels

The *Dolphin II* panel was composed of high caliber individuals,[212] which led many observers to hope for a constructive decision. A blue ribbon panel, however, does not guarantee a sound panel report. The panel had the opportunity to correct the *Dolphin I* panel's legal mistakes, but did not. The panel also had the opportunity to consider fully the implications of its decision for other environmental trade measures, but did not.

Part of the problem is that the GATT judicial process is highly insular. Panels conduct hearings that are closed to the public, and in the case of the *Dolphin I* and *Dolphin II* panels, do not permit experts, for example a marine biologist, to testify.[213] Behind these closed doors, governments have license to present ill-conceived arguments.

Moreover, only governments may present arguments to a panel. A nongovernmental organization may not intervene with an amicus brief or correct mistakes made by the plaintiff, or the defendant, government. Other governments not party to the dispute may make presentations to the panel, but cannot otherwise listen to the proceedings.

Normally, a panel report remains secret until it is adopted. In recent years, GATT reports, including the *Dolphin I* report, have been leaked. For the *Dolphin II* report, USTR Kantor announced that he would disclose the report to the public.[214] Kantor also wrote to GATT Director-General Peter Sutherland requesting that the GATT Council debate on *Dolphin II* take place in an open meeting that would allow nongovernmental organizations to participate.[215] The GATT Council categorically rejected this request,[216] with the EU indicating that it did not have the slightest sympathy for an open hearing.[217]

GATT panels also suffer from weak composition. The panels are typically unbalanced. The three panelists are almost always men,[218] and are always drawn from the GATT community. Panelists are generally trade attorneys, law professors, or current government officials, but are not professional judges. As such, GATT panelists bring a narrow, GATT-centric perspective to their task.[219] If the *Dolphin II* panel had included some regulators or scientists, it might have pointed out the myopia in the view that the primary embargo "could not possibly, by itself, further the United States objective of protecting the life and health of dolphins."[220] It might also have examined the embargo in connection with its economic effects.

The panel's role is to determine whether a trade measure violates GATT. The panel is not supposed to alter GATT obligations.[221] But there has been a disturbing tendency of GATT panels to rewrite Article XX.[222] In-

209. *See Dolphin II* REPORT, *supra* note 2, para. 6.1.

210. Indeed, "unilateral" is not mentioned in the *Dolphin II* report.

211. For example, the panel stated that it had used the "recognized methods" of treaty interpretation, but that "none" of them lent "any" support to the view that Article XX would permit trade embargoes to achieve environmental objectives in the jurisdiction of another country. *See id.*, para. 5.42.

212. The chair of the panel was George A. Maciel, Brazil's former Ambassador to the United Nations agencies in Geneva and to GATT. During the Uruguay Round, he was chairman of the negotiating group on safeguards. In 1976, he was Chairman of the GATT Council. The *Dolphin II* panel also included Winfried Lang and Alan Oxley. Mr. Lang is Austria's Ambassador to the United Nations agencies in Geneva and to GATT and is a leading scholar of international environmental law. He presided over the conference that wrote the Montreal Protocol. Mr. Oxley was Australia's Ambassador to GATT and representative to the United Nations Conference on Trade and Development. He also served as Chairman of the GATT Council in 1987.

213. But panels can call in experts from international organizations. *See* GATT, *supra* note 1, art. XXIII:2, at 39.

214. Kantor was required to do so under previous court order. *See* Public Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385 (D.D.C. 1992). This action drew a quick rebuke from the government of Canada, which opposes public disclosure. *See U.S. to Seek Negotiations With EU Over Pending Expansion*, INSIDE U.S. TRADE, June 24, 1994, at 6.

215. *Kantor Letter to Sutherland*, INSIDE U.S. TRADE, June 17, 1994, at 6.

216. *See* John Zarocostas, *GATT Snubs U.S. Request to Open Tuna-Dolphin Debate to Public*, J. COM., July 21, 1994, at 8A.

217. *See Mexico Calls for End to Tuna Ban But Delays Call for Panel Adoption*, INSIDE U.S. TRADE, July 22, 1994, at 5-6.

218. There were no women on the *Dolphin I* or *Dolphin II* panels. Indeed, no woman has served on any GATT panel considering an environmental issue.

219. The *Dolphin II* panel contained one member with strong environmental credentials, but panels use majority rule.

220. *Dolphin II* REPORT, *supra* note 2, para. 5.37.

221. GATT, Ministerial Declaration of Nov. 29, 1982, Decision on Dispute Settlement, para. x, BISD 29S/13. See also the points the United States made in *Dolphin II* REPORT, *supra* note 2, paras. 3.11 & 3.32.

222. *See* Charnovitz, *supra* note 136, at 37, 47-55.

stead of exercising judicial restraint, the panels have been activists in creating new "rights" for exporters and, hence, obligations of importers.[223]

Uruguay Round Changes

During the Uruguay Round, GATT-member countries agreed to several changes in the GATT adjudication process that will have an impact in environmental cases.[224] Under current GATT procedures, a panel is limited to rendering a decision recommending to the GATT Council that the Council request the defendant country to bring the trade measure into conformity with GATT. A plaintiff country may only impose retaliatory trade sanctions if the GATT Council approves the recommendation by consensus and the defendant country does not conform its law to GATT rules.[225]

Under the new rules, a panel report is automatically approved unless the Council rejects it by consensus.[226] If the defendant country does not change its law to conform with GATT, the plaintiff may retaliate.[227] For example, if a law like the MMPA is found to violate GATT, a complaining country like Mexico would be able to use trade sanctions to try to force the United States to admit Mexican tuna. These changes will affect all countries, but especially the United States, which since 1980 has been a GATT defendant more often than the EU or any country.[228]

A defendant country can avoid retaliation through negotiated settlement. But a settlement may not provide optimal results. For example, although from an economic welfare perspective there is nothing objectionable about a defendant country lowering its own tariffs, such compensation is objectionable in principle if a defendant country working to safeguard the environment has to compensate countries that are not. Moreover, as tariffs go to zero, it will be harder for defendant countries to find a tariff to lower. Eventually compensation will come in some other form, like cash.

Both GATT *Dolphin* panels sought to soften the impact of their decision by noting that GATT contains a waiver mechanism for situations when a law violates GATT.[229] Under current rules, such a waiver requires a two-thirds majority vote.[230] The Uruguay Round raises the hurdle for obtaining such a waiver by requiring three-quarters of all member nations to approve the waiver.[231]

The United States as Defendant

The USTR has never successfully defended a U.S. environmental regulation or import ban in a GATT lawsuit.[232] In recent years, the USTR has been criticized for threatening trade sanctions under §301 of the Trade Act of 1974,[233] insisting on "voluntary" quotas, and seeking "results-oriented" trade policies. Such unilateral action may have undermined the credibility of the USTR before GATT panels. Indeed, one of the *Dolphin II* panelists explained publicly that "There are pressures inside the United States for the U.S. to apply its unilateral approach to trade policy to environmental policy."[234] Given the USTR's unpopularity in other countries, the President should consider assigning another agency, such as the U.S. Department of Justice, to represent U.S. interests in GATT proceedings.[235]

No matter who defends U.S. laws in GATT, the USTR needs to upgrade its environmental diplomacy. Not one of the six countries that made presentations to the *Dolphin II* panel supported the United States.[236] The USTR has been remarkably ineffective at gaining foreign support, assuming it has tried. The Clinton Administration may have committed a tactical blunder in early 1994, when it announced a set of principles for when unilateral environmental trade measures might be warranted.[237] These principles seem to exclude MMPA embargoes.

The European Union as Plaintiff

The EU's positions in both the *Dolphin I* and *Dolphin II* cases were inconsistent with other EU policy. Although the EU purported to defend open trade in the *Dolphin II* case, the EU has imposed its own quotas on canned tuna.[238] Unlike the U.S. tuna embargo, which is designed to protect dolphins, the EU action is designed to protect commercial interests.

In other instances, the EU has implemented actions akin to those it decried in *Dolphin II*. Although the EU opposes U.S. unilateralism, the EU has enacted its own similar, unilateral measures for environmental purposes. For example, the forthcoming EU ban on furs caught in countries that do not prohibit the use of leghold traps is a government policy control. It applies not only to furs killed in an inhu-

223. *See Dolphin I* REPORT, *supra* note 8, para. 5.27; *Dolphin II* REPORT, *supra* note 2, para. 5.26.

224. Other reforms included: A new standing appellate body, a method for constituting expert review groups, and a requirement that every party make available a nonconfidential summary of its pleadings.

225. *See supra* p. 10568.

226. OFFICE OF USTR, ISBN 0-16-045022-5, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS GENERAL AGREEMENT ON TARIFFS AND TRADE, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, arts. 16.4 & 17.14 (1994).

227. *Id.*, art. 22.

228. The United States has also been the most active GATT plaintiff.

229. *See Dolphin I* REPORT, *supra* note 8, para. 6.3; *Dolphin II* REPORT, *supra* note 2, para. 5.43; GATT, *supra* note 1, art. XXV:5, at 44.

230. GATT, *supra* note 1, art. XXV:5, at 44. In addition, a majority of all GATT members must support the waiver.

231. Agreement Establishing the World Trade Organization (WTO), *supra* note 226, art. IX:3.

232. The United States has lost three cases, *Dolphin II*, *Dolphin I*, and UNITED STATES—PROHIBITIONS OF IMPORTS OF TUNA AND TUNA PRODUCTS FROM CANADA (adopted Feb. 22, 1982) GATT, BISD 29S/91. The United States did successfully defend an environmental tax. GATT, UNITED STATES—TAXES ON PETROLEUM AND CERTAIN IMPORTED SUBSTANCES (adopted June 17, 1987) BISD 34S/136.

233. 19 U.S.C. §2411.

234. Alan Oxley, *Why the GATT Is Green, in* INTERNATIONAL TRADE, INVESTMENT & ENVIRONMENT 230, Fenner Conference on the Environment (Ralf Buckley & Clyde Wild, eds., July 1993).

235. One organization has suggested that the U.S. Department of Justice represent the United States in GATT hearings. *See Consumer Group Presses for Public Role on Standards in GATT Bill*, INSIDE U.S. TRADE, Apr. 22, 1994, at 4.

236. *See Dolphin II* REPORT, *supra* note 2, paras. 4.1-.39.

237. Testimony of the Honorable Timothy E. Wirth, on Trade and the Environment, *Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 103d, 2d Sess. 9, 12 (1994).

238. Council Regulation 3900/92, 1992 O.J. (L 392) 26. *See* USTR, NATIONAL TRADE ESTIMATES REPORT ON FOREIGN TRADE BARRIERS 77-78 (1994).

mane way, but to all furs from the guilty country, even furs from captive-bred animals. Its purpose can only be to "force" countries to change their policies.[239]

Also, a few years ago the co-plaintiffs in *Dolphin II* took a position on extrajurisdictionality in a case before the European Court of Justice (ECJ) that was opposite the position they took in *Dolphin II* on this issue.[240] In the case before the ECJ, the issue was whether Article 36 of the European Economic Community (EEC) Treaty,[241] which is analogous to Article XX of GATT and permits import restrictions for the "protection of health and life of humans, animals or plants," permitted the Netherlands to use an import ban to protect the red grouse living in the United Kingdom. The Court disagreed with the assertion of both the European Commission and the Netherlands that the import ban was permitted. But its decision was predicated on two facts; that protection of wild birds in EU countries had already been "regulated exhaustively" by the EU's Directive on Wild Birds,[242] and that the red grouse was neither migratory nor endangered.[243] It is interesting to speculate how the Court might have ruled had the facts been similar to *Dolphin II*—that is, if the EU had no Directive and if the species in question was migratory and/or endangered.[244]

Although GATT does not have to be consistent with ECJ rulings, the EU ought to be consistent in its treaty interpretations. It seems inconsistent for it to claim that GATT Article XX(b) is not extrajurisdictional when it declared that Article 36 of the EEC treaty was extrajurisdictional?[245] In noting that some of the EU's arguments in *Dolphin II* "are clearly contrary to its own internal law on the trade/environment issues," one commentator explained that "[t]his reflects a breakdown in communication between the relevant Directorates-General [of the European Commission]."[246]

Resolving Environmental Disputes

The contretemps over the U.S. tuna embargoes is more an environmental dispute than a trade dispute.[247] The conflict concerned how much protection dolphins should be given, who should pay for it, and what actions individual countries could take in the absence of multilateral agreements.

For several reasons, GATT is the wrong forum for such disputes. GATT consideration of environmental disputes is bound to be unbalanced. First, GATT is a friend to environmental free riders.[248] A complaining country has nothing to lose by lodging a GATT complaint. For example, the United States may be told to admit Mexican tuna, but Mexico cannot be told to be more careful in fishing or to cease its intransigence to international agreements.[249] Second, a GATT panel cannot base its decision on principles of international law such as the United Nations Convention on the Law of the Sea (UNCLOS),[250] which provides that "states shall cooperate with a view to the conservation of marine mammals"[251] and that states "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources" of the high seas.[252] Third, a GATT panel can only address a dispute's GATT implications. Because it can only view an environmental dispute as a trade dispute, GATT is ill-equipped to deal with a multidimensional problem. Thus, allowing GATT to judge environmental disputes can be unhealthy both for the world trading system and for the global environment since environmental laws will continue to be on the defensive and countries with high environmental standards may be wrongly branded international scofflaws. Unfortunately, such complaints go to GATT because it is the only available forum for these disputes.

An international organization is needed to settle environmental conflicts. In the tuna-dolphin conflict, there was a need for conciliation to find a compromise between the U.S. and Mexican positions, both of which were partly right and partly wrong. Instead, GATT delivered a judgment that one country was wrong. This approach may be appropriate for commercial disputes, but is inappropriate for many environmental ones.[253]

There is also a need for reconsidering GATT rules in connection with "individual transferable quotas," which are being viewed as a possible solution to fisheries mismanagement.[254] The allocation of such quotas would not violate GATT Article XI, but the enforcement of such quotas at the border could. Restrictions on the tradeability of such

239. As the government of Canada has pointed out, "there must be compliance for all of the listed species that occur within a country, or none can be exported to the European Union." DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, THE CANADIAN FUR TRADE AND THE EUROPEAN UNION REGULATION ON FUR IMPORTS 3, July 1994.

240. Case C-169/89, Criminal Proceedings Against Gourmetterie Van den Burg, I E.C.R. 2143 (1990). *See Dolphin II* REPORT, *supra* note 2, para. 3.25.

241. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

242. Council Directive 79/409, 1979 O.J. (L 103) 1.

243. Case C-169/89, Criminal Proceedings Against Gourmetterie Van den Burg, I E.C.R. 2143, para. 16.

244. Since GATT has no Directive on wild dolphins and since dolphins are migratory, a GATT interpretation that Article XX is extrajurisdictional would not be inconsistent with the Court's interpretation of Article 36.

245. For the EU's response to this point, see *Dolphin II* REPORT, *supra* note 2, para. 3.48.

246. *See* Philippe Sands, *GATT 1994 and Sustainable Development: Lessons From the International Legal Order*, *in* PAPERS PRESENTED AT THE GATT SYMPOSIUM ON TRADE, ENVIRONMENT, AND SUSTAINABLE DEVELOPMENT, GATT DOC. TE/009, July 1994, at 27, 29.

247. *See Dolphin II* REPORT, *supra* note 2, para. 3.11.

248. Because of the most-favored nation principle, GATT is also a friend to free riders in trade liberalization, since trade concessions given to a reciprocating nation must also be given to a nonreciprocating one.

249. *See Dolphin I* REPORT, *supra* note 8, para. 6.1. This refers to the period before mid-1992, when Mexico did join the new international agreement.

250. Dec. 10, 1982, 21 I.L.M. 1261. The Convention enters into force November 16, 1994.

251. *Id.*, arts. 65 & 120, 21 I.L.M. 1282, 1291.

252. *Id.*, art. 118, 21 I.L.M. 1291. *See also* World Charter for Nature, G.A. Res. 37/7, U.N. 48th Plenary Meeting, 37th Sess., para. 21 (e), U.N. Doc. No. A/RES/37/7, 22 I.L.M. 455 (1982) (providing that states shall "Safeguard and conserve nature in areas beyond national jurisdiction").

253. *See* Naomi Roht-Arriaza, *Precaution, Participation, and the 'Greening' of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 97-98 (1992).

254. *See* Betsy Carpenter, *Not Enough Fish in the Stormy Sea*, U.S. NEWS & WORLD REP. Aug. 15, 1994, at 55.

quotas may also come under the review of the new World Trade Organization.[255]

Originally, GATT panels were meant to serve a conciliatory function. But since the late 1970s, GATT has moved toward an increasing judicialization of trade complaints. The Uruguay Round moves GATT even more in this direction.[256] Therefore, the European Parliament's proposal for a moratorium on GATT environmental cases pending the establishment of better rules merits serious consideration.[257]

The above discussion refers only to the primary embargo. The intermediary embargo is different because it does present a true trade conflict for which GATT is a suitable forum. As many countries have noted, the United States was asking those countries to take action—not import Mexican tuna—that they believed was GATT-illegal. Furthermore, the indirectness of the intermediary embargo makes its GATT legality doubtful under the Article XX headnote criteria. Instead of using this intrusive approach, the U.S. government should have negotiated with the EU to have the EU adopt protections similar to those in the MMPA. There was support for this in the European Parliament.[258]

Law of the Sea

The Clinton Administration's recent statements that it will seek Senate approval for U.S. accession to UNCLOS raise a potential new hurdle for trade controls imposed under the MMPA. According to one commentator, "The United States may have to relinquish its use of unilateral economic sanctions as a method of protecting dolphins, sea turtles, and whales if it chooses to become a party to UNCLOS. . . ."[259] In exclusive economic zones, UNCLOS gives coastal states jurisdiction over marine conservation policies.[260] On the high seas, UNCLOS may be read as suggesting that conservation measures must be multilateral.[261] UNCLOS also states that conservation measures shall "not discriminate in form or in fact against the fishermen of any State."[262]

UNCLOS settlement procedure may provide another approach to environmentally related trade issues. Under UNCLOS, a nation affected by a U.S. trade embargo can invoke the agreement's compulsory dispute settlement procedure.[263] Decisions under this procedure are final and parties have an obligation to comply with them.[264] Thus, even if a GATT panel were to conclude that an environmental trade measure fit under Article XX, an UNCLOS tribunal could rule that the measure violated UNCLOS. On the other hand, a country that challenges a trade measure under UNCLOS and loses could be told to reform its conservation policies.

Unlike GATT, dispute settlement under UNCLOS would not be limited to trade issues. UNCLOS would also be an environmental tribunal. The United States would be able to argue that UNCLOS recognizes a right to limit the exploitation of marine mammals "more strictly."[265] The United States would also be able to challenge other countries regarding the adequacy of their conservation policies and the extent of their cooperation to obtain international agreements.

Presently, however, the United States is not a party to UNCLOS, and, thus, the United States could not be a defendant or a plaintiff to the UNCLOS dispute procedures. Furthermore, the applicability of UNCLOS to laws like the MMPA is unclear in the absence of UNCLOS standards. Arguably, UNCLOS refers to restrictions on fishing, not restrictions on commerce enforced at the border. This argument is strongest for the new ban on the sale of dolphin-unsafe tuna because that ban applies domestically.[266] There is also some question as to whether the U.S. import ban on marine mammals comes within the scope of UNCLOS.

According to one commentator, the tuna embargoes are economic "sanctions" that contradict soft international law.[267] But the primary embargo is not an economic sanction. The intermediary embargo gets close to being a sanction. But Dolphin II is a dispute about what the EU should import. Thus, it would not seem to be within the purview of UNCLOS.

U.S. Marine Mammal Policy, GATT, and International Law

Dolphin mortality in the ETP has dropped sharply in recent years. In 1993, U.S. vessels killed only 115 dolphins and foreign vessels killed about 3,500 dolphins.[268] The average kill rate for both U.S. and foreign vessels was about one-half of a dolphin per set, i.e., the dropping of a net.[269] Thus, the MMPA's goal of insignificant dolphin mortality levels approaching zero has been achieved.[270]

Given this policy success, it is difficult to justify a continued need for the tuna embargoes. Because dolphins are

255. The World Trade Organization was created in the Uruguay Round of trade negotiations. This organization would replace GATT as an institution.

256. The most recent GATT BISD changes the listing of cases from "conciliation" to "dispute settlement." BISD 39S/vii.

257. GATT Negotiations: Trade and Environment, para. 5, 1994 O.J. (C 114) 35. *See also Global Legislators Seek Moratorium on Challenges to Environment Standards*, 17 Int'l Envtl. Rep. (BNA) No. 5, at 204 (Mar. 9, 1994); *House Members Call for Moratorium on Green Challenges in GATT*, INSIDE U.S. TRADE, Feb. 19, 1994, at 7.

258. *See European Parliament Calls for EC Ban on Imports of Tuna Caught in Purse-Seines*, 8 Int'l Trade Rep. (BNA) No. 47 at 1739 (Nov. 27, 1991).

259. Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1, 5 (1994).

260. UNCLOS, *supra* note 250, arts. 56.1 & 61.1, 21 I.L.M. 1261. *See also* McLaughlin, *supra* note 259, at 31-32.

261. McLaughlin, *supra* note 259, at 34-38.

262. UNCLOS, *supra* note 250, art. 119.3, 21 I.L.M. at 1291.

263. *Id.* pt. XV, 21 I.L.M. at 1322-25.

264. UNCLOS, *supra* note 250, art. 296, 21 I.L.M. at 1324. UNCLOS Article 282 provides that UNCLOS will defer to dispute settlement procedures in other agreements if they entail a binding decision. Mr. McLaughlin has argued that current GATT procedures are not binding. *See* McLaughlin, *supra* note 259, at 59-60. It is unclear whether the Uruguay Round revisions will render these procedures binding for purposes of Article 282.

265. UNCLOS, *supra* note 250, art. 65, 21 I.L.M. at 1282.

266. *See McLaughlin, supra* note 259, at 70 n.405 (addressing laws that are legitimate domestic concerns).

267. *Id.* at 6 n.14 & 63-72.

268. MARINE MAMMAL COMMISSION, ANNUAL REPORT TO CONGRESS 116 (1993). Most U.S. vessels had departed the ETP or reflagged.

269. *Id.* at 117.

270. 16 U.S.C. §1371(a)(2), ELR STAT. MMPA §101(a)(2).

only depleted rather than endangered,[271] a kill rate between zero and one per set may actually be too low from a benefit-cost perspective since there will always be accidents. The MMPA, however, does not provide for benefit-cost analysis in rulemaking.

In 1992, two decades after the MMPA called for international negotiations, a comprehensive, regional dolphin protection regime was finally achieved. Some defenders of dolphins find this regime unacceptable because it does not ban setting nets on dolphins.[272] But there are offsetting benefits in obtaining an international regime since effective conservation requires widespread cooperation. The United States now must determine whether these benefits justify harmonizing its own regime downward to the lower international standards.

One reason to loosen U.S. regulations might be that there may be a trade-off between the safety of dolphins and the safety of other sea creatures.[273] Setting nets on dolphins maximizes the catch of marketable tuna. On the other hand, using some dolphin-safe techniques may increase the incidental catch of other species such as sharks, wahoo, billfish, and sea turtles. And some alternative techniques result in increased capture of immature tuna, which could undercut the sustainability of tuna populations.[274]

While these are interesting ecological issues, they lie outside the purview of GATT.[275] GATT is not competent to weigh dolphin lives against shark lives, or to weigh dolphin lives against the commercial costs to the Mexican or EU tuna industries. GATT panels should not question the environmental goals of countries or the values that underlie these goals.

The U.S. tuna-dolphin program has been so successful that it now may be obsolete. But that is a decision for the U.S. Congress to make, not GATT. GATT has no mandate to apply an "international commerce clause," akin to the interstate Commerce Clause of the U.S. Constitution.[276]

Many trade experts believe that GATT panels should decide the reasonableness of environmental laws that affect imports. A losing defendant country would then have the option either to change its regulation or to compensate the plaintiff country for lost exports. This approach, however, is deeply flawed. The amount of compensation would depend on many factors that have nothing to do with the importance of the species being preserved. For example, a dolphin swimming with sturgeon would be more costly to save than a dolphin swimming with tuna. In addition, under such an approach, the defendant country would have to bear the full costs of its conservation policy even though the entire world may benefit from its trade restrictions.

In theory, the optimal balance between dolphin safety and the price of tuna would be reached regardless of whether GATT "rights" reside with tuna-producing or tuna-consuming nations. If Mexico has a right to export unimpededly, then the United States will be able to achieve its environmental goals only by subsidizing Mexico's dolphin-safe nets, and perhaps providing supplemental compensation.[277] If the United States has a right to refuse ecologically contaminated imports, then Mexico will incur new expenses for dolphin safety in order to sell its tuna. Seen in this way, the issues of GATT versus the MMPA, and the overarching controversy regarding trade and the environment, is more about who pays for environmental protection than about the merits of free trade.[278]

The U.S. government also needs to reflect on its predisposition for applying economic pressure. There are certainly situations where the cause is important enough to merit using market power to influence foreign behavior. But such measures should be resorted to occasionally, not on a regular basis. Intermediary embargoes, like the one in the MMPA, are an aggressive act and should be resorted to only when there is a fundamental interest involved.

American self-restraint is desirable for at least three reasons. First, large countries should not take advantage of their size. Although all countries can use market power to dictate product standards or item-specific standards, only large counties have the power to dictate government policy or production practice controls. Second, the use of pressure may cause more harm than good to the target country. It may also exact a high cost from American consumers without any concomitant benefits. Third, such action may violate U.S. obligations. For example, the Charter of the Organization of American States declares that no state may use "coercive measure of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."[279]

Recommendations

Changes to the MMPA

The U.S. Congress would help America's credibility if it were to amend the MMPA to correct the features that have been correctly ruled GATT-illegal. At the very least, the dolphin-kill rate limit for foreign vessels should be set in advance, rather than retroactively.

271. 57 Fed. Reg. 27013 (June 17, 1992).

272. Some of the concern is ethical. Relying on dolphins for deciding where to cast nets is viewed as harassing the dolphins.

273. *See* Betsy Carpenter, *What Price Dolphin?*, U.S. NEWS & WORLD REP., June 13, 1994, at 71.

274. *See* CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN 277 (1993).

275. Yet a little-noticed provision in GATT does mandate collaboration "to expand trade for the purpose of economic development . . . through technical and commercial standards affecting production, transportation, and marketing. . . ." *See* GATT, *supra* note 1, art. XXXVIII:2(e), at 56.

276. For example, see Cresenzi Bird Importers, Inc. v. New York, 658 F. Supp. 1441 (S.D.N.Y. 1987), where a district court sustained a state law prohibiting the sale of live wild birds. The court noted that New York "has an interest in cleansing its markets of commerce which the Legislature finds to be unethical. Moreover, a state may constitutionally conserve wildlife elsewhere by refusing to accept local complicity in its destruction." *Id.* at 1447. The plaintiffs had argued that the purpose of the New York Wild Bird Law was the preservation of world ecology, which they argued was not a legitimate local concern under Commerce Clause adjudication.

277. One commentator has suggested, for example, that the United States might pay Mexican fishermen to cease using nets thought likely to entrap dolphins. *See* Martin Wolf, THE RESISTIBLE APPEAL OF FORTRESS EUROPE 55 (1994).

278. *See The Cost of Clean Living*, THE ECONOMIST, July 9, 1994, at 67 (proposing that environmentalists would be better off relying on the panoply of GATT-approved bribes, such as diplomacy, financial assistance, and technology transfers, to convert their "nongreen" neighbors).

279. Charter of the OAS, Apr. 30, 1948, art. 19, 119 U.N.T.S. 48, 2 U.S.T. 2394.

Congress should repeal the intermediary embargo, or at least make it less restrictive by rewriting it to deal only with tuna "laundering."[280] One option would be to have the intermediary country certify that it is not selling to the United States tuna that is under a primary embargo, yet permit the intermediary country to import such tuna for its own consumption.

Congress should also consider merging the comparability regulations and the new dolphin-safe standard into one regime aligned as closely as possible to the IATTC and intergovernmental agreements. As is often the case with U.S. environmental legislation, the MMPA is too prescriptive on technique. It should focus on a performance standard.[281] For example, instead of prohibiting the setting of nets on dolphins, "dolphin-safe" tuna might be redefined to zero dolphin kills per set on a ship that adheres to its overall dolphin mortality limits under the intergovernmental agreement. The same standard should apply to all oceans where tuna is caught since there may be other areas of the world, besides the ETP, where fishing vessels set on dolphins.

The MMPA needs to retain a mechanism to reimpose a tuna embargo against countries that do not abide by their obligations under the IATTC agreement. As one commentator has noted, "one way to read the history of this issue is that these negotiated promises from Mexico and Venezuela . . . were made possible only because of the leverage generated by the unilateral trade measure concluded by the [*Dolphin I*] panel to be contrary to the GATT."[282] This leverage should not be relinquished until the IATTC and ETP fishing countries devise a workable mechanism of enforcement. An enforcement agreement was drafted last year, but has not yet been signed.[283] Ideally, any sanctions against noncomplying countries should be applied multilaterally.

By reforming U.S. law in these ways, the United States would not be yielding to GATT. The *Dolphin II* panel wanted the United States to alter the MMPA because the Act might *fail* to change foreign behavior. Instead, the United States should alter the MMPA because it has already *succeeded* in changing foreign behavior.

Dolphin II *Versus* Dolphin I

While *Dolphin II* may be slightly better than *Dolphin I*, the new judgment is problematic on both environmental and legal grounds. The Clinton Administration should strongly oppose the GATT Council's adoption of the *Dolphin II* panel report. The Administration should also use the debate in the GATT Council to educate trade officials about why the report would subvert GATT Articles III and XX. The Bush Administration neglected to do this after the *Dolphin I* report. In addition, the USTR should include high-level environmental officials in its GATT delegation and should urge all other GATT members to do the same in order to raise the quality of the GATT debate in environmental cases.

In view of the anticipated strong push by GATT members to urge the GATT Council to adopt the *Dolphin II* report, the United States should call for the *rejection* of the *Dolphin I* report. Despite its unadopted status, the *Dolphin I* report continues to exert a bad influence. For example, the EU cited it eight times in its presentation before the *Dolphin II* panel. Moreover, since the *Dolphin I* and *Dolphin II* panels reached contradictory conclusions about whether Article XX(b) and XX(g) are extrajurisdictional, they cannot both be right.[284] If the GATT Council believes that *Dolphin II* is correct in its finding that the drafting history does not demonstrate that Article XX(b) cannot be extrajurisdictional, then *Dolphin I* must be wrong in suggesting that the drafting history precludes extrajurisdictionality.[285] The first report deserves a formal burial so that it does not continue to foment mischief. Firmly rejecting the *Dolphin I* report would be the best first step GATT parties could take to show that environmental scofflaws will not be able to hide behind international trade rules.

280. *See supra* n.52 and accompanying text.

281. See 19 U.S.C. §2532(3), which obliges federal agencies to use performance rather than design standards if appropriate. This obligation does not apply to Congress.

282. David A. Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?*, 49 WASH. & LEE L. REV. 1389, 1398 (1992).

283. Protocol on Enforcement of Dolphin Protection Agreement, June 1993 (on file with IATTC).

284. Some countries, including Mexico, want GATT to adopt both reports. Williams, *supra* note 6, at 6; Zarocostas, *supra* note 216, at 8A.

285. *See Dolphin II* REPORT, *supra* note 2, para. 5.33; *Dolphin I* REPORT, *supra* note 8, para. 5.26.