The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision

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Editors' Summary: On September 3, 1991, a three-member dispute resolution panel formed by the signatories to the General Agreements on Tariffs and Trade (GATT) held that a U.S. embargo on Mexican tuna and tuna products harvested in the Eastern Tropical Pacific Ocean violated GATT. The resulting controversy has focused on the decision's effect on U.S. actions under the Marine Mammal Protection Act (MMPA), and the ramifications to other U.S. environmental laws with international trade impacts. The authors describe the legal background of this decision, including the GATT and MMPA provisions addressed by the panel, analyze the decision in depth, and discuss the recent U.S. District Court for the Northern District of California decision enjoining the Secretaries of Commerce and the Treasury and the National Marine Fisheries Service from allowing intermediary nations to import tuna from embargoed harvesting nations into the United States. Finally, the authors analyze the potential effects of the panel's decision on domestic laws and international laws and agreements and conclude that although the decision's policy ramifications will be significant, it will have little effect on U.S. law.

Until recently few individuals realized that international environmental and trade law regimes, which had appeared to many to be on parallel tracks, were actually on a collision course. Then, on September 3, 1991, a three-member dispute resolution panel (the Panel) formed by the nations who are signatories, or "contracting parties," to the General Agreements on Tariffs and Trade (GATT) [1] upheld a challenge by Mexico that an American embargo of Mexican tuna and tuna products harvested from the Eastern Tropical Pacific Ocean (ETP), [2] commenced under the U.S. Marine Mammal Protection Act (MMPA), [3] violated the provisions of GATT. [4]

The Panel's decision is a flash point for both the environmental and trade law communities. Environmental lawyers understand that a special relationship exists in the ETP between tuna and dolphin that causes schools of tuna to swim with pods of dolphin. Many environmental lawyers are concerned that without the MMPA's protections, dolphins will be needlessly slaughtered. Moreover, environmental attorneys are concerned about the GATT fate of other important environmental laws. Meanwhile, trade lawyers generally view the decision as the logical extension of free trade concern over measures that can be perceived as "protectionist." If trade law and environmental law are to proceed once again on parallel paths toward their mutual goal of sustainable development, trade lawyers and environmental lawyers must become much more familiar with the legal culture of each other's fields. This Article is intended to facilitate that process by providing a working understanding of the GATT Panel's decision.

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1. *See* GATT, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187. In 1948, GATT Article III was amended. 62 Stat. 3680, 62 U.N.T.S. 82.

2. The ETP is a five to seven 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. The ETP is defined, for the purposes of the Marine Mammal Protection Act, as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west latitude, and the coasts of north Central and South America. *See* 50 C.F.R. §216.3 (1991).

3. 16 U.S.C. §§1361-1407, ELR STAT. MMPA 001-028.

4. GATT, UNITED STATES—RESTRICTIONS ON IMPORTS OF TUNA (adopted Sept. 3, 1991) (Panel report No. DS21/R) [hereinafter PANEL REPORT].

Legal Background

The General Agreements on Tariffs and Trade

GATT is, without question, the principal instrument determining international trade relations. [5] The overall goal of GATT is to provide the contracting parties with standardized rules to allow for expanded free and fair trade among the contracting parties. Structurally, GATT consists of three parts. Part I (Articles I to II) contains the most favored nations provisions and tariff concession obligations. Part II (Articles III to XXIII), sometimes referred to as the GATT "code of conduct," contains the majority of GATT's substantive provisions, including those on customs procedures, subsidies, and quotas. [6] Part II also includes what are best thought of as the exceptions to the general obligations of GATT. Part III (Articles XXIV to XXXVIII) contains the procedural mechanisms for implementing the other obligations and provisions of GATT.

A basic understanding of certain GATT provisions is necessary to provide a framework for analyzing the opinion of the Panel. The decision of the Panel rests on the appli-

5. In the United States, GATT is provisionally applied by its parties by virtue of the Protocol of Provisional Application (PPA), Oct. 30, 1947, 61 Stat. pt. 5 at A2051, 55 U.N.T.S. 308. For a more complete description of GATT and its workings, see generally JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989).

6. *See* JACKSON, *supra* note 5, at 40.

cation of two of GATT's central objectives: the removal of barriers to trade and the elimination of discriminatory trade practices.

The Panel's analysis of the MMPA as a restrictive trade measure is based on GATT Article XI:1, which prohibits the use of quantitative restrictions, such as quotas and measures other than duties that have the effect of restricting fair and free trade.[7] In addition to the Panel's reliance on GATT's general prohibition of trade barriers, the Panel's decision also relies heavily on GATT's principle of nondiscrimination. Nondiscrimination in trade incorporates two obligations.[8] The first obligation of nondiscrimination is Article I's most favored nation obligation, or the obligation of a contracting party to provide to all other contracting parties the most favorable treatment in trade that it provides to any country.[9] The second obligation of nondiscrimination is the obligation of the contracting parties to treat both foreign and domestic "like products" equally, once the foreign product has cleared customs and entered domestic commerce.[10] This national treatment principle is derived primarily from Article III, and the Panel relied on the expressions of this principle in Article III:1 and :4.[11] GATT, however, was not intended to prevent national governments from being able to act on legitimate policy goals. Accordingly, Article XX provides limited exceptions to GATT's general prohibitions to accommodate such policy goals.[12] The Panel decision addressed the application of two of these exceptions, Article XX(b) and (g).[13]

In addition to the application of GATT's more general requirements, Mexico's challenge, as set out in more detail later in this Article,[14] required the Panel to review the specific treatment of product labeling requirements under GATT. This review compelled the Panel to address the interplay between Article I's most favored nation requirements[15] and Article IX's provisions on "marks of origin."[16] However, the challenge under the GATT provisions primarily sought review of the MMPA.

The Marine Mammal Protection Act

The goal of the MMPA is to reduce the "incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations" to "insignificant levels approaching a zero mortality and serious injury rate."[17] The MMPA attempts to achieve this stated goal through a regulatory program that establishes industry-wide practices for tuna harvesting designed to prevent the incidental "taking" of marine mammals, specifically various species of dolphins. Many of the concerns regarding the commercial taking of dolphin that the MMPA is intended to address focus on commercial tuna harvesting operations in the ETP.

In the ETP a special relationship exists between dolphins and tuna. ETP tuna schools tend to travel below air-breathing dolphin pods, which travel at or just below the surface of the water. This relationship between tuna behavior and dolphin behavior has led to the widespread use in the ETP of a fishing practice called "setting on dolphin." Fishing boats using this technique purposely encircle pods of dolphin with a "purse-seine" net in order to capture the tuna

7. Article XI:1 provides:

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

GATT, *supra* note 1, art. XI:1, 61 Stat. at A32-33, 55 U.N.T.S. at 224, 226.

8. *See* JACKSON, *supra* note 5, at 133.

9. *See* JACKSON, *supra* note 5, at 133. To this end Article I provides:

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

GATT, *supra* note 1, art. I, 61 Stat. at A12, 55 U.N.T.S. at 196, 198.

10. *See* JACKSON, *supra* note 5, at 133.

11. Article III:1 provides:

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

GATT, *supra* note 1, art. III:1, 62 Stat. at 3680, 62 U.N.T.S. at 82. Article III:4 states in relevant part:

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

Id. art. III:4, 62 Stat. at 3681, 62 U.N.T.S. at 82.

12. *See* JACKSON, *supra* note 5, at 189-90.

13. Article XX(b) and (g) provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> * * *
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

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

14. *See infra* notes 69-72 and accompanying text.

15. See *supra* note 9 and accompanying text for a discussion of the most favored nations requirements.

16. Article IX requires the contracting parties to accord products of other territories nondiscriminatory marks of origin requirements and requires the contracting parties to take certain steps, such as wherever practical allowing these marks to be affixed at time of importation, designed to minimize the burdens that marks of origins can have on imported products. GATT, *supra* note 1, art. IX, 61 Stat. at A29-A30, 55 U.N.T.S. at 220, 222.

17. MMPA §101(a)(2), 16 U.S.C. §1371(a)(2), ELR STAT. MMPA 004.

traveling below the dolphin. The main vessel then "purses" the net by drawing in on a cable attached to the bottom of the net and takes in a cable at the top of the net to gather the net's contents. The practice of setting on dolphin results in large numbers of dolphin injuries and deaths. The specific provisions of the MMPA that apply to ETP tuna operations are set out in §101.[18]

Section 101(a)(2)[19] of the MMPA authorizes the limited incidental taking of marine mammals by U.S. commercial fishermen pursuant to a valid permit issued by the National Marine Fisheries Service (NMFS) and in compliance with the provisions of §§103[20] and 104[21] of the MMPA. Only one such permit has ever been issued—a general industry-wide permit issued to the American Tuna-Boat Association for all domestic tuna operations conducted within the ETP. This general permit, in accordance with the provisions of the MMPA, establishes a fixed ceiling for incidental dolphin taking rates for U.S. vessels and sets out percentage limits within this fixed ceiling for the taking of certain subspecies of dolphin.[22] This general permit not only incorporates the regulatory requirements imposed on ETP fishing by the MMPA, but also establishes additional permit-specific regulatory requirements.[23]

☐ *The MMPA's Direct Embargo Provisions.* The MMPA also contains special provisions that apply to foreign tuna and tuna product imports to the United States harvested from the ETP. These special provisions are contained in §101(a)(2)(B),[24] which specifically prohibits the importation of yellowfin tuna and yellowfin tuna derived products harvested by purse-seine nets, unless the Secretary of Commerce makes an affirmative finding that (1) the government of the harvesting country has a program regulating the incidental taking of marine mammals that is comparable to that of the United States; and (2) the average incidental taking rate of marine mammals by vessels of the harvesting country is comparable to the average incidental taking rate of U.S. vessels.[25]

The second prong of the comparability analysis requires the Secretary to retroactively find that the incidental taking rate of the harvesting country's tuna fleet did not exceed 1.25 times the average taking rate for U.S. vessels, as derived from the unweighted kill per set average for the U.S. fleet for the same time period.[26] This U.S. unweighted kill per set average is then compared to the taking rate of each harvesting country, calculated as a weighted average to allow for differences in mortality rates caused by species and subspecies taken and the location of the sets. Additionally, to establish comparability the Secretary must make a finding for each nation that the percentages of Eastern spinner and coastal spotted dolphin taken by that nation's fleet did not exceed 15 percent and 2 percent, respectively, of the total number of marine mammals taken by that nation's fleet.[27] The Secretary is under no affirmative duty to issue comparability findings unless a harvesting country requests such a finding and demonstrates to the Secretary, by documentary evidence, that the harvesting country meets each of the comparability requirements.

☐ *The MMPA's Intermediary Nation Embargo Provisions.* Mexico's GATT challenge also requested review of the MMPA's intermediary nations provisions. MMPA §101(a)(2)(C)[28] requires the Secretary, in order to ensure compliance with the provisions and intent of the MMPA's direct embargo provisions, to require the governments of all nations that import tuna and/or tuna products into the United States from another nation to certify and provide reasonable proof to the Secretary that the government of the intermediary nation has acted to prohibit the importation of tuna and tuna products from a harvesting country if the direct importation of those products into the United States from that harvesting nation has been banned.[29] Unless an intermediary nation implements a ban on imports from a noncomplying harvesting country within 60 days of the United States' ban on direct imports and the Secretary receives the required proof of this ban from the intermediary nation within 90 days of the United States' direct ban, then the Secretary, on the 91st day following the United States' direct ban, must institute a ban on the intermediary nation's tuna and tuna product imports.[30]

Other Dolphin Protection Laws

Mexico also challenged the provisions of two other related U.S. laws: the discretionary embargo provisions of the Pelly Amendment,[31] and the labeling requirements of the Dolphin Protection Consumer Information Act (DPCIA).[32]

☐ *The Pelly Amendment.* Under MMPA §101(a)(2)(D)[33] the Secretary of Commerce must, six months after the imposition of either a direct embargo on tuna and tuna product imports from a harvesting nation or an embargo on tuna and tuna products from an intermediary nation, certify to the President of the United States, for the purposes of the Pelly Amendment, that such embargo has been in effect for six months.[34] This certification triggers the President's discretionary power under the Pelly Amendment to impose a ban on all "fish products . . . from the offending country for such duration as the President determines appropriate

18. 16 U.S.C. §1371, ELR STAT. MMPA 004.
19. 16 U.S.C. §1371(a)(2), ELR STAT. MMPA 004.
20. 16 U.S.C. §1373, ELR STAT. MMPA 007.
21. 16 U.S.C. §1374, ELR STAT. MMPA 008.
22. *See* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 967, 21 ELR 20259, 20261 (N.D. Cal. 1990).
23. *Id.*
24. 16 U.S.C. §1371(a)(2)(B), ELR STAT. MMPA 004.
25. MMPA §101(a)(2)(B)(i)-(ii), 16 U.S.C. §1371(a)(2)(B)(i)-(ii), ELR STAT. MMPA 004.
26. MMPA §101(a)(2)(B)(i)-(ii)(II), 16 U.S.C. §1371(a)(2)(B)(i)-(ii)(II), ELR STAT. MMPA 004.
27. MMPA §101(a)(2)(B)(i)-(ii)(III), 16 U.S.C. §1371(a)(2)(B)(i)-(ii)(III), ELR STAT. MMPA 004.
28. 16 U.S.C. §1371(a)(2)(C), ELR STAT. MMPA 005.
29. MMPA §101(a)(2)(C), 16 U.S.C. §1371(a)(2)(C), ELR STAT. MMPA 005.
30. *Id.*
31. 22 U.S.C. §1978(a) (1990).
32. 16 U.S.C. §§1371, 1385 (West Supp. 1991).
33. 16 U.S.C. §1371(a)(2)(D), ELR STAT. MMPA 005.
34. MMPA §101(a)(2)(D), 16 U.S.C. §1371(a)(2)(D), ELR STAT. MMPA 005.

and to the extent that such prohibition is sanctioned by [GATT]."[35]

☐ *The Dolphin Protection Consumer Information Act.* The DPCIA specifies labeling standards for all tuna exported from or offered for sale in the United States. The DPCIA makes it a violation of §5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of tuna products to include on the label of such products the terms "dolphin safe" or any other terms intended to falsely suggest that the tuna product was harvested in a manner that was not harmful to dolphins, if the tuna product contained therein was harvested (1) in the ETP by a vessel utilizing purse-seine nets under conditions that do not meet the standards for dolphin safety; or (2) on the high seas by vessels engaged in driftnet fishing.[36]

Procedural Background

The Mexican GATT challenge to the MMPA stems from more than 20 years of efforts to protect dolphins, especially those dolphins whose habitat includes the ETP. Before this struggle was ever brought to the GATT Panel, it was fought in the halls of the U.S. Congress and in the U.S. courts.

In 1972, faced with growing public outcry against the large numbers of marine mammals being killed and injured incidental to commercial fishing operations, the U.S. Congress enacted the MMPA.[37] The 1972 version of the MMPA included a ban on foreign imports of tuna harvested with technology that resulted in the killing or injuring of marine mammals in excess of U.S. standards.[38] By 1988, the NMFS still had not complied fully with the MMPA's tuna import provisions, forcing Congress to amend the MMPA to ensure that foreign tuna imports met marine mammal safety standards and marine mammal taking rates comparable to those required of the U.S. tuna fleet.[39] The 1988 amendments to the MMPA made clear that unless the Secretary of Commerce issued a finding that foreign tuna imports met standards comparable to those of the United States, these imports must be banned.

Despite Congress' repeated efforts to ensure that foreign tuna imports complied with the provisions of the MMPA, in 1990 the Secretary still had not issued comparability findings to allow imports of tuna, nor had the Secretary undertaken any efforts to ban these imports.[40] Earth Island Institute, a nonprofit organization engaged in efforts to protect marine mammals, commenced an action (*Earth Island I*) in the U.S. district court for the Northern District of California to require the Secretary to comply with the foreign fleet provisions of the MMPA.[41] In the face of the government's continued efforts to avoid embargoing Mexican tuna, the district court ordered the embargo of Mexican tuna and tuna products until the Secretary complied with the MMPA's import provisions.[42] The United States appealed the district court's embargo to the Ninth Circuit Court of Appeals, which affirmed the decision of the district court.[43] This embargo remains in effect today.

The GATT Challenge

On January 25, 1991, with the United States appeal pending before the Ninth Circuit, Mexico requested the contracting parties to GATT to establish a dispute resolution panel to review the American embargo on Mexican tuna and tuna products. On February 6, 1991, the GATT Council agreed to convene the panel as Mexico had requested.

On May 15 and June 17, 1991, the Panel held meetings with the representatives from United States and Mexico. Written and oral presentations in support of Mexico's challenge were submitted by Australia, the European Communities, Indonesia, Japan, Korea, the Philippines, Senegal, Thailand, Venezuela, and Norway. Canada also submitted its views supporting Mexico's challenge except as it applied to the DPCIA.[44]

On August 16, 1991, the Panel issued a draft opinion upholding Mexico's challenge that the American embargo on Mexican tuna and tuna products violated GATT. On September 3, 1991, without substantively changing its draft opinion, the Panel issued its final opinion in the case.[45]

The Panel's Decision

The Direct Embargo Provisions and Their Pelly Amendment Ramifications

☐ *Quantitative Restrictions Versus Point of Importation Regulations.* Mexico first alleged that the MMPA's direct embargo provisions are quantitative restrictions on importation that are generally prohibited by GATT Article XI:1. The United States responded that the MMPA's direct embargo provisions are not quantitative restrictions under Article XI, but are, instead, internal regulations applied to imported products at the point of importation and are permissible under GATT Article III:4.

35. 22 U.S.C. §1978(a)(4) (1990).

36. 16 U.S.C. §1385(d) (West Supp. 1991). At the time of the Panel's opinion no regulations existed to implement the provisions of the DPCIA. *See* PANEL REPORT, *supra* note 4, at 7.

37. *See* Pub. L. No. 92-522, 86 Stat. 1027, *amended by* Pub. L. No. 100-711, 102 Stat. 4755, *and* Pub. L. No. 101-627, 104 Stat. 4467; *see also* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 967, 21 ELR 20259, 20261 (N.D. Cal. 1990) [hereinafter *Earth Island I*].

38. *See* MMPA §101(a)(2), 16 U.S.C. §1371(a)(2), ELR STAT. MMPA 004; *see also Earth Island I*, 746 F. Supp. at 967, 21 ELR at 20261.

39. *See* Pub. L. No. 100-711, 102 Stat. 4755; *see also Earth Island I*, 746 F. Supp. at 968, 21 ELR at 20262.

40. *See Earth Island I*, 746 F. Supp. at 968, 21 ELR at 20262.

41. *Id.* at 964, 21 ELR at 20259.

42. Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1452, 21 ELR 20843, 20844-45 (9th Cir. 1991). The district court had ordered an embargo of Mexican tuna on August 28, 1990, and the Secretary "ostensibly imposed the embargo" on September 6, 1990. *Id.* The very next day, however, the Secretary issued an unwarranted comparability finding for Mexico. *Id.* Earth Island Institute asked the district court for a temporary restraining order banning Mexican tuna imports on the grounds that the comparability finding of September 7, 1990, violated the procedures established by the MMPA. *Id.* On October 4, 1990, the district court granted Earth Island Institute's request for the temporary restraining order. *Id.* at 1451, 21 ELR at 20844. On October 19, 1990, the court, at the request of the government, converted the temporary restraining order into a preliminary injunction. *Id.* at 1452, 21 ELR at 20844-45.

43. *Id.*

44. *See* PANEL REPORT, *supra* note 4, at 2. The other nations submitting views to the Panel generally supported the goal of dolphin protection, however viewed trade embargoes as protectionist trade measures.

45. *See* PANEL REPORT, *supra* note 4.

The Panel noted that under Articles III:1 and :4 and the notes to Article III, the products of one country imported into another country must be "'accorded treatment no less favorable than that accorded to like [domestic products].'"[46] The Panel explained, however, that an internal tax as referred to in Article II:1

> which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, [that tax] is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind [permissible under Article III].[47]

The Panel emphasized that by its terms Article III:1 allows only those point of importation regulations that apply to a product. The Panel noted that the MMPA provisions do not apply directly to the product, since they do not affect the composition of the tuna in the can, nor do they apply to the product by prescribing a method of tuna harvesting that has an effect on the tuna as a product. The Panel held that because the MMPA's direct embargo provisions do not apply directly to the tuna as a product or regulate the sale of tuna as a product, the import provisions cannot constitute internal regulations applied at the point of importation allowable under GATT Article III:4.[48]

Despite having already found Article III:4 inapplicable to the MMPA direct embargo provisions, the Panel went on to find in dicta that even if the MMPA's direct embargo provisions had "applied to the product," rather than the process, these provisions would still not have been allowable under Article III:4.[49] The Panel noted that Article III:4 only allows for internal regulations to be applied to imports at the point of importation where those requirements are not less favorable than the treatment afforded the domestic product. The Panel was persuaded by evidence showing that the method for calculating Mexican compliance with the MMPA required Mexico to meet a retroactive and variable standard derived from the actual taking rates of the U.S. fleet, as opposed to a fixed protection standard. Consequently, the Panel held that the MMPA did not accord the Mexican tuna imports as favorable treatment as that afforded U.S. tuna.[50]

Having dispatched the United States' point of importation argument, the Panel turned its attention to GATT Article XI's prohibition on quantitative restrictions. The Panel noted that the MMPA and the relevant customs law banned the importation of tuna caught by vessels of Mexico with purse-seine nets in the ETP and the importation of tuna deemed to originate from Mexico. Citing Article XI:1's ban on "any prohibitions or restrictions . . . instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party," the Panel held that the U.S. embargo on Mexican tuna was a quantitative restriction that was inconsistent with the provisions of GATT Article XI.[51]

The Pelly Amendment

The Panel next addressed the Pelly Amendment's conformity with Article XI of GATT. The Panel stressed that the Pelly Amendment did not require the President to institute an embargo on all fish products, but merely gave the President the discretion to institute such a ban. The Panel further noted that the President had not invoked these powers in this case. Because the President had not invoked his powers under the Pelly Amendment, and because the mere existence of discretionary powers that could conflict with GATT is not itself a conflict with GATT, the Panel found that the Pelly Amendment was not on its face inconsistent with GATT.[52]

☐ *Application of the Article XX Exceptions.* Having found that the U.S. embargo of Mexican tuna products did not conform to the general requirements of GATT, the Panel turned its attention to determining whether or not the MMPA direct embargo provisions fell within the exceptions to the general requirements of GATT. The United States argued that the MMPA's provisions were allowed under the exceptions contained in Article XX(b) and (g).

Article XX(b): Species Preservation Measures

Article XX(b) provides that measures that are not disguised restrictions on international trade, that are not applied in an arbitrary or unjustifiably discriminatory manner, and that are "necessary to protect human, animal or plant life" are not precluded by GATT.[53] The United States argued that the MMPA's import provisions fell within Article XX(b)'s exception because (1) they served the sole purpose of protecting dolphin lives, (2) they were "necessary" within the meaning of Article XX(b), and (3) no alternative measures were reasonably available to the United States to protect dolphin health and lives outside of the United States' jurisdiction. Mexico responded that (1) Article XX(b) was not applicable to activities outside the jurisdiction of the contracting party adopting the measures; and (2) the tuna embargo was not necessary, since other means, such as an international agreement, were reasonably available to the United States and would allow the United States to meet its objectives. With respect to Article XX(b), the Panel upheld both of Mexico's arguments.[54]

In limiting Article XX(b) to actions within domestic jurisdiction, the Panel noted that Article XX(b) originated from a similar provision in §32(b) of the Draft Charter of the International Trade Organization (ITO).[55] The Panel further noted that §32(b) of the ITO included a requirement that actions to protect a species are allowable "if corresponding domestic safeguards under similar conditions exist in the importing country."[56] The Panel observed that this phrase was originally intended to address the issue of the abuse of sanitary conditions by importing countries. The Panel concluded that the drafters intended that Article

46. PANEL REPORT, *supra* note 4, at 39-40 (quoting from GATT Article III:4 and Article III note, 62 Stat. at 3681, 62 U.N.T.S. at 82).
47. *Id.*
48. *Id.* at 41.
49. *Id.* at 41-42.
50. *Id.* at 41.
51. *Id.* at 42.
52. *Id.* at 43.
53. *See* GATT, *supra* note 1, art. XX(b), 61 Stat. at A61, 55 U.N.T.S. at 262.
54. *See* PANEL REPORT, *supra* note 4, at 45-46.
55. *Id.* at 45.
56. *Id.*

XX(b) should only apply to domestic conditions.[57] The Panel based the jurisdictional limitation on a sense of necessity; if Article XX(b) allows for limitations based on each contracting party's unilateral international standards, the general agreement "would provide legal security only in respect of trade between a limited number of contracting parties with identical regulations."[58]

The Panel also held that even if Article XX(b) allows for extraterritorial actions, the MMPA's direct embargo provisions do not comport with the basic requirements of Article XX(b), because they are not "necessary" within the meaning of Article XX(b).[59] First, the Panel found that the MMPA's import provisions are not necessary because the United States had not exhausted all reasonable alternatives available to achieve its objective of protecting dolphins. Specifically, the United States had not made sufficient efforts to create an international agreement on tuna and dolphin. Second, the Panel found that because the MMPA establishes a variable standard for determining Mexican compliance, the MMPA's import standards are too "unpredictable" to be "necessary."[60]

Article XX(g): Conservation of Exhaustible Natural Resources

Similar to Article XX(b), Article XX(g) provides an exception to GATT's general prohibitions for nondiscriminatory, nonarbitrary measures "relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption."[61] The United States argued that the MMPA's direct embargo provisions fall within Article XX(g)'s exception, because the MMPA's restrictions are "primarily aimed at the conservation of dolphin,"[62] and the import provisions are "'primarily aimed at rendering effective restrictions on domestic production or consumption' of dolphin."[63] Mexico argued, as it had with Article XX(b), that Article XX(g) cannot be applied extrajurisdictionally.

The Panel, citing the report of a previous panel, noted that in order for a measure to be "taken in conjunction with" domestic restrictions, the measure must be primarily aimed at making the domestic restriction effective.[64] The Panel then determined that the only way a country can effectively control an exhaustible natural resource is if the resource is within its jurisdiction. Applying this logic in its next step, the Panel determined that Article XX(g) is therefore also limited to activities within the jurisdiction of the country adopting the measure.[65] Additionally, the Panel noted in dicta that even if Article XX is not limited domestically, the MMPA's import provisions are too unpredictable to be "primarily aimed at conserving dolphin."[66]

The Intermediary Nations Embargo

Relying on its reasoning regarding the direct embargo, the Panel then found that the intermediary nations embargo was similarly outside the scope of Article III's allowance for internal regulations applied at the point of importation. The Panel concluded that the intermediary nations embargo was, therefore, inconsistent with Article XI:1's prohibition on quantitative restrictions.[67] Further, the Panel determined that as with the direct embargo, the intermediary nations embargo was not within the Article XX(b) and (g)'s exceptions to GATT's general prohibitions.[68]

The Dolphin Protection Consumer Information Act

The Panel also analyzed whether the DPCIA's labeling requirements comply with GATT. Mexico argued that the DPCIA labeling requirements fall within the confines of Article IX:1.[69] The Panel, however, agreed with the United States that the provisions of Article IX:1 do not apply to the DPCIA because Article IX:1's provisions apply only to marks of origin and not markings of products generally, and that the DPCIA should be reviewed under the general most favored nation requirements of Article I:1.[70]

Mexico argued in the alternative that under Article I:1 the DPCIA discriminates against Mexico as a nation that fishes in the ETP. The Panel noted that the DPCIA labeling provisions do not restrict the sale of tuna or tuna products, because (1) tuna with or without the dolphin safe label could be freely sold, (2) the provisions do not provide mandatory requirements that must be met in order to gain access to a government conferred advantage, and (3) any advantage that did occur resulted from the free choice of the consumer to give preference to dolphin safe tuna. The Panel emphasized that "[t]he labelling provisions therefore

57. *Id.* The Panel glossed over the fact that this phrase was removed well in advance of the signing of GATT, and this deletion could rightfully be interpreted as an intent to remove any domestic limitation.

    It is unclear whether, in its present form, the jurisdictional limitation of Article XX(b) requires the action taken to occur within the jurisdiction of the party acting, or that the individual protected must be physically located within the jurisdiction of the party acting.

58. *Id.*

59. *Id.* at 46.

60. *Id.*

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

62. PANEL REPORT, *supra* note 4, at 46.

63. *Id.*

64. *Id.* at 47 (citing to GATT, CANADA—MEASURES AFFECTING EXPORTS OF UNPROCESSED HERRING AND SALMON para. 4.6 (adopted Mar. 22, 1988) (Panel report No. BISD 35S/98, 114)).

65. *Id.* As with the jurisdictional limit on Article XX(b), it is unclear whether Article XX(g) now requires that actions to preserve a resource be taken within the jurisdictional confines of the party acting, or that the resources to be protected be physically located within the party's jurisdiction.

66. *Id.*

67. *Id.* at 48. The United States also argued that the intermediary-nations embargo was justified under Article XX(d)'s exception for measures necessary to secure compliance with laws or regulations not inconsistent with GATT. The Panel, noting that it had found that the direct embargo, with which the intermediary nation was seeking to ensure compliance, was itself inconsistent with GATT, dismissed this claim. *Id.* at 49.

68. *Id.* at 48.

69. Article IX:1 provides that

    > [e]ach contracting party shall accord to the products of other . . . contracting parties treatment with regard to marking requirements no less favorable than the treatment accorded to like products of any third country.

    GATT, *supra* note 1, art. IX:1, 61 Stat. at A29, 55 U.N.T.S. at 220.

70. *See* PANEL REPORT, *supra* note 4, at 49.

did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods." [71] Additionally, the Panel held that the DPCIA does not discriminate, under Article I:1, against countries fishing in the ETP, because the DPCIA does not draw distinctions on the basis of national origin: it applies to tuna harvested from the ETP by any vessel regardless of the vessels country of origin. [72]

The Panel's Concluding Remarks

In its concluding remarks, the Panel was quick to note that its decision did not reflect the appropriateness of Mexican or American conservation measures, but merely examined these measures' compliance with the provisions of GATT. [73] The Panel also stated that its decision in no way affected the rights of nations to "tax or regulate domestic production for environmental purposes," but "[a]s a corollary to these rights a [nation] may not restrict imports of a product merely because [the product] originates [from] a country with environmental policies different from its own." [74]

The Panel expressed concern that if Article XX(b) and (g)'s exceptions were read to permit import restrictions in response to differences in environmental standards, the contracting parties would have to establish limits on the range of deviations in environmental standards that would justify an import restriction response by a contracting party. [75] The Panel opined that if the contracting parties sought to allow trade measures of this kind it would be preferable to do this by amending GATT, or adopting a supplementary agreement to it, not by interpreting Article XX's exceptions. [76] Finally, the Panel noted that its report "would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies, nor the right of the contracting parties acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of [GATT]." [77]

Aftermath of the Tuna/Dolphin Decision

On January 9, 1992, a little more than four months after the Panel's decision, the U.S. District Court for the Northern District of California, in *Earth Island Institute v. Mosbacher* (*Earth Island II*), [78] issued a preliminary injunction enjoining the Secretary of Commerce, the NMFS, and the Secretary of the Treasury from "permitting the importation into the United States of all yellowfin tuna and tuna products from any intermediary nation, until [these officials] obtain certification and proof that the intermediary nation has prohibited the importation of tuna which could not be exported directly to the United States under the provisions of the [direct] embargo." [79] The court found that the plaintiffs had shown probable success on the merits of their claim that the United States' intermediary nation embargo program did not satisfy the requirements of the MMPA, [80] because it did not ban all yellowfin tuna and tuna products from intermediary nations, but only banned imports from noncompliant intermediary nations that were harvested in the ETP. Although the district court's order issuing the preliminary injunction makes no mention of either the Panel's decision or GATT in general, the parties' arguments in the case made extensive references to both.

While the United States did not argue that the court was legally bound by the Panel's decision in interpreting the intermediary embargo nation provisions of the MMPA, the government did go to great lengths to make the court aware of the Panel's decision. [81] Implicit in this effort to present the court with the Panel's decision was the notion that the court should be aware of, and consider in its decision, the effects of its decision on foreign trade relations. [82] The United States pointed to the Panel's decision as evidence of the substantial friction that could result from a more stringent reading of the intermediary nations embargo provisions of the MMPA. [83]

Plaintiff Earth Island Institute responded to the United States' GATT argument in two ways. First, Earth Island Institute argued that because the Panel's decision had not been adopted by GATT's contracting parties, the Panel's decision had no binding effect whatsoever. [84] Second, Earth Island Institute argued that even if the Panel's

71. *Id.* at 49-50.
72. *Id.* at 50.
73. *Id.*
74. *Id.*
75. *Id.* at 51.
76. *Id.*
77. *Id.*
78. No. C 88-1380 TEH (N.D. Cal. Jan. 9, 1992).
79. *Id.* at 22-23; *see also supra* notes 24-27 and accompanying text (discussing the MMPA's direct embargo provisions), *supra* notes 28-30 and accompanying text (discussing the MMPA's intermediary nation embargo provisions). The order of the court also requires the relevant federal officials to implement "forthwith" a program to enforce the intermediary nations embargo in accordance with the MMPA. *Earth Island II*, No. C 88-1380 TEH at 22-23. The order provides that such an intermediary nation embargo program

> shall require that an official of the government of *each* [nation identified as an intermediary nation] must [provide] certification *and* proof that that nation has acted to prohibit the importation of tuna that is barred from direct importation into the United States under the terms of the MMPA, including tuna and tuna products which were harvested by embargoed nations with purse seine nets in the [ETP].

Id. The court's order does not, however, apply to yellowfin tuna and tuna products that were in transit at the time of the order. *Id.* at 23.
80. *Id.* at 16-20. The court also noted that the intermediary nation embargo program did not require certification and proof that the nations in question prohibited the importation of certain tuna and tuna products, but was instead satisfied by proof that intermediary nations did not, at the time of certification and proof, import such tuna. *Id.* at 18-19.
81. Federal Defendants' Supplemental Memorandum Re Intermediary Nation Embargo 1-4, *Earth Island II*, No. C 88-1380 TEH (N.D. Cal. Jan. 9, 1992) [hereinafter Defendants' Memorandum].
82. *See Id.* at 1-4; *see also*, Plaintiffs' Reply in Support of Motion for Summary Judgment and Preliminary and Permanent Injunctions 5 n.3, *Earth Island II*, No. C 88-1380 TEH (N.D. Cal. Jan. 9, 1992) [hereinafter Plaintiffs' Reply] (discussing defendant's foreign trade relations arguments).
83. Defendants' Memorandum, *supra* note 81, at 1-4; *see also* Plaintiffs' Reply, *supra* note 82, at 5 n.3.
84. Plaintiff's Reply, *supra* note 82, at 5 n.3.

decision had been adopted, it could have no direct effect on the defendant's duties under the MMPA. [85]

Analysis and Effects of the Panel's Decision

As the plaintiff in *Earth Island II* correctly pointed out, the decision of a GATT panel is not binding on the parties to the dispute and has limited precedential value until the decision has been adopted by the GATT Council. [86] Although either party can request adoption of a panel decision, as of this writing, neither Mexico nor the United States has sought to do so. Currently, Mexico and the United States are negotiating both a free trade agreement and an international agreement on ETP tuna/dolphin, [87] and so long as these negotiations continue to progress, seeking review of the Panel's decision is in neither country's best interest. The actual effect of the Panel's decision is, therefore, in limbo, and the U.S. embargo on Mexican tuna and tuna products remains in force.

Despite the nonbinding nature of the Panel's decision, the decision is nonetheless of great importance for a number of reasons. First, should either Mexico or the United States become dissatisfied with the progress of negotiations, the decision could be reviewed for adoption and could become binding at any time. Next, even if the decision is not adopted, the reasoning of the Panel is likely to be applied in future cases regarding similar disagreements. Finally, the decision displays the environmental shortcomings of current international trade law.

In principle, even if the Panel's decision is adopted by the General Council, it will have little direct effect on the viability of the MMPA or other American law. [88] As a practical matter, however, nations, including the United States, desire freer trade and do not want to be perceived as acting in opposition to GATT. Thus, in the interest of foreign relations, unless the United States feels that the protection of the environment warrants violating GATT, the United States and the other contracting parties must develop ways to harmonize GATT's provisions, as expressed in the Panel's decision, with national and international environmental laws. [89]

The Decision's Effects on Domestic Laws

Despite the Panel's assurances that its decision does not affect the domestic environmental protections of contracting parties, in this era of global interconnectedness the Panel's assurances are not entirely accurate. As free trade opens up domestic markets to foreign goods, American products must compete with foreign products from nations with lower environmental standards. These foreign products, in effect, receive a subsidy, because they need not comply with higher standards, which in certain instances can increase cost. This subsidy can be passed on to the consumer in the form of lower prices. Since concerns about American competitiveness are running high, if American environmental laws even appear to harm American competitiveness—by making American products more expensive than imported products—public sentiment in favor of strong environmental protections could diminish. This shift in public sentiment could threaten the effective enforcement of current environmental laws and hamper efforts to enact laws to address global warming, biodiversity, and other environmental problems. [90]

The Panel's decision not only aids and abets the misconception that environmental laws are anticompetitive, but it simultaneously limits the United States' ability to enact environmental laws that are procompetitive. There is growing awareness that flexible, market-based laws actually improve competitiveness by encouraging businesses to become more efficient and more innovative, which are critical skills for competing in today's global market. [91] The Panel's opinion, however, makes it all but impossible for such market-based regulations to comply with GATT.

Market-based regulations, in order to be effective, must place the same environmental demands on all products in a given market. Such market-based regulations will necessarily require foreign products sold in U.S. markets to bear the costs of the lower environmental standards of their countries of origin. Unless such market-based regulations actually affect the physical or chemical makeup of the product, the regulation will violate GATT. [92] By their very nature, few market-based regulations will actively affect the actual underlying products sold within the markets to which these regulations apply. Thus, the Panel's decision not only exacerbates the misconception that environmental

85. *Id.* Earth Island Institute emphasized that the defendants' duties under the MMPA could only be altered if Congress decided to modify the MMPA. *Id.*

86. The GATT dispute resolution mechanism is set out in the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT, BISD 26 Supp. 210 (1980), *as modified by* GATT, BISD 29 Supp. 13 (1983).

87. Telex from the U.S. Dept. of State, Elements Re Dolphin Conservation, to American Embassy Mexico, Ref. No. (A) 91 Mexico 24946 (Sept. 1991) (unpublished telex on file with the Center for International Environmental Law—U.S., Washington, D.C.).

88. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 467, 507-08 (1990). Although disagreement persists over the status of GATT in the hierarchy of U.S. domestic law, even assuming that GATT has become the law of the United States, only U.S. laws enacted before 1947 will be trumped by GATT because of the terms of the PPA and the application of the later-in-time rule. *See id.* at 508.

Moreover, with regard to private parties, the Fifth Circuit has held that the U.S. treaty obligations under GATT do not provide foreign parties with standing to challenge certain environmental regulations promulgated by EPA that restrict trade. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 22 ELR 20037 (5th Cir. 1991). This holding limits the vulnerability of U.S. environmental protections to GATT-based challenges in U.S. courts by limiting the access of foreign plaintiffs to the U.S. judicial system.

89. This statement is not intended to suggest that the authors believe that the United States should not continue to apply, enforce, and improve the environmental laws of the United States.

It should also be noted that the United States has not been reticent to violate GATT obligations when using self-help to pursue trade interests, even to force the reform of GATT. *See* Robert E. Hudec, Remarks at the 84th Annual Meeting of the American Society of International Law 33-44 (Mar. 29, 1990).

90. *See, e.g.*, Charles P. Alexander, *Gunning for the Greens*, TIME, Feb. 3, 1992, at 50-52.

91. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 647-49 (1990). *See also* Michael E. Porter, *America's Green Strategy*, SCI. AM., Apr. 1991, at 168.

92. Even if market-based regulations actually affect the product, it is possible that such regulations may still violate GATT's requirements.

regulations are anticompetitive, it helps turn the misconception into reality. [93]

Further, the Panel's decision that point of importation regulations can only be upheld if they regulate the sale or affect the makeup of a product calls into question not only the effectiveness of procompetitive market-based regulations, but also the effectiveness of virtually all environmental regulations that apply to imported products. Comparatively few environmental regulations regulate the sale of a product or actually affect the physical or chemical makeup of a product; the vast majority establish standards for either the production process that creates the product or the handling of the wastes from that production process. Unless they fall within one of the GATT exceptions, regulations that apply to imported products, but do not have an actual affect on the product or regulate the sale of the product, are likely to be found in violation of GATT, even though the imported product is accorded exactly the same treatment as the domestic product. [94] Similarly, nonenvironmental regulations, such as worker safety codes, that apply to imported goods but fail to regulate the sale or makeup of the actual product are also in jeopardy of violating GATT.

The Panel's treatment of the GATT Article XX(b) and (g) exceptions also raises a number of serious concerns. First, by limiting the application of Article XX's exceptions to only "jurisdictional" actions, the Panel failed to take into account the responsibilities that all nations have to conserve global resources and world heritage and to serve as trustees for future generations by adopting sustainable practices. The Panel's domestic limitation is nonsensical, because it fails to take into account the fact that domestic environmental harms are now, increasingly, being traced to actions occurring beyond a nation's borders. Limiting the reach of a nation's environmental laws to domestic activities substantially undercuts its ability to protect itself from adverse extraterritorial activities.

Second, the Panel imposes a strict standard of necessity for measures to qualify for Article XX's exceptions. Under the Panel's reasoning, a nation cannot claim a measure is "necessary" unless the nation can demonstrate that the measure sets a definitive standard at the level of protection that is needed to ensure the protection of human, animal, or plant life or the continued existence of a resource. The strict-proof-of-necessity standard that the Panel appears to establish here can significantly hamper legitimate domestic environmental regulations that apply to foreign products from qualifying under Article XX's exceptions.

Third, the Panel also seems to predicate the ability of a domestic regulation to qualify for Article XX's exceptions on the regulating nation's prior attempts to achieve similar protections through an international agreement. As the Panel correctly points out, effective international agreements can provide the global solutions needed to address international environmental problems; however, the Panel fails to take into account that such international accords are, generally, not swiftly made. Delays attendant to negotiating an international agreement can allow environmental harms, such as species loss, to become irreversible before an international accord can be reached. Moreover, the unilateral actions of one nation can be an important catalyst in bringing about an international agreement. Simply put, the Panel's decision fails to reflect the needs of nations to have the flexibility and speed that unilateral extraterritorial actions offer.

In addition to the decision's effects on substantive environmental protection standards, the Panel's decision also raises concerns about the viability of environmental labeling laws. While the Panel upheld the DPCIA, its decision was based on the findings that the DPCIA's provisions do not affect market access (both dolphin-safe and dolphin-destructive tuna can still be sold) and are voluntary (dolphin-safe tuna is not required to bear a dolphin-safe marking). Mandatory labeling laws, which allow a product to be sold only if it carries an environmental disclosure that does not apply to the product, establish requirements that affect market access and are likely to be found to violate GATT. [95]

The Decision's Effects on International Laws and Agreements

The Panel's decision will also have substantial effects on international laws and agreements. While the Panel's own decision shows these two categories are in no way mutually exclusive, the effects on international law are best thought of as effects on international environmental laws, and effects on international trade laws, specifically GATT and a Mexican American free trade agreement.

☐ *Effects on International Environmental Laws.* The decision's strongest underlying theme is the Panel's opinion that the best method for dealing with international environmental problems is through international agreements. Based on this underlying theme, the decision takes significant strides towards encouraging such international agreements. While limiting the scope of national laws, the Panel was quick to emphasize that its decision did not limit the ability of the GATT contracting parties to enter into agreements that in the environmental field, may, in fact, necessarily

93. It should be emphasized that market-based solutions are, however, not necessarily a panacea for all environmental problems and may, in accordance with the precautionary principle, be inappropriate for problems that involve unconventional threats, high degrees of scientific/technical uncertainty, and/or the threat of irreversibilities. *See* Daniel M. Bodansky, *Scientific Uncertainty and the Precautionary Principle*, ENV'T, Sept. 1991, at 4-5.

94. The Panel stated that:

> A contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers, and a contracting party is also free to tax or regulate domestic production for environmental purposes. As a corollary to these rights a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own.

PANEL REPORT, *supra* note 4, at 50. Earlier in the decision, however, the Panel emphasizes that in order for the taxes or restrictions imposed on domestic products to be imposed on imported products, these taxes or restrictions must qualify as point of importation requirements, which are viable only if they regulate the sale or affect the actual product sold. *Id.* at 41.

95. Mandatory labeling laws that require a product to disclose its production process methods in order to be sold on a market are, in essence, just an alternative means of banning products because of their methods of production.

conflict with GATT.[96] Despite the Panel's reliance on international agreements, the Panel does little to clarify the interplay between international environmental agreements and GATT. While the Panel notes that an agreement by GATT's contracting parties need not comply with GATT, the Panel does not discuss what effect an international agreement has on contracting parties that do not sign the agreement or take a reservation to some part of the agreement, nor does the Panel touch on how many contracting parties must enter into an agreement for that agreement to trump GATT for all the contracting parties. As future international environmental agreements are created, these outstanding questions could prove to be a significant obstacle to their implementation. For example, in light of these uncertainties, the fate under GATT of the Montreal Protocol,[97] the Basel Convention,[98] and the United Nations' Driftnet Resolution[99] remains to be seen.

☐ *Effects on International Trade Laws.* As the Panel noted, GATT, in its current version, is not intended to provide the contracting parties with a means to respond to differences in environmental protection among nations, nor is it intended as a mechanism to provide nations with incentives to act in environmentally intelligent ways. Because trade policy can provide incentives and disincentives for resource use that have direct and dramatic effects on the world's environment, nations may need to discipline trade policies to ensure environmentally sound development. They will have to change GATT first, however.

There are a number of different mechanisms that could be used to make GATT environmentally friendly, and each of these methods has its own costs and benefits. First, GATT could be amended to incorporate environmental measures into the agreement itself. Amending GATT would the strongest way of obligating the largest number of contracting parties to abide by an environmental code. Amending GATT, however, would be politically very difficult, and the contracting parties would still be free to take a reservation to such an amendment. Perhaps a more realistic way to harmonize environmental regulation and trade regulation would be for the contracting parties to enter into a side agreement to GATT that would set out an "environmental code." While an environmental side agreement would only bind the signatories, such an agreement would be substantially easier to negotiate than an amendment to GATT. If a side agreement proves unachievable, an "understanding" on the meaning of GATT's terms, such as those in Article XX's exceptions, could be agreed to by the GATT contracting parties to allow the environmental regulations to be read in harmony with GATT.

The Panel's decision may, in the near future, also begin to play a decisive role in the negotiations and approval of a Mexico-United States free trade agreement. While Congress has extended President Bush's authority to negotiate a "fast track" free trade agreement, this extension of authority is not irrevocable and was predicated on the assurances by both President Bush and Mexico's President Salinas that Mexico is now an environmentally sound trading partner and that a free trade agreement will in no way weaken U.S. environmental laws. There is a growing perception that the Mexican government that brought a challenge to the most basic protections of the MMPA may not be as environmentally aware as it would have the American public and Congress believe. There is also growing fear that Mexican-American free trade, in the form of the GATT tuna /dolphin decision, is already compromising the strength of U.S. environmental laws. In spite of these fears, it remains to be seen whether the environmental concerns over a Mexico-United States free trade agreement that have been highlighted by the Panel's decision are significant enough to cause revocation of the Bush administration's "fast track" or to alter or block a free trade agreement. At the moment, however, it appears unlikely that such a revocation will occur.

Conclusion

The Panel's decision, even if adopted by the GATT Council, will have little actual effect on U.S. law. Nevertheless, the decision forces the United States either to abide by the decision and allow foreign products harvested in environmentally unsound ways to be sold in American markets at the expense of U.S. interests, or to ignore the decision and undermine the effectiveness and credibility of international law and its dispute resolution mechanisms. While the GATT Panel's decision is disheartening because it has the potential to jeopardize many of our most important environmental protections, it nonetheless has served to raise awareness of potential conflict between environmental and trade law. Environmental and trade lawyers alike are beginning to recognize that free trade is not necessarily "free." Unless trade rules are modified to allow for environmental and social protections, free trade can entail significant environmental and social costs. There is also a growing awareness that there is a symbiotic relationship between healthy trade and a healthy environment. Much of international trade consists of trade in natural resources, and the continued availability of these resources, and their attendant trade opportunities, is dependent on the environmentally sound and sustainable management of these natural resources. These realizations are creating an understanding that international trade agreements and understandings, such as GATT and a Mexico-United States free trade agreement, must be harmonized with the need for national and international environmental protections that advance the goal of sustainable development. In essence, "free trade" must become synonymous with "sustainable trade."

The need to harmonize environmental laws and international trade agreements is also forcing us to accelerate our continuing reappraisal of environmental protections. From this reappraisal we are finding that protecting against environmental harms is not necessarily anticompetitive or

96. *See* PANEL REPORT, *supra* note 4, at 51. The Panel recognized that GATT's contracting parties can amend GATT to allow them to enter into agreements that would otherwise conflict with GATT. *Id.* As a practical matter, they can also enter into agreements that do conflict with GATT.

97. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

98. Basel Convention on the Transboundary Movements of Hazardous Waste and Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649.

99. G.A. Res. 44/225, U.N. GAOR, 44th Sess., 85th mtg., U.N. Doc. A/44/746/Add. 7 (1989).

anti-free trade. Properly framed environmental regulations can encourage increased trade liberalization by industries that are less wasteful and more innovative. Environmental laws provide incentives to reduce wastes and inefficiencies and, as such, are procompetitive for both domestic and foreign industries. Moreover, one of free trade's primary goals is the establishment of a level playing field so that free and fair trade can be conducted by all nations. Harmonized international environmental standards, brought about by international environmental or trade agreements, at levels that accurately reflect and effectively address the environmental threats all nations face, remove the de facto subsidies historically provided to industries in nations with lower environmental standards and create a level playing field for trade that does not jeopardize the global resources upon which trade, markets, and our world depend.