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GATT AND THE ENVIRONMENT: THE FRICTION BETWEEN INTERNATIONAL TRADE AND THE WORLD'S ENVIRONMENT - THE DOLPHIN AND TUNA DISPUTE

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I. THE SCOPE OF THE INQUIRY

Much has been written in recent years on the role environmental issues should play in the decisionmaking process embodied in the General Agreement on Tariffs and Trade (GATT). In parallel but unrelated discussions, the present structure and even the continued utility of GATT in connection with international trade issues has been questioned, quite apart from the role of environmental issues in the process.¹ Since the conclusion of World War II, substantial changes in the nature of the world's economies, the expanding scope and the changing nature of environmental degradation, as well as increasing public pressure regarding environmental regulations, have worked together to promote a re-examination of international trade policies and, more particularly, the role that environmental concerns should play in influencing those policies. Two pots containing historically unrelated topics—trade and the environment—are boiling. Some wish to mix the topics and some do not. Virtually all of the literature and documents reviewed while developing this article, however, strongly advocate one view or another on the subject. This article does not intend to take sides in the debate by advancing any particular position. Those heavily engaged in the debate are very capable of setting forth the advocates' positions. This article merely intends to provide the reader with the background to put the issues in perspective and some insights regarding the points that are being raised by those more directly embroiled in the process.

Any comprehensive analysis regarding the role of the environment in international trade would go well beyond the bounds of GATT. A number of other international organizations and

1. See, e.g., Clyde V. Prestowitz, Jr., et al. *The Last Gasp of GATTism*, HARV. BUS. REV., Mar.-Apr. 1991, at 130.

agreements would be involved in such an analysis.² It would be misleading, however, to someone not familiar with GATT to underemphasize its real significance to international environmental issues, particularly in view of the recent report of the GATT dispute resolution panel in the dolphin and tuna dispute, discussed at length below.³ GATT routinely is referred to in terms such as "the principal international agreement regulating trade between nations."⁴ It is the major international trade agreement and institution impacting global environmental issues.

The relatively pervasive nature of GATT in international trade thereby places it in a position to substantially influence environmentally related activities of both individual and groups of nations.⁵ This article does not purport to address that broader subject in any comprehensive fashion. Instead it focuses on the GATT process, the United States' role in GATT, and the role of the environment in the GATT process through an analysis of two specific fact patterns:

FACT PATTERN NO. 1: The United States passes a statute that restricts a tuna fisheries practice in such a way as to reduce the "incidental" killing of dolphins and applies those restrictions to the U.S. tuna fleet. The statute also provides for an embargo on the importation of tuna from other countries where the "incidental" dolphin kill in a given year exceeds a certain multiple of the U.S. "incidental" kill.

FACT PATTERN NO. 2: The United States imposes environmental requirements on the manufacture of a product, while other countries do not, causing the U.S. product to cost more. The issue presented is whether the United States can do any-

2. For example, the Organization for Economic Cooperation and Development (OECD) and the United Nations Environment Programme (UNEP).

3. United States Restrictions on Imports of Tuna, GATT Panel Report (In Re Matter DS 21/1), submitted to the Parties, Aug. 16, 1991, reprinted in 30 I.L.M. 1594 (1991) [hereinafter *Panel Report: Dolphin/Tuna*]. This panel report has not yet been adopted by the GATT Council. *Id.* at 1594 n.*.

4. PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT 7.

5. In fact, the environmental commentators recently called upon by the United States Congress to comment on the recent GATT dispute resolution panel report were uniformly of the view that its impact on the environmental statutes and resolutions of individual countries and on a variety of international environmental agreements, which rely on trade restrictions for effective enforcement, would be very substantive. See *GATT: Implications on Environmental Laws: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (Sept. 27, 1991) [hereinafter *Hearing*] (testimony of Steven Shrybman, David Phillips, Ralph Nader, and Charles Arden-Clarke).

thing when the foreign product is imported in order to keep the U.S. product price competitive.

Fact Pattern No. 2 addresses the question of which environmental issues enjoy a right of protection by a particular nation. Fact Pattern No. 1 addresses the circumstances under which such protectionism may be exercised, even if the right does exist. Under current GATT principles, the search for a "right to act" is met by a very narrow construction of GATT. Even where it is acknowledged to exist, the right to enact protectionist measures is strictly scrutinized to determine whether the measure at issue is "primarily aimed at" health and safety or the conservation of natural resources, or whether the measure is a prohibited disguised restraint on trade. As protectionism's territorial impact is substantially circumscribed by GATT and the burden of proof is on the proponent of the restriction, at present the environment is an unwelcome guest at GATT.

In analyzing those two fact patterns, however, one must first explore the forum in which such issues are resolved, as well as the principal missions of the people who are involved in that process. If one does not understand the forum, the process, and the contradictory forces at work upon the decisionmakers, one can neither analyze the issues nor place the results of analysis in an appropriate perspective.

II. THE FORUM AND THE PARTICIPANTS

A. *GATT - The Institution*

Shortly after the conclusion of World War II, a variety of conferences were held, under the auspices of the United Nations and other organizations, targeted on re-establishing a viable world economy, in the wake of the damages and disruption caused by the war. Steps toward this goal included the formation of a proposed triad of institutions: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the International Trade Organization (ITO). These three institutions were intended to focus on the reconstruction of Europe, world economic development, and the expansion of world trade. The IMF, under the auspices of the ITO, was to furnish funds for those countries that were operating at a deficit in international trade.

It was hoped that the efforts of three international entities would promote: (1) A higher standard of living for more people

within the world at large, and (2) world peace by encouraging better interaction between more countries on a continuing basis. The latter concept was fueled by a belief espoused by some that the protectionism spawned by the Great Depression of the 1930s hurt all economies in the world, paved the way for dictators, and set the stage for a devastating war.

The ITO was to have functioned pursuant to the Havana Charter. GATT was merely an interim agreement memorializing a variety of post-war tariff reductions, which had already been agreed to by a number of the parties considering the ITO. While the IMF and World Bank were approved and put into operation, the United States Congress refused to approve the ITO, although the U.S. representatives had done much of the drafting regarding the formation of the ITO.

The countries involved, however, did not wish to see the gains they had made through GATT disintegrate as well. As a consequence, an interesting evolution of this "interim" agreement commenced. It was formalized as a permanent treaty effective January 1, 1947. The signatory countries are referred to as the "Contracting Parties". Today, its staff organization, the Secretariat, has four hundred employees in offices on the shores of Lake Geneva, headed by a Director General. Interestingly from an historical perspective, the current Secretariat staff are still employees of the "Interim Commission of the ITO," an organization held over from 1947, which is responsible for hiring employees, retaining the Director General, and entering into contracts. The GATT Secretariat serves as a facilitator of negotiations between the Contracting Parties.

While there was broad participation in GATT from the outset, some one hundred new nations have emerged since World War I. Presently, approximately 125 countries participate in GATT, and several eastern European countries, and the People's Republic of China reportedly are attempting to participate. Contracting Parties exercise their authority through the GATT Council. The Council, established in 1960, is composed of representatives from any Contracting Party who wishes to participate. The GATT Council meets on a monthly basis in Geneva and its actions are subject to being vetoed by the Contracting Parties as a whole. Though in 1975 a Steering Committee⁶ was created, it was never placed into effective operation.

6. Referred to as the "Consultative Group of 18" (now made up of 22 countries).

One of the interesting challenges presented by the GATT structure is the fact that each country that originally entered into GATT was allowed to "grandfather" a variety of provisions in their domestic laws that were not in conformance with the GATT articles.⁷ While many of those grandfathered domestic laws have become outdated, a number still remain. Similarly, as additional countries were added to GATT, they grandfathered inconsistent provisions in their domestic laws by virtue of their "accession protocols." To further compound the complexity of the situation, a variety of the parties have established "side agreements," which establish standards outside of the GATT provisions. Those standards often are governed by dispute resolution procedures independent of GATT. In short, a reading of the GATT articles alone can be extremely misleading if as one is trying to gain a true insight to what is at issue.

Ironically, while the United States became a Contracting Party by executive agreement and proclamation in 1947,⁸ the Senate has never given its consent to GATT, and Congress has never formally approved it. Despite that, the United States has been an active participant in GATT, and the United States Congress on a variety of occasions has passed domestic legislation implementing GATT decisions.⁹ GATT has been revised at various times since 1947 by virtue of "rounds" of negotiations, each of which takes several years to conclude. Seven such rounds have been concluded to date. The last one, the Tokyo Round, was completed in 1979. The Uruguay Round is currently underway, although there appears to be some skepticism as to whether it will conclude successfully. Its intended completion date has already been extended by one year.

It is apparent from a reading of the GATT articles, and the writings of commentators on the subject, that the broad array of environmental issues confronting the world today were not intended to be addressed directly in the document as originally drafted in 1947. Whether one can find environmentally protective wording and options within that document as amended in the various rounds, is really the heart of the analysis of the two fact patterns addressed in this article. In attempting that analy-

7. PESCATORE, *supra* note 4 at 15.

8. Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947).

9. See, e.g., Trade Act of 1974, 19 U.S.C. § 2101 (1988); Trade Agreements Act of 1979, 19 U.S.C. § 2503; Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2905.

sis, however, one must put the background of the formulation of the GATT articles' language in perspective.

From the very outset, the underlying purpose of GATT was the reduction of trade barriers between countries in order to inspire and allow for open trading. It represents an effort to bring laissez-faire economic policy to a broader world population. Initially, tariffs were viewed as one of the most compelling problems impeding the achievement of this underlying goal. The first five rounds, conducted up through 1961, were concerned exclusively with tariff reductions. The subsequent rounds also dealt with nontariff barriers such as import quotas, safety standards, testing requirements, and governmental subsidies.¹⁰ Through these rounds, the Contracting Parties made various amendments to the GATT articles and also approved specific codes on various topics, such as the Antidumping Code and a code specifically directed to the dispute resolution process.¹¹

B. The Direct Role of the Environment in GATT

Some twenty-four years after GATT was originally executed, the Secretary General of the United Nations Conference on the Human Environment requested that GATT signatory members participate in preparatory work for the 1972 United Nations Stockholm Conference. At the conference the GATT Secretariat prepared and submitted a paper entitled *Industrial Pollution Control and International Trade*.¹² That conference produced the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*.¹³ Certain aspects of the GATT Secretariat's paper will be discussed below in connection with the second hypothetical. However, in rela-

10. See PESCATORE, *supra* note 4, at 8 n.3 and accompanying text.

11. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Decision, adopted Nov. 28, 1979, BISD 265/210 (GATT Basic Instruments and Selected Documents, 26th Supp.) (1980); *Ministerial Declaration*, adopted, Nov. 29, 1982, BISD 295/9 (1983) (addressing dispute settlement procedures); *Action Taken On 30 November 1984*, GATT Decision, BISD 31S/8, 9-10 (1985) (addressing dispute settlement procedures); *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Decision, adopted Apr. 12, 1989, BISD 365/61 (1990) [hereinafter *Montreal Reforms*].

12. *GATT: Studies in International Trade, Industrial Pollution Control and International Trade*, GATT Doc. L/3538 (June 9, 1971) [hereinafter *GATT Industrial Pollution Control*] (photocopy on file with the Tulane Environmental Law Journal).

13. U.S. Doc. A/Conf. 48/14, 11 I.L.M. 1416 (1972) (more formally known as the report of the U.N. Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972).

tively broad terms it would seem fair to say that this paper emphasizes a rather restrictive role for environmental concerns in the GATT process.

In 1971, the GATT Council established a "Working Group on Environmental Measures and International Trade."¹⁴ This "Working Group" has never met during the twenty years of its existence. Over the past year, there has been some pressure put on the GATT Council to activate the Working Group.¹⁵ As a broad generality, it would seem fair to say that more developed countries (MDCs) are likely to tolerate a broader role for environmental concerns in connection with world trade activities, than are lesser developed countries (LDCs), who have expressed a substantial reticence on that point. These LDCs apparently view the injection of environmental issues into international trade as a mechanism that could limit their participation in lucrative world trade at a time when many such countries are burdened with substantial debt incurred in the process of attempting development. MDCs seek primarily to protect their

14. *Decision of the GATT Contracting Parties to Establish a Group on Environmental Measures and International Trade Adopted by GATT Council in 1971*, GATT Doc. C/M/71, at 4-5 (1971) (photocopy on file with the *Tulane Environmental Law Journal*). The document establishing this working group provides:

The CONTRACTING PARTIES

Noting that efforts at the national or international level to control pollution and to protect human environment can have important consequences for international trade;

Desiring to co-operate in this sphere with a view to contributing to the effective operation of the General Agreement and the attainment of its objectives;

Bearing in mind the provisions of the General Agreement;

Recognizing that in appropriate cases it may be desirable that contracting parties examine between themselves the possible effects on the operation of the General Agreement of measures to control pollution and protect human environment and that such examinations should be fruitful if they are undertaken at the appropriate time;

Desiring to establish appropriate and flexible procedures which would facilitate consultations between contracting parties;

Decide to establish a Group whose main functions would be:

1. to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of developing countries.
2. to report on its activities to the Council.

15. *Environment Initiative Sparks Debate on GATT Role*, GATT NEWSL., Jan.-Feb., 1991, at 3, 5; *World Lawmakers Urge Negotiators to Examine Environmental Impact of Trade*, INSIDE U.S. TRADE, Nov. 23, 1990, at 7, 7-8 [hereinafter *World Lawmakers*]; *Environmental Group Still on Hold*, MEALEY'S EUR. ENVTL. L. REP., Jan. 16, 1991, at 13.

own industries, which often are burdened with the higher costs of operation associated with environmental regularity compliance. MDCs also purport to have an interest in preventing global environmental degradation could result from a lack of environmental requirements in many aspects of world trade. The latter point, however, is not necessarily high on all of these countries' agendas.

When one considers the language in the brief document that serves as the present charter for the inactive Working Group on Environmental Measures and International Trade, one must wonder whether the true mission of the Working Group was to bring environmental issues into the GATT process or whether its true mission is to defend the GATT process from the intrusion of environmental issues. It would be the author's impression that the latter is the more likely conclusion, particularly given the history of GATT and the contents of the 1971 GATT paper on *Industrial Pollution Control and International Trade*,¹⁶ which was produced by the Secretariat at approximately the same time as the Working Group's charter.

In evaluating the importance of these trade issues, and their influence on international relations, one should consider that even some of the *Stockholm Declaration* principles would seem to be directed to the protection of open trade, being particularly sensitive to the LDC's interests.¹⁷ Reportedly there is some pressure within GATT to participate in the 1992 United Nations Conference on Environment and Development, also known as "Earth Summit."¹⁸ It remains to be seen, however, whether GATT will activate the Working Group or participate in the Earth Summit. Other than those steps noted above, it would appear that the only substantive GATT activities in connection with environmental matters are a 1990 paper prepared for the

16. *GATT Industrial Pollution Control*, supra note 12.

17. For example, Principle 11 provides: "The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries . . .;" Principle 21 provides: "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies . . .;" and Principle 23 provides: ". . . [I]t will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries." U.S. Doc. A/Conf. 48/14, 11 I.L.M. 1416 (1972).

18. U.N. Conf. On Envir. & Dev., *Earth Summit News* (United Nations Conference on Environment and Development), Mar. 1991, at 1 (United Nations Earth Summit Conference, Rio de Janeiro, scheduled for June 1-12, 1992); *Environment Initiative Sparks Debate on GATT Role*, supra note 15, at 3.

GATT Secretariat on behalf of a Working Group on Domestically Prohibited Goods¹⁹ and a limited number of dispute resolution panels on specific issues.

C. The Dispute Resolution Procedure

The dispute resolution procedure utilized by GATT is set forth generally in Articles XXII and XXIII. Those articles utilize terms such as "sympathetic consideration," "consultation," and the like, setting a diplomatic, nonadjudicative tenor. In fact, the articles are very broad and unspecific as to the procedures that will be employed.

There have been approximately eighty dispute resolution panel decisions reported. In the earliest days, the Director General merely rendered a decision. The process then evolved into the use of five members on a panel, which would report to the Contracting Parties as a whole. After the 1950s, the process evolved into a three-person panel, which continues to be used today. In the past decade the process has become more formalized by virtue of a variety of agreements constituting what is generally referred to as the "Code."²⁰ Although the process has drifted more toward being adjudicative, rather than a negotiation, its overall approach would suggest it still remains a quasi-diplomatic process.

CHART 1

OVERVIEW REGARDING GATT DISPUTE RESOLUTION PANEL PROCEDURES

	PROCEDURE	COMMENTS
1.	Consultations between the parties	Even after the panel is appointed one of its historically accepted obligations is to foster continuing negotiations or consultations between the parties.
2.	The complaining Contracting Party requests that the Council constitute a dispute resolution panel	While it is not required that the Council agree to do so, it normally does.

19. See *Export of Domestically Prohibited Goods and Other Hazardous Substances*, GATT Doc. DPG/W/6 (Feb. 2, 1990).

20. See *supra* note 11 and accompanying text.

CHART 1 (continued)

	PROCEDURE	COMMENTS
3.	Panel selected	The Director General suggests the names from an approved list. This is a change from the past, when the governmental employees assigned to the Geneva offices of countries not involved in the dispute would be appointed to participate on the panels. Major trading countries, such as the United States, Canada, Japan and Italy were normally excluded, as they were generally considered to have an interest in virtually any type of dispute. Presently, panels tend to also include experts on trade, who are not necessarily governmental employees. Governmental affiliations are not carried on the list and have been de-emphasized, although representatives of the parties to the disputes are not allowed as panel members. The parties to the dispute consult with the Director General with respect to who will be seated. Ultimately, the Council approves the panel.
4.	An agreed set of issues is prepared	The panel and the parties engage in this process together.
5.	Written submissions, including "annexes" (the evidence in support of the position of the party) are submitted to the panel	These submissions are filed simultaneously. Therefore, the complained of party does not have the benefit at this stage of knowing exactly what the arguments of the complainant are.
6.	A hearing is held	At this point the parties can question each other and they can be questioned by the panel. In view of the simultaneous filing of the initial submissions, this apparently does not tend to be quite as adversarial a hearing as it otherwise might be.
7.	Reply submissions and annexes are filed by the parties	These are filed simultaneously.
8.	Second hearing is held	This is apparently somewhat more adversarial in nature, as the parties now have had the opportunity to analyze the arguments of each other.

CHART 1 (continued)

	PROCEDURE	COMMENTS
9.	Participation by intervening Contracting Parties	Contracting Parties may intervene in the proceedings. They are given the right to file submissions and are given the right to participate, in part, in the hearings. In the hearings, they are allowed to make their presentations and are then invited to leave. They are not given access to any of the submissions or annexes filed by the principal parties to the dispute. ²¹
10.	A draft report is prepared by the panel. The "descriptive part" (facts and arguments) are submitted to the parties for review and comment	One will note that most of the opinions are rather brief and to the point. Commentators on the topic have opined that the opinions being prepared in the last decade are materially more complete and understandable than their predecessors. This is attributed to the fact that the GATT Secretariat now has legal staff and that a GATT trade specialist and a GATT attorney are assigned to each dispute resolution panel.
11.	A final report is distributed to the principal parties to the dispute ten days before it is distributed to the GATT Council	The findings and conclusions of the GATT dispute resolution panel are not the subject of rewriting by the parties to the dispute, but are the product of the dispute resolution panel. The ten day interval is intended to give the parties to the dispute an opportunity to negotiate a settlement.
12.	The GATT Council considers the report of the dispute resolution panel	In the history of GATT, there has only been one dispute resolution panel report that has been rejected in its entirety. While some are modified in some respects, it is clear from reading about these dispute resolution panels that the complainant normally wins in the panel and that the panel is virtually never overturned or modified in substantial regard by the Council.
13.	Procedural deadlines during the course of the process	Apparently, the procedural deadlines have become tighter during the course of the evolution of the various amendments to the Code regarding dispute resolution procedure. Currently, it normally takes approximately one year for a complaint to make it through the entire process from the beginning until the time that the Council has the matter under advisement.
14.	Remedies	Normally, the dispute resolution panel merely says whether a party has violated its obligations under GATT. It rarely provides for any direct remedy. In fact, there is only one reported decision wherein trade retaliation was provided for.

21. There has been some discussion recently concerning further opening up the process to third parties. An analogy is drawn by some commentators to a provision for private interested parties to make submissions and attend hearings, which apparently has

CHART 1 (continued)

	PROCEDURE	COMMENTS
15.	Enforcement of result	This is probably the weakest part of the entire process, even after the various "reforms" in the Code. While it is not specified in the Articles, it is replete in the discussion of the commentators and in my discussions with involved personnel that the GATT operates by "consensus." In the context of enforcement of the opinion rendered by a dispute resolution panel, "consensus" means that the Contracting Party that is being complained of can generally bottle up the panel finding in the Council for a very prolonged period of time. That is generally done under the guise of "studying" the proposal. That "study" can go on for a year or more. Even when the complained of country is called to task, it can then shift gears to wanting to "negotiate" and thereby drag the process out even further. The GATT Council will not act on a dispute resolution panel recommendation until the "consensus" is built. In this context, "consensus" means that the losing party has the opportunity to decide when it will lose. Interestingly, however, the losing parties do not veto the dispute resolution panel finding, as they know that they may be next in the complaining position.
16.	Domestic implementation	Oftentimes the alleged violation arises out of existing domestic legislation in the complained of country. It apparently can take years before such domestic legislation can be reversed or amended. As a consequence, prompt resolution is not the norm. ²²

worked adequately in connection with the United States-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281. It would not appear, however, that a provision of this nature is likely to make it through GATT's belabored revision process at any point in the immediate future.

22. This adherence to the quasi-diplomatic approach has been confirmed as late as 1982, when the "consensus" approach was reaffirmed by the GATT Contracting Parties in the November 29, 1982. See *Ministerial Declaration*, *supra* note 9. The strongest statement seeking to force a more expeditious implementation of a result is found in *Montreal Reforms*, *supra* note 9, at 1033, which themselves (although only temporary during the Uruguay Round) state that "delay of the process of dispute settlement shall be avoided," hardly an overwhelming mandate.

D. GATT "Law"

The body of GATT law is found in a variety of documents. Many of them generally are not available to the ordinary practitioner, certainly not in the United States. That body is composed of the following:

CHART 2

<i>SOURCE</i>	<i>COMMENTS</i>
General Agreement on Tariffs and Trade	The various Articles, as amended over the years.
Interpretative Notes	These are attached to the GATT.
Drafting history for the Havana Charter	These are the notes of the Preparatory Committee of the U.N. Conference on Trade and Employment, which was held in various cities preliminary to the formulation of the Havana Charter. While these are available, they are generally difficult to obtain, as they are maintained on microfiche at GATT in Geneva.
Basic Instruments and Source Documents (BISD)	This is the official reporter series for GATT. Original documents and some early panel opinions are found in the original volumes. That early set of volumes is augmented by annual supplements, volumes containing panel opinions and significant papers.
Analytical Index	This in essence is a combination of an abbreviated legislative history and overview of principal jurisprudence, originally prepared and supplemented by the GATT Secretariat. It apparently focuses on a phrase by phrase analysis of the Articles and the documents related thereto. It would appear to be a key document to have in order to undertake any substantive GATT analysis.
Accession Protocols	These are the protocols relative to parties that have come into the agreement after it was originally confected. In pertinent part, these protocols contain their reservations of their "grandfathered" domestic laws that are not in conformity with GATT.
Side Agreements	These are separate agreements between certain of the parties that establish different rights and obligations on specific topics. Many of them contain their own dispute resolution procedures, separate and apart from the GATT dispute resolution panel procedure.

E. The Principal Decisionmakers and How They Interact

In a country such as the United States, it is the executive branch that actually participates in the GATT process. In general, Congress often establishes the legislation that either supports or challenges the GATT process. The relationship between the executive and legislative branches will be clearly illustrated in connection with the tuna/dolphin dispute dis-

cussed below. In taking a broad overview of the forum and the players involved, however, one must bear in mind that specific governmental bodies are not necessarily unified in their positions with respect to this issue of interaction between GATT and environmental issues. For example, it is reported that the representative of the U.S. executive branch, the Office of the United States Trade Representative (Office of the USTR), is taking a wait and see approach with respect to the overall consideration of environmental matters in the GATT process. At the same time, a group of United States legislators is actively petitioning the GATT Council and the trade representatives of other countries in support of active consideration of environmental concerns in the course of addressing trade issues. An article entitled *World Lawmakers Urge Negotiators to Examine Environmental Impact of Trade* explained:

Members of a group of legislators from major industrialized nations late last week urged the chief trade negotiators of the U.S., the European Community and Japan, as well as the head of the General Agreement on Tariffs and Trade to begin examining the environmental impact of trade practices. The group, called the Global Legislators Organization for a Balanced Environment (GLOBE) includes Senators George Mitchell (D-ME), John Heinz (R-PA) and Reps. Tom Foley (D-WA) and Richard Gephardt (D-MO). It urged late last week that world trade negotiators pay closer attention to the effect of trade on the environment.²³

The article goes on to note that the now late Senator Heinz personally urged U.S. Trade Representative Carla Hills in a July 31, 1990 letter to convene the GATT Working Group on environmental issues. Ms. Hills, responding to Senator Heinz's letter some three months later on October 22, 1990, stated that she did "not necessarily agree with the perspective that current GATT provisions are inadequate to address environmental issues as they arise, [but] it is certainly true that the relationship of GATT principles in environmental policy objectives is not well-established." She further stated that Heinz's suggestion was "an interesting one and we will discuss it with our trading partners at an appropriate time" but she would probably not take action until she had seen the results of the current deliberations of the Organization for Economic Cooperation and Development (OECD). Of course, the U.S. Trade Representative is

23. *World Lawmakers*, *supra* note 15, at 7-8.

also the United States representative to OECD, pursuant to the terms of the Trade Act of 1974.²⁴

To truly understand the dynamics at work in a particular case (the dolphin/tuna issue discussed below being a good example), one must understand the dynamics at work with respect to the advocate of the United States' position. Insofar as environmental issues attempt to creep into the GATT process, it would appear that a rather fundamental conflict of interest potentially emerges by virtue of having the U.S. Trade Representative serve as the advocate for the United States position. That subject could bear some considerable analysis and is not directly the topic of this article. A brief overview of the Office of the USTR, however, is necessary in order to put the tuna/dolphin dispute and the future interaction between international trade and the environment in perspective.

Originally, the Office of the United States Trade Representative was established as the Office of the Special Representative for Trade Negotiation.²⁵ The Trade Act established the Office of the USTR as an agency of the Executive Office of the President. The U.S. Trade Representative is appointed by the President and confirmed by the Senate. The statute specifies that the Finance Committee shall be the route to Senate approval - obviously something of a signal as to the statutorily intended emphasis and focus of the office. Interestingly, the office by statute reports to both the President and to Congress. The U.S. Trade Representative is a cabinet level official with the rank of ambassador. Several of the deputy U.S. Trade Representatives, including the one stationed in Geneva, also are given the rank of ambassador. The U.S. Trade Representative serves as an *ex officio* member of the Boards of Directors of the Export/Import Bank and the Overseas Private Investment Corporation. The trade representative also serves on the National Advisory Council for International Monetary and Financial Policy. Insofar as trade and development interests are concerned, the trade representative serves as the U.S. negotiator in connection with a variety of international agreements including GATT, the OECD, and the United Nations. Over the years since the 1974 Trade Act, the Office of the USTR has undergone certain organizational changes that

24. 19 U.S.C. §§ 2101, 2171, 2411.

25. See Exec. Order No. 11,075, 28 Fed. Reg. 473 (1963) (establishing office of Special Representative for Trade Unifications as provided for by the Trade Expansion Act).

generally have consolidated this position.²⁶

The office's history gives one a clearer picture of its perspective regarding its mission. In his 1983 article entitled *U.S. Trade Policy Needs One Voice*, George Cabot Lodge stated:

The idea for the U.S.T.R. Office emerged in Congress in the early 1970s as frustration grew with the old procedures for trade negotiation. There were two problems: first, the United States, the leading proponent of free trade in the world, was, Congress thought, being increasingly bested by other countries that would not play by the rules. The "cheaters", such as Japan and France, were continually confronting us with sophisticated and subtle policies and relationships with which we could not compete, such as non-tariff barriers and close coordination among government, business, and labor. Second, our negotiators would go to an international meeting and reach an agreement, only to have Congress upset the deal.

In 1973 representatives of 102 nations met in Tokyo and agreed to begin multilateral trade negotiations, "The Tokyo Round," to reduce tariff and nontariff barriers and to reform, the global mechanism for implementing international trade agreements. Congress, the Executive, business, and labor were eager to avoid the fiascos of the past. The 1974 Trade Act thus established a new structure for making trade policy. It consisted of three major elements.²⁷

According to Lodge, these three elements included:

1. Congress changed its role from one of writing trade bills to one of general oversight by virtue of agreeing to vote up or down on trade agreements that were brought to it (i.e., "fast track").
2. The Office of the Special Trade Representative was given its current name, Cabinet status and direct White House authority. It was given chairmanship over a series of inter-governmental coordinating committees and given authority to devise and then negotiate a single united governmental position.
3. A series of advisory committees composed of members from the private sector were created to consult with and advise GATT negotiators. As of the time that Lodge prepared his article in 1983, there already were forty-five such private

26. See Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980) (providing for the establishment of United States Trade Representative and setting out duties of office); 19 U.S.C. §§ 2901-06.

27. George Cabot Lodge & William R. Glass, *U.S. Trade Policy Needs One Voice*, HARV. BUS. REV., May-June, 1983, at 75, 79.

advisory committees with nearly 1,000 members representing the interests of agriculture, industry and labor. Congress maintained oversight by requiring that final reports from each such advisory committee would be submitted to Congress. According to Lodge: "The idea was that if the executive branch had not taken the advice of these groups into account, and the latter were not satisfied with the outcome, then Congress would not agree to what was negotiated."²⁸

When one carries the logic of that 1983 article forward to the present, it puts some of the issues being raised in the current national debate into perspective. For example, on September 27, 1991, Joshua B. Bolten, the General Counsel of the Office of the USTR presented the following testimony to a congressional subcommittee holding a hearing related to the GATT panel report on the Mexico tuna dispute:

The private sector advisory committees now include individuals specifically selected with environmental expertise. The appointment of these individuals will be an important means by which we are able to consider the capability of our environmental and trade objectives, including the Uruguay Round. Each of the relevant advisory committees is required by statute to provide a report on any trade agreement in advance of its being signed.²⁹

However, Mr. Bolten's confidence in the advisory committee system apparently is not shared by some environmentalists. In further testimony at that same congressional subcommittee hearing, the following was offered: "In recent weeks, five token environmentalists have been appointed to trade advisory committees where they are mixed in with 1,000 business advisors. No public health or consumer advocates have been appointed."³⁰ An analysis of the correct view on this topic goes well beyond the scope of this article, but obviously becomes an issue when one considers the rather fundamental question of who should be doing what about bringing the important concerns of the environment and of international trade into some form of an orderly, coordinated, and consistent approach.

In its present organizational structure, there are a variety of Assistant U.S. Trade Representatives for various geographical

28. *Id.* at 78.

29. *Hearing, supra* note 5, at 25-26 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative).

30. *Id.* at 71 (testimony of Ralph Nader).

areas around the world, an Assistant U.S. Trade Representative for GATT affairs, and individual Assistant U.S. Trade Representatives for: (1) Industry; (2) services, investment, intellectual property and science and technology; and (3) agriculture.

With that background, let us turn to the first fact pattern, a real case with far-reaching implications.

III. MEXICO'S 1991 GATT COMPLAINT AGAINST THE UNITED STATES BAN ON TUNA AND TUNA PRODUCTS

A. Introduction

On February 22, 1991, pursuant to the Marine Mammal Protection Act³¹ (MMPA), the executive branch of the U.S. government was forced by the U.S. courts to impose an embargo on all yellowfin tuna and tuna products from Mexico until the Secretary of Commerce made certain affirmative findings.³² Specifically, the embargo was imposed until the Secretary of Commerce determined that the average rate of "incidental taking" of dolphins by Mexico was not more than two times that of the United States for the same period in 1989 or 1.25 times that of the United States by the end of the 1990 fishing season and thereafter.³³ On March 26, 1991, that embargo was extended by order of a federal district court judge in California to imported yellowfin tuna caught by the nations of Venezuela and Vanuatu.³⁴ At Mexico's request the GATT Council convened a dispute resolution panel on February 6, 1991 to hear Mexico's complaints.³⁵ The panel, was made up of three individuals from Uruguay, Hungary, and Switzerland. Although the GATT Secretariat refused to give the author any information with respect to the panelists' backgrounds, from everything that can be learned unofficially, it would appear unlikely that they have any particular background in environmental or scientific matters.³⁶ Given the nature of the GATT organization, its principal mission and the legal analysis that follows, that should not be surprising. The panel issued its report on September 3, 1991. It is reported that the panel report would have gone to the GATT

31. 16 U.S.C. §§ 1361-1407.

32. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1450 (9th Cir. 1991).

33. *Id.* at 1450-51.

34. *Hearing*, *supra* note 5, at 3-4 (testimony of David Phillips).

35. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1598, ¶ 1.1.

36. *See, e.g., Hearing*, *supra* note 5, at 5 (testimony of David Phillips).

Council for consideration on October 8, 1991, but Council consideration was deferred by agreement while Mexico and United States attempted to negotiate a settlement³⁷.

The fundamental dispute arises out of a marine fisheries harvesting practice, which has as an undesirable side effect the killing and maiming of large numbers of dolphins. The dolphin in one area of the world, the Eastern Tropical Pacific Ocean, tend to swim on the surface of the water above schools of yellowfin tuna.³⁸ The fisheries practice at issue involves sighting the dolphins on the surface and then surrounding them with large nets³⁹ aided by motorboats and even helicopters.⁴⁰ These "purse seine" nets are then pulled closed at the bottom and top. All of the fish caught in the net are lifted to the surface. Many of the dolphins caught up in this process are killed or maimed. To appreciate the significance of this topic, one must consider that in the early 1970s the United States fishing fleet alone was responsible for the "incidental kills" of over 300,000 dolphins annually.⁴¹ The United States' brief in the GATT dispute with Mexico asserts that it has been estimated that seven to eight million dolphin have been killed as a result of this practice in the last thirty years.

The MMPA was passed in 1972. Its purpose was to save as many dolphins as possible. Yet, for a number of years it was not even enforced with respect to the U.S. fishing fleet.⁴² As enforcement was mandated in the U.S. fleet, pressures were brought to bear on the U.S. government to implement the embargo features embodied in the Act. Those embargo provisions were intended to bring pressure upon foreign fishing fleets to begin similar enforcement of like standards.⁴³ The issue has received considerable public attention and, despite the seriousness of the topic, some has been humorous:

37. *Hearing, supra* note 5, at 12 (testimony of Joshua B. Bolten, General Counsel, Office of U.S. Trade Representative).

38. Apparently, there is no scientific explanation for this phenomenon. See *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1449 (9th Cir. 1991).

39. These large nets can measure up to one mile in circumference and are several feet deep.

40. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 966 (N.D.CA. 1990).

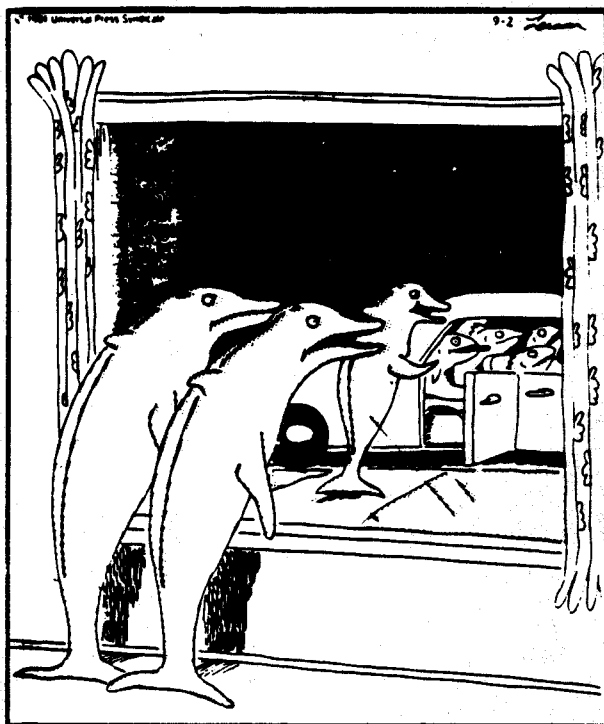
41. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1450 (9th Cir. 1991) (citing 134 CONG. REC. S.1633, 1634-45 (1988)).

42. *Id.* at 1453.

43. *Id.*

The Far Side

By Gary Larson



"Well, there he goes again. . . . I suppose I shouldn't worry, but I just get a bad feeling about Jimmy hanging with those tuna punks."

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Not so humorous, however, was the effort to gather sufficient information to prepare this article. The very nature of the inquiry required is illustrative of the institutions being discussed. The GATT Secretariat in Geneva and the Office of the U.S. Trade Representative in Washington both refused to make any of the parties' briefs available while the GATT process was underway. They referred to such documents as being "restricted."⁴⁴ Even after the media reported that the panel had birthed its report, both the GATT Secretariat in Geneva and the

44. See *Hearing*, *supra* note 5, at 16 (testimony of Joshua Boltin, General Counsel, Office of U.S. Trade Representative) (under GATT dispute office of settlement procedures, panel reports remain confidential until adopted).

Office of the USTR in Washington refused to make copies of either the panel report or the briefs available. In a subsequent inquiry to the Office of the USTR regarding its position on the applicability of the Freedom of Information Act,⁴⁵ it was stated that they did not have any particular exception in the FOIA to rely upon, but that the panel report and U.S. briefs by coincidence had been "de-restricted" because of "substantial interest" in the topic. The background for that "de-restricting" decision is reported, by an environmental group, to have included congressional pressure and the leak of a copy of the report to the trade press.⁴⁶ Which version or which combination of the two stories most accurately describes reality will have to be the concern of others. However, the Office of the USTR still will not furnish copies of any of the other countries' submissions, once again citing no particular authority under FOIA.⁴⁷ As a consequence, during the months when the panel proceeding was pending, the only information available for analysis was that which could be gleaned from the news media and similar sources.⁴⁸

45. 5 U.S.C. § 552 (1988).

46. See *Hearing*, *supra* note 5, at 7 (testimony of Ralph Nader).

47. The fundamental purpose and mandate of the FOIA is the prevention of secrecy in government through full disclosure of government documents. That mandate, however, is subject to nine specific statutory exceptions enumerated in 5 U.S.C. § 552(b). Of these, arguably the deliberative process or executive privilege exception, 5 U.S.C. § 552(b)(5), and the interests of national defense or foreign policy exception, 5 U.S.C. § 552(b)(1), could be applicable here. Yet, the U.S. Supreme Court has interpreted the deliberative process exception as protecting only those "confidential intra-agency advisory opinions . . . disclosure of which would be injurious to the consultative functions of government." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The exception does not protect final agency actions which constitute statements of policy. *Id.* at 153-54. As the United States had already formulated and set forth its position and policy in its briefs, the deliberative process exception would appear to be inapplicable. By contrast, in *National Latex Products Co. v. United States*, the deliberative process exception was successfully invoked by the U.S. Trade Representative as to documents which did not contain statements of officially adopted policy. 1982 WL 2208 (Ct. Int'l Trade 1982). Similarly, the foreign policy and national defense interests exception would not appear to be implicated because apparently no deliberate classification of the briefs (specifically required by the FOIA in order to prevent disclosure) was made. The reported jurisprudence does not indicate that the U.S. Trade Representative has been judicially challenged on the FOIA issue of the availability of the other countries' submissions. A strict reading of the FOIA, and of its implementing regulations, 15 C.F.R. §§ 2004.1-2004.12 (1991), indicates these submissions may fall outside of the FOIA, because technically, these briefs are not U.S. agency documents. But see *Forsham v. Harris*, 445 U.S. 169 (1980), wherein the Supreme Court included within the definition of "agency documents" those which the agency itself did not create but of which it maintains a copy.

48. See, e.g., *Trade Policy: GATT Panel Hears Arguments on U.S.-Mexico Tuna Dispute, With Focus on Trade Obligations*, 8 INT'L TRADE RPTR., 735 (1991); *Mexico, Canada Challenge U.S. Trade Policy in GATT Council Meeting*, INSIDE U.S. TRADE, Feb.

B. The Litigation in The United States

The actual imposition of the embargo only occurred after substantial litigation by an environmental group against the U.S. government in the U.S. court system.⁴⁹ Of course, those courts guided by the mandate of Congress regarding the actions required of U.S. agencies, principally addressed themselves to the provisions of the U.S. legislative act at issue. In the GATT procedure that followed, however, Mexico's allegations turned attention to the means and mechanisms used by the United States to enforce the MMPA and contended that those means and mechanisms were violative of GATT.⁵⁰ Because the latter point was not relevant in the U.S. litigation, it is not addressed in the reported U.S. court decisions.

The principal focus of this article is the GATT process. Though somewhat dissimilar issues were addressed in the U.S. federal court litigation, it is not appropriate to dwell on that litigation at length. Some aspects of the litigation do bear comment, however, as they tend to illustrate the lack of continuity of purpose, even within our own government, when a friction point emerges between the intensely debated and important issues of trade and the environment. Given the divergence between current domestic legislation and the existing international trade agreement embodied in GATT, it should not be surprising to see our various political, public, and private institutions simultaneously pulled in varying directions.

The U.S. litigation involved only the MMPA. Earth Island Institute, a nonprofit environmental group, prosecuted the litigation as a result of the Treasury Department's failure to implement an embargo on tuna from Mexico.⁵¹ In broad terms, the executive branch, through the Treasury Department, failed to carry out its statutory obligation to compare the number of "incidental kills" committed by the U.S. tuna fleets to the number of kills committed by other nations' tuna fleets while

8, 1991, at 1, 20; see also Jeanne J. Grimmett, *Environmental Regulation and the GATT*, at 23-25, Congressional Research Service Report, No. 91-285A, March 27, 1991. (I did not feel nearly as bad about not having original documents to work with when I saw that Ms. Grimmett, working for the Library for Congress in a report to Congress, apparently had access to no more than news media reports with respect to the dispute resolution procedure).

49. See *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D.CA. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

50. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1601, ¶¶ 3.1-3.5.

51. *Earth Island Inst.*, 746 F. Supp. at 966.

fishing in a designated area. The executive branch also failed to impose an embargo, which purportedly resulted from the comparison of incidental dolphin kills, on Mexico.

The executive branch resisted the suit in federal district court on the ground that using the available data assembly procedure, it could not make a finding to support an embargo within the time period statutorily allotted for such a finding.⁵²

The district court disagreed and ordered the embargo. The issuance of the district court ruling, however, did not result in an effective imposition of the embargo. The preliminary injunction was granted on August 28, 1990.⁵³ On September 6, 1990, the embargo was imposed by the executive branch. The next day the National Marine Fisheries Service (NMFS) made the required comparability finding, concluding that Mexico had exceeded the kill limit for 1989. The NMFS, however, went on to find that Mexico appeared to be in compliance for the first six months of 1990, and therefore the one-day old embargo was lifted.⁵⁴ Bear in mind that the government's main argument in the district court had been that it was very difficult to assemble any of this data, even on an annual basis. Earth Island Institute successfully challenged the lifting of the one-day embargo imposed by the district court.⁵⁵ The Ninth Circuit noted, "It is difficult to understand how the government could issue a favorable determination in this case in less than two weeks when it had previously argued that it needed at least six months to collect and analyze data from foreign nations."⁵⁶

During this entire period of time, the Office of the USTR engaged in negotiations with Mexico concerning the establishment of a free trade agreement between the two countries that would substantially reduce a variety of tariff and nontariff trade barriers between them.⁵⁷ The U.S. executive branch lost in the U.S. court system, was forced to impose the embargo, and thus stepped back from the domestic U.S. litigation. Mexico immediately stepped forward in a different forum — the GATT dispute resolution process. Stepping forward to defend the United States' position in this process was the Office of the USTR.

52. *Id.* at 972.

53. *Earth Island Inst.*, 929 F.2d at 1451.

54. *Id.*

55. *Id.*

56. *Id.*

57. The Agreement finally reached is embodied in the Understanding Regarding Trade and Investment Relations, Nov. 6, 1987, U.S.-Mex., 27 I.L.M. 439 (1988).

C. *Intervention by Other Countries*

Other GATT Contracting Parties intervened against the United States position. Australia, the European Community, Indonesia, Japan, Korea, the Philippines, Senegal, Thailand, and Venezuela made oral presentations to the GATT panel on May 5, 1991.⁵⁸ Canada and Norway made separate written submissions. None of the oral or written submissions were supportive of the United States' position. Without the benefit of inside knowledge, this situation would seem to raise fundamental questions regarding the degree to which the international community can be expected to support a broader role for environmental issues in trade in the future, or the degree to which the United States sought support. It simply is impossible to tell from the records made available.

D. *Mexico's Submission to GATT*

The submission of Mexico, as supported by the various other submissions of the countries listed above, raised the following fundamental claims:

1. The embargo required by the MMPA constitutes a violation of the "quantitative restrictions" provisions found in Article XI of GATT.
2. The embargo required by the MMPA violates certain provisions in Article XIII, prohibiting discriminatory conditions in specific geographic areas.
3. The embargo required by the MMPA violates Article III, relating to internal regulations.
4. The Pelly Amendment⁵⁹ is violative of Article XI.
5. The intermediary nations' embargo required by the MMPA violates Article XI.
6. The Dolphin Protection Consumer Information Act (DPCIA)⁶⁰ violates Articles I and IX.⁶¹

Some of these assertions bear further explanation before undertaking a legal analysis and review of the panel report. First, the "intermediary nations" issue relates to a MMPA provision targeted on preventing an embargoed country from avoiding the direct impact of the MMPA by merely transshipping

58. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1598, 1610-15, ¶¶ 1.3, 4.1-4.27.

59. 22 U.S.C. § 1978(a) (1988) (Also known as Section 8(a) of the Fisherman's Protective Act of 1967).

60. 16 U.S.C.A. § 1385 (West Supp. 1991).

61. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1601, ¶ 3.3.

through an "intermediary country." Under this provision of the MMPA, the intermediary country is required to certify and provide reasonable evidence that it has banned importation of tuna from countries like Mexico, whose tuna is banned from direct export to the United States.

Second, the Pelly Amendment⁶² argument stems from yet another provision of the MMPA, which provides that six months after the embargo's effective date the Secretary of Commerce is required to certify to the President that the embargo had been in place for six months.⁶³ The Pelly Amendment provides discretionary authority to the President to prohibit the importation of all fisheries' products to the extent that such a prohibition is sanctioned by GATT.⁶⁴ The panel report acknowledges that this Pelly Amendment authority had never been triggered or exercised by the President in connection with the United States-Mexico tuna dispute.⁶⁵

Third, one of the contentions raised by Mexico, embraced in a somewhat different context by the panel, involved the method of computation that the MMPA required, of countries like Mexico, in connection with the incidental taking of dolphins. Their complaints in this regard include the following:

- a) The United States fleet is able to work against an absolute quantity restriction, while all other countries are required to work against averages.
- b) The United States fleet can know and understand their status as the year progresses, while the foreign nation to which their performance is later compared has nothing to work with until after the fact.
- c) The United States set the rate of incidental kill unilaterally and without consideration of issues related to other countries.
- d) The mathematical formula used to calculate the U.S. kill is different than the formula used to calculate the kill by foreign countries, by virtue of using a series of zones in the U.S. calculation and merely using an overall figure in making the calculation for all other countries.⁶⁶

Fourth, the DPCIA prohibits the export or sale in the

62. 22 U.S.C. § 1978 (a) (1988).

63. 50 C.F.R. § 216.24(e)(5)(x) (1991).

64. 22 U.S.C. § 1978(a)(4).

65. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1618-19, ¶ 5.20.

66. See *id.*, at 1604, ¶ 3.22.

United States of tuna bearing "Dolphin Safe" or similar labeling if:

1. The tuna was harvested on the high seas using a driftnet; or
2. The tuna was harvested in the Eastern Tropical Pacific Ocean by a purse seine unless:
 - a) The Secretary certifies that the boat was not sufficiently large to use the purse seine in a way that would kill dolphins; or
 - b) The product is accompanied by:
 - (i) a written statement executed by the captain of the vessel which caught the fish certifying that they did not intentionally deploy on or catch dolphins;
 - (ii) a written statement executed by the Secretary or his designee or a representative of the Inter-American Tropical Tuna Commission which states that there was an approved observer on the vessel the entire trip and that they did not intentionally catch any dolphins.⁶⁷

The Act also mandates that these written statements be endorsed in writing by each exporter, importer and processor of that particular product.

E. The United States Position

The first of the two U.S. submissions (U.S. briefs) to the GATT panel emphasized the scientific and environmental importance of these dolphin protecting measures. In both submissions, the United States took the position that the MMPA embargo did not violate the basic articles of GATT. Alternatively, the United States pled the applicability of the exceptions found in Article XX(b) and (g).⁶⁸ The United States went on to argue that, as the Pelly Amendment was discretionary and had not been implemented, it therefore did not violate GATT.⁶⁹ Finally, the United States took the position that the DPCIA did not prohibit importation or sale but merely imposed accurate labeling requirements, which are arguably not violative of GATT.⁷⁰

While all of these points are argued in the briefs, the real heart of the United States' defense addressed the applicability of the Article XX exceptions and the permissible scope of those

67. 16 U.S.C.A. § 1385 d(2)(B)(ii) (West Supp. 1991).

68. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1601, ¶ 3.6(b).

69. See *id.*, at 1602, ¶ 3.13.

70. See *id.*, at 1603, 1604, ¶ 3.21.

exceptions. In general terms, the U.S. approach invited the GATT panel to adopt a rather expansive and environmentally responsive position. As will be discussed, the GATT panel declined this invitation and, in fact, used the opportunity to prepare an opinion that was substantially more restrictive than the previously somewhat unclear state of GATT law on the subject. Indeed, the opinion drew a line in rather clear terms, where one might have argued that some ambiguity existed in the past.

The discussion will now turn to an overview of the legal principles involved in some of the earlier GATT "jurisprudence." This "overview" is intended to be just that, a rather cursory recitation of the fundamental provisions of the key Articles, some brief explanation, and in some instances a review of potentially applicable decisions by earlier dispute resolution panels. It is not intended to be a detailed analysis of GATT law, but is merely intended to set the stage for a review of the panel report in the U.S.-Mexico tuna dispute.

F. Analysis of the Law to Apply - Overview

The foregoing may seem to be an awfully long road to walk before getting to a specific analysis of the law to apply. Yet, a review of the GATT "law" makes it apparent that one cannot effectively undertake an analysis in a vacuum. First, one must recognize that there is precious little "jurisprudence" regarding this topic in GATT "law." Second, one must recognize that the fundamental principles of GATT "law" are not founded upon environmental concerns. Quite the contrary, they have a very firm foundation prohibiting any activity by Contracting Parties that would appear to be "trade distorting" or constitute "trade barriers"; labels easily applied to many, if not all, requirements generated by environmental concerns. Third, one must be ever mindful of the factors which may influence both the "judiciary" and the "advocates" engaged in the process. An analysis that fails to encompass all three considerations parts company with reality. With that in mind, let us first turn to an analysis of the "law."

1. Article XI - The Quantitative Restriction Allegations

Mexico asserted that the prohibition on imports violated the provisions of GATT. Article XI is entitled "General Elimination of Quantitative Restrictions" and contains two paragraphs. The first sets forth a general prohibition:

1. 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.⁷¹

The second paragraph of Article XI sets forth a variety of exceptions to that general prohibition:

2. The provisions of paragraph one of this Article shall not extend to the following:
 - b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marking of commodities in international trade;
 - c) Import restriction on any agricultural or fishery product, imported in any form, necessary to the enforcement of governmental measures which operate:
 - (i) To restrict the quantities of the like domestic product permitted to be marketed or produced⁷²

The balance of Article XI sets forth a notice requirement, a country seeking to restrict importation pursuant to subparagraph (2)(c) must give public notice of the quantity of the product to be imported and must ensure that such quantity restrictions are similar in proportion to quantity restrictions for domestic products.

A cold reading of Article XI would suggest some consideration should be given in this case to the provisions in Paragraph 2. Mexico simply argued that they did not even apply.⁷³ That the United States did not even address the topic is not surprising, given the GATT jurisprudence on the topic. In *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*,⁷⁴ a GATT dispute resolution panel was assembled to address a U.S. complaint regarding a Canadian prohibition on the export of certain unprocessed salmon and unprocessed herring. The parties agreed that the prohibition violated Article

71. GATT Article XI:1.

72. GATT Article XI:2(b) and (c)(i).

73. See *Panel Report: Dolphin/Tuna*, *supra* note 3 at 1602, ¶ 3.10.

74. *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Panel Report, adopted Mar. 22, 1988, BISD 35S/98 (1989) [hereinafter *Canada's Export of Herring*].

XI:1, but Canada then went on to invoke the exceptions stated in Article XI:2(b) and Article XX(g).⁷⁵

The Article XI:2(b) contention turned on a factual analysis with respect to whether the Canadian prohibition was truly "necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."⁷⁶ Factually, there were two parts to this argument. First, Canada contended that the prohibition on exporting certain unprocessed salmon and herring was necessary to maintain its quality standards for these fish, including the standards for frozen salmon exported from Canada.⁷⁷ It should be noted that the Article XI:2(b) exception applies only if the restrictions are "necessary" to the application of such standards or regulations.⁷⁸ In pertinent part, the GATT panel noted that:

Canada applied quality standards to fish and [] it prohibited the export of fish not meeting the standards. . . . However, [] Canada prohibited export of certain unprocessed salmon and unprocessed herring even if they could meet the standards generally applied to the fish exported from Canada. Therefore . . . these export prohibitions could not be considered as "necessary" to the application of standards within the meaning of Article XI:2(b).⁷⁹

Second, Canada advanced the proposition that Article XI:2(b) applied because the restrictions were necessary to Canada's marketing of commodities in international trade. Canada argued that the prohibition against exporting unprocessed fish caused the development of a superior quality of processed fish for marketing abroad.⁸⁰ Canada also argued that it was in competition with Japan, and that it could not have maintained its market share in processed fish if forced to export unprocessed fish.⁸¹ The panel dismissed this contention stating, "The drafters of Article XI:2(b) agreed that this provision would cover export restrictions designed to further the marketing of a commodity by spreading the supplies of the restricted product over a longer

75. *Id.* at 111, ¶ 4.1.

76. *Id.*

77. *Id.* at 101, 102, ¶ 3.6.

78. *Id.* at 112, ¶ 4.3.

79. *Id.* ¶ 4.2.

80. *Id.* ¶ 4.3.

81. *Id.*

period of time."⁸² Therefore, the panel denied Canada the Article XI:2(b) exception.

The GATT panel report in *United States-Prohibition of Imports of Tuna and Tuna Products From Canada*⁸³ is somewhat less enlightening, although it touches upon similar topics and was cited by Mexico in its submission. The United States' position in that dispute seemed far weaker from the outset than that of Canada in the salmon and herring case. In 1979, the United States elected to prohibit the entry of tuna and tuna products from Canada for consumption and their withdrawal from warehouses for the same purpose.⁸⁴ It is apparent from the decision that this action was principally motivated by the earlier seizure of certain U.S. tuna boats in the Pacific Ocean by Canada. That seizure was a consequence of a dispute between Canada and the United States regarding the distance offshore of Canada that the U.S. fleet would be permitted to fish unimpeded. Approximately one year after the embargo went into effect an interim agreement dealing with the tuna vessels, was drafted, and the embargo was lifted.⁸⁵ Approximately one year after that the Treaty on Pacific Coast Albacore Tuna vessels and port privileges was confected and ratified, bringing the entire vessel seizing dispute to a conclusion.⁸⁶

Canada refused to allow the GATT dispute resolution panel procedure, which had been ongoing in the interim, to be declared moot.⁸⁷ Canada argued that the treaty did not resolve the existence of damages from the embargo and did not prohibit future United States action that might be taken once again under section 205 of the Magnuson Fishery Conservation and Management Act of 1976 (Magnuson Act).⁸⁸ The panel proceeded to a decision.⁸⁹

82. *Id.* at 112-13, ¶ 4.3; see also author's discussion of the Article XX(g) contentions, *infra* part III.F.3.

83. *United States-Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Panel Report, adopted Feb. 22, 1982, BISD 29S/91 (1983) [hereinafter *Panel Report: Canada Tuna Imports*].

84. *Id.* at 106, ¶ 4.4.

85. *Id.* at 105, ¶ 4.2.

86. Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, May 26, 1981, U.S.-Can., 33 U.S.T. 615.

87. *Panel Report: Canada Tuna Imports*, *supra* note 83, at 106, ¶ 4.3.

88. 16 U.S.C. §§ 1801-1882, 1825 (1988).

89. This raises some interesting points. The GATT decision process normally involves an ongoing effort by the panel (which in previous years took a substantial period of time to conclude their activities) to foster negotiations between the parties in order to settle the dispute. In the event that there is a negotiated settlement before the panel has

The panel found a violation of Article XI based on the fact that the United States did not impose similar restrictions on domestic production; for example, the United States restricted domestic production on some forms of tuna, but not others.⁹⁰ With respect to Canada, however, the United States embargoed all tuna of any type.⁹¹ Additionally, during the time in question, the United States did not consistently restrict domestic production even on the types of tuna it had restricted at other times.⁹²

2. Article III - Internal Regulations

Article III contains ten separate paragraphs. Two of those paragraphs arguably could be applicable to the United States-Mexico tuna dispute. Paragraphs 1 and 4 state that:

1. The Contracting Parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
4. The products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall be accorded treatment no less favorable 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. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transportation and not on the nationality of the product.⁹³

concluded its procedures, the ordinary approach is for the panel to merely report the nature of the dispute and to report that it was negotiated to an amicable conclusion. Additionally, the decisions of the panels make it clear that they do not award "damages" and that they construe their mandate very narrowly, not venturing into advisory opinions concerning what measures countries might take in the future. While Canada obviously was successful in persuading this panel to proceed with a full opinion, its suggested reasoning for proceeding further with an opinion bears little relationship to the history of GATT "jurisprudence."

90. *Panel Report: Canada Tuna Imports*, *supra* note 83, at 108, 109, ¶ 4.10.

91. *Id.*, at 107, ¶ 4.6.

92. *Id.*, at 109, ¶ 4.12.

93. GATT Article III:1 and 4.

In reference to Paragraph 1, the Note Ad Article III⁹⁴ explains:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III: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, is nevertheless to be regarded as an internal tax or other internal charge or law, regulation or requirement of the kind referred to [Article III:1], and is accordingly subject to the provisions of Article III.⁹⁵

The fundamental law of Paragraph 1, as refined by the Note Ad Article III, would seem to focus on the language that prohibits the application of such requirements in a fashion that essentially disguises or openly promotes "protection to domestic production." Paragraph 4 would appear to mandate that any requirements imposed upon the exporting country place that country in a position where its products "shall be accorded treatment no less favorable than that accorded to like products of national origin." Therefore, assuming that one gets past the antiprotectionism addressed in Paragraph 1, one must demonstrate as a matter of fact that the "treatment no less favorable than" test of Paragraph 4 also has been met.⁹⁶

3. Article XX - The Exceptions

In analyzing claims related to GATT, one must bear in mind that prohibitions of certain trade related restrictions are set forth in the various Articles of GATT, such as Articles III and XI. Even if domestically imposed restrictions are violations of one or more of those Articles, the analysis is not concluded. Attention then turns to the "general exceptions" embodied in Article XX. When one turns to the panel report in the Mexico tuna dispute, one will find that the real heart of the debate lies in these exceptions. Additionally, it is hard to escape the conclusion that the panel report's holdings substantially narrow the

94. "Note Ad" is the terminology utilized in Appendix I of the GATT Articles to denote certain explanatory comments regarding specific provisions in the articles, which are referred to as "Notes and Supplementary Provisions." They are incorporated as "an integral part" of GATT by virtue of Article XXXIV.

95. Note Ad Article III:1.

96. For an excellent review of the "national treatment" and "internal laws" aspects of Article III, as contrasted with the import-export focus of Article XI, see *Lobsters From Canada*, USA 89-1807-01, Final Report of the FTA Panel, May 25, 1990, ¶ 7.16 [hereinafter *Lobsters From Canada*].

exceptions, even beyond the rather narrow interpretation accorded to them previously.

Article XX, in pertinent part, 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 the 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 consumption⁹⁷

While there are ten exceptions listed in Article XX, only those two have any arguable application to the facts presented here.

The approach to these exceptions that previous GATT dispute resolution panels have taken is illustrated by two earlier GATT panel reports, which bear some examination. In *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*,⁹⁸ the panel addressed Canada's contention that Article XX(g) was applicable. As noted above, this dispute turned on a U.S. complaint regarding a Canadian prohibition on the export from Canada of certain unprocessed salmon and unprocessed herring. At the outset, the panel stated that the parties all agreed that the salmon and herring stocks were "exhaustible natural resources," a starting point in an Article XX(g) analysis.⁹⁹ The panel then turned to a two-step analysis. First, the panel analyzed the specific wording of the exception in order to define its scope more precisely. Second, the panel turned to Canada's factual assertions.

The panel noted that the exception in subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources, while provisions contained in four of the other subparagraphs require that the measure at issue be "necessary" or "essential" to the achievement of the policy purpose set forth in those provisions.¹⁰⁰ Therefore, the panel examined

97. GATT Articles XX (b) and (g).

98. *Canada's Export of Herring*, *supra* note 74, at 113-15, ¶¶ 4.4-7.

99. *Id.*, at 113, ¶ 4.4.

100. *Id.*, at 114, ¶ 4.6.

whether, as a matter of law, it was intended for the provisions of Article XX(g) to apply to a broader range of activity and be more liberally construed than just those that are narrowly construed as being "necessary" or "essential."¹⁰¹ In an interesting statement, the panel concluded:

However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope of a measure serving trade policy purposes but merely to insure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.¹⁰²

The panel went on to further define "relating to" as being analogous to "primarily aimed at" the conservation of an exhaustible natural resource.¹⁰³ Obviously, the panel set up a fact-based test that turned on the fact finder's conclusions regarding the "true" objective of the prohibition.

In completing its analysis of the scope of the language found in Article XX(g), the panel considered the requirement that such measures are to be made effective "in conjunction with" restrictions on domestic production or consumption.¹⁰⁴ The panel applied a similar legal analysis to that term, with reference to the intent of GATT. The panel stated, "[a] trade measure could therefore in the view of the panel only be considered to be made effective 'in conjunction with' production restrictions if it was primarily aimed at rendering effective these restrictions."¹⁰⁵

Having defined the scope of the Article XX(g) exception, the panel turned to examine the factual basis of Canada's assertions. Canada contended that the export prohibitions were not conservation measures per se but had a "conservation effect" because they aided in the building of a statistical foundation for harvesting restrictions.¹⁰⁶ The panel dismissed this contention, noting that Canada derived other fisheries' statistics without such prohibitions.¹⁰⁷ It also found that Canada did not limit the purchases of the unprocessed fish by domestic processors or con-

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*, at 114, ¶ 4.7.

107. *Id.*

sumers, but did limit such purchases by foreign processors.¹⁰⁸ As a consequence, the panel found against Canada.

The panel in *United States-Prohibition of Imports of Tuna and Tuna Products from Canada*, as noted above, dealt with a U.S. prohibition on the entry for consumption and withdrawal from warehouse for consumption of tuna and tuna products from Canada. In defense of the prohibition, the United States argued the applicability of Article XX(g).¹⁰⁹ The panel noted that the United States did apply a similar prohibition with respect to imports from Costa Rica, Ecuador, Mexico, and Peru. Additionally, the panel noted that the U.S. action had been publicly announced by the United States as a "trade measure."¹¹⁰ While that public announcement helped the United States past the argument that the trade measure was really a "disguised" restriction on international trade, it did not help the United States' position in its fundamental contention that the primary aim of the prohibition related to the conservation of natural resources.¹¹¹ In short, the panel found that the U.S. position failed on the facts.

Additionally, in considering the panel report in the Mexico tuna dispute one would want to be aware of the decision in *Lobsters From Canada*.¹¹² It should be noted, however, that the panel deciding *Lobsters From Canada* was a "panel of experts established under the United States-Canada Free Trade Agreement (FTA) to assist the governments of Canada and the United States to resolve a dispute over the trade between them in live lobsters harvested in Canada."¹¹³ The report explains that the United States-Canada Free Trade Agreement¹¹⁴ incorporates, by reference, various provisions from GATT. Therefore, the panel set about to analyze certain articles from GATT in light of the GATT jurisprudence. While their analysis is lengthy and thorough, it is unknown what precedential value a GATT dispute resolution panel will accord such a decision by a body other than another GATT dispute resolution panel. With that reservation in mind, however, the report offers further insight into the overall issue of the Article XX exceptions.

108. *Id.*, at 115, ¶ 4.7.

109. *Canada Tuna Imports*, *supra* note 83, at 93, ¶ 4.7.

110. *Id.*, at 108, ¶ 4.8.

111. *Id.*, at 108-9, ¶ 4.9.

112. *Lobsters from Canada*, *supra* note 96, ¶ 1.1.

113. *Id.*, ¶¶ 7.1.1.1, 7.1.5.

114. Free Trade Agreement, Jan. 22, 1988, U.S.-Can. 27 I.L.M. 281.

In 1989, the United States amended the Magnuson Act to make it unlawful "to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species *Homarus americanus*" at a size below that specified by the Act.¹¹⁵ Apparently for quite some time, lobsters of a smaller size imported from Canada were mixed in with larger lobsters, which made it difficult to deal with U.S. efforts to control the size of lobsters that could be harvested and sold in the United States. Canada challenged the statute, claiming that its provisions violated Article XI of GATT. The United States defended it, arguing that the provisions of the statute fell within the purview of Article III, constituted an internal law, were applied even-handedly to the United States nationals as well as foreign nationals; therefore, the Magnuson Act was permitted by GATT.¹¹⁶ Alternatively, the United States argued that if Article XI was applicable, the exception found in Article XX(g) was also applicable.¹¹⁷

In stark contrast to the brevity of many GATT dispute resolution panel reports, the *Lobsters From Canada* report, some 107 pages long, includes a relatively elaborate analysis of GATT authorities and a detailed "minority" opinion. Apparently, this panel of experts, operating under the FTA, either did not feel constrained by the traditions of GATT the preparation of concise narrowly focused opinions, or this FTA panel suffered from having five members, rather than three, which necessitated having something in the opinion for or from everyone. In any event, the opinion addresses a variety of interesting topics but really only touches on issues relevant to the United States - Mexico dispute in one respect, the applicability of Article XX(g).¹¹⁸

The FTA panel addressed that issue in a rather roundabout fashion. The majority found that Article III was applicable and was not being violated by the United States.¹¹⁹ Therefore, because the United States had prevailed, the majority did not need to turn to the provisions of Article XX(g) as no exception was necessary. The minority, however, was of the view that Article XI, not Article III, was applicable and was violated, thereby necessitating an examination with respect to the applica-

115. 16 U.S.C.A. §§ 1801-1882, 1857(1)(J) (West Supp. 1991).

116. *Lobsters from Canada*, *supra* note 96, ¶ 4.2

117. *Id.*, ¶ 4.3.

118. *Id.*, ¶ 4.4

119. *Id.*

bility of Article XX(g).¹²⁰ In addressing that issue, the panel's minority report referred to an earlier FTA panel ruling¹²¹, which established a series of tests for the applicability of Article XX(g):

- 1) The measure must relate to an exhaustible natural resource.
- 2) Domestic production of the resource must be likewise restricted.
- 3) The measure must not involve arbitrary or unjustifiable discrimination between foreign countries.
- 4) The measure must be primarily aimed at conservation.¹²²

This test is virtually identical to the GATT dispute resolution panel's opinion regarding the same general topic in *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*.¹²³

The panel in *Lobsters from Canada* concluded that the principal matter at issue was their determination whether the measures included in the United States domestic legislation were "primarily aimed at" conservation of U.S. lobsters or were disguised trade restrictions.¹²⁴ Interestingly, from the perspective of the United States-Mexico dispute, this panel stated quite clearly that the burden of proof fell on the United States, as it was attempting to prove the applicability of an exception to a general rule.¹²⁵ To reach a determination, the panel examined the legislative history and the enforcement history with respect to the statute. Additionally, and of some interest with respect to the United States-Mexico tuna dispute, the panel examined whether alternative methods had been explored.¹²⁶ On this topic, the United States offered little in the way of evidence, arguing principally that GATT and the FTA did not require such an analysis of alternatives.¹²⁷ The minority report, however, expressed the view that the exploration of alternatives would have been a demonstration that the primary aim of the statutory scheme was conservation. The minority opinion on the applicability of Article XX(g) stated:

Taking all this into consideration, the members of the Panel

120. *Id.*, ¶ 9.1.

121. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, CDA 89-1807-01, Final Report of the FTA Panel, Oct. 16, 1990, ¶¶ 7.02, 7.04.

122. *Lobsters from Canada*, *supra* note 96, ¶ 9.2.1.

123. *Canada's Export of Herring*, *supra* note 74, at 112-15, ¶¶ 4.2-.7.

124. *Lobsters From Canada*, *supra* note 96, ¶ 9.4.1.

125. *Id.*, ¶ 9.3.1.

126. *Id.*, ¶¶ 9.4.2, 9.8.1.

127. *Id.*, ¶¶ 9.8.1.

who concluded that the U.S. measures were in conflict with Article XI were able to conclude only that the objectives of the 1989 amendment were both of a conservation nature and a trade restriction. Due to the fact that there was no persuasive evidence to support the assertion that the amendment's primary objective was conservation, and the limited discussion of alternatives, these members were unable to draw a conclusion that the amendment was "primarily aimed at" conservation. The United States, for example, did not address the reasons for which its conservation objectives could not be met by special marking of Canadian small lobsters, requirements that lobsters be sorted by size prior to importation into the United States, particular documentary requirements as to sub-sized lobsters of Canadian origin, increased penalties for the possession of sub-sized lobsters, more vigilant enforcement effects, or possibly other requirements. In other words, some members of the panel were of the view that the United States had not made the case strongly enough to lead those members to the conclusion that the measures were primarily aimed at conservation.¹²⁸

Neither the Mexico tuna dispute panel nor the U.S. briefs cited this decision.

A principal finding of the panel in the United States-Mexico tuna dispute, is that exceptions to the GATT principles found in Article XX cannot have extraterritorial effect; they cannot affect the conduct of Contracting Parties outside of the territorial limits of the Contracting Party seeking to rely upon the exception.¹²⁹ One will note that the "extraterritoriality" issue is not addressed in the decisions discussed in this article. When the United States first responded to this topic in the United States-Mexico tuna dispute in its second brief, it cited no authority and merely stated that the extraterritorial argument advanced by Mexico was not logical.¹³⁰ Similarly, the United States-Mexico tuna panel report similarly cites no authority beyond the panel's general views with respect to the overall intent of GATT.¹³¹

4. The Dolphin Protection Consumer Information Act Allegations

The law to apply with respect to the DPCIA¹³² is Article

128. *Id.*, at ¶ 9.9.1.

129. See *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1620-21, ¶ 5.31.

130. See *Second Brief for the United States*, In *Re Matter DS 21/1*, *reprinted in* 30 I.L.M. 1594 (1991).

131. See *generally*, *Panel Report: Dolphin/Tuna*, *supra* note 3.

132. 16 U.S.C. § 185 (West Supp. 1991).

IX (Marks of Origin). Beyond that Article, there is little to guide one in the analysis of this particular issue. In pertinent part, Article IX reads:

1. Each Contracting Party shall accord to the products of the territories of the other Contracting Parties treatment with regard to marking requirements no less favorable than the treatment accorded to like products of any third country.
2. The Contracting Parties recognize that, in adopting and enforcing laws and regulations relating to marks of origins, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting of countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.¹³³

The panel report in the United States-Mexico tuna dispute accords very little analysis to this particular point. Instead, the panel's decision and the arguments advanced by the parties turn on interpretations of the language found in the Article itself, not on decisions of prior dispute resolution panels.

G. The Panel Report

Given this overview of relevant GATT law, one is better prepared to assess the report of the panel in the United States-Mexico tuna dispute. Although that report goes on for some fifty-one pages, much of it is taken up with what amounts to a summarized record of the proceeding. Furthermore, although the ultimate conclusions are clearly articulated, the analytical portion is rather abbreviated. Indeed, the most significant points are decided more on the basis of broad policy considerations than on the basis of any particularly intricate legal analysis.

Let us turn to the arguments most easily disposed of by the panel. First, the panel rejected Mexico's challenge to the Pelly Amendment as inconsistent with Article XI. Citing prior panel reports,¹³⁴ the panel affirmed that domestic legislation vesting an executive with the discretion to take action violative of GATT was not in and of itself a violation of GATT until such time as

133. GATT Article IX:1 and 2.

134. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1619, ¶ 5.21 (citing *United States-Taxes on Petroleum and Certain Imported Substances*, GATT Panel Report, adopted June 17, 1987, BISD 34S/136, 160, 163-4, ¶¶ 5.2.2, 5.2.9-10; *EEC - Regulation on Imports of Parts and Components*, GATT Panel Report, adopted May 16, 1990 BISD 37S/132, 198-99 ¶¶ 5.25-5.26.

the violative act occurred.¹³⁵

Second, the panel rejected Mexico's contention that the labeling provisions of the DPCIA were inconsistent with GATT law. Noting that the provisions of the DPCIA applied equally to all countries fishing in the Eastern Tropical Pacific, the panel found that the Act did not discriminate against tuna products harvested by Mexico any more than tuna products harvested by some other country.¹³⁶ Thus, the panel found that there was no violation of the United States' obligations under GATT Article I:1.¹³⁷ Additionally, the panel found that labeling provisions found in Article IX:1 were intended to regulate the marking of origin of imported products, but not the marking of products generally.¹³⁸ Therefore, the panel did not feel that the DPCIA provisions were governed by Article IX:1.¹³⁹

Third, the panel did not rule on the Article XIII allegation of discriminatory specific conditions for a specific geographic area; it felt that the allegation was moot in view of its finding that the United States had violated Article XI¹⁴⁰.

Fourth, Mexico's "intermediary nations" arguments were accepted by the panel for the same reasons it accepted Mexico's Articles XI, III, and XX contentions which are discussed below.¹⁴¹

Mexico's Article XI, III, and XX contentions present the central issues of the United States-Mexico tuna dispute. The panel found that the quantitative restrictions provisions of Article XI had been violated and that the United States had offered no defense to the contention.¹⁴² Actually, the United States *had* offered a defense. The United States submitted two briefs. The

135. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1619 ¶ 5.21.

136. *Id.*, at 1622, ¶ 5.43.

137. *Id.*, at 1622, ¶ 5.44.

138. *Id.*, at 1622, ¶ 5.41.

139. *Id.*

140. *Id.*, at 1688, ¶ 5.19.

141. *Id.*, at 1621-22, ¶¶ 5.35-40. However, an interesting contrast is presented by subsequent events in the domestic United States litigation. In the most recent phase of *Earth Island v. Mosbacher*, No. 88-1380 (N.D. Cal. Jan. 10, 1992) (order granting preliminary injunction and denying summary judgment and permanent injunction), the United States District Court issued a preliminary injunction on January 9, 1992, ordering the U.S. government to enforce the secondary embargo aimed at what the court described as "tuna laundering." *Id.* at 3. The government had sought to enforce a very restricted interpretation of the statute, but the court would not agree. *Id.* at 6, 15. In an interesting contrast, the two bodies are moving in directly opposite directions at the same time, both presumably pursuant to the approval of some U.S. legislation.

142. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1618, ¶¶ 5.17-19.

first raised an issue with respect to Article XI, which is acknowledged in the panel report.¹⁴³ The United States contended that measures subject to the provisions of Article III are not to be considered in the context of Article XI or Article XIII, based upon the U.S. interpretation of an earlier panel report.¹⁴⁴ In response, Mexico cited other previous panel reports and some legislative history with respect to Article XI.¹⁴⁵ It is apparent that the panel was unimpressed with the contention of the United States. The second brief submitted by the United States contained no mention of a defense to the Article XI claim.

The panel then turned its attention to the internal regulations provisions in Article III, concluding that Article III would allow for a levy or imposition of conditions at the point of import of a foreign product *only* if the same levy or imposition had been made on that product domestically.¹⁴⁶ The panel went on to note that the MMPA did not directly deal with the "product" itself (*i.e.*, the tuna fish), but rather with the steps deemed appropriate by the United States in producing the "product."¹⁴⁷ In analogizing to a tax situation previously addressed by GATT, the panel stated: "Thus, under the national treatment principle of Article III contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes)."¹⁴⁸

Specifically, the panel held:

[T]he MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.¹⁴⁹

143. *Id.*, at 1602, ¶ 3.11.

144. *Canada-Administration of the Foreign Investment Review Act*, GATT Panel Report, adopted Feb. 7, 1984, BISD 30S/140,162, ¶ 5.14 [hereinafter *Panel Report: Foreign Investment*].

145. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1602, ¶ 3.12.

146. *Id.*, at 1618, ¶ 5.13.

147. *Id.*, at 1618, ¶ 5.14.

148. *Id.*, at 1618, ¶ 5.13.

149. *Id.*, at 1619, ¶ 5.14.

The panel then turned to the exceptions found in Article XX, which ultimately became the heart of the opinion. Two procedural points were covered initially. First, Mexico had contended that alternative pleading was not available under GATT and that the United States' alternative plea relative to these exceptions constituted an admission that the fundamental articles of GATT had been violated.¹⁵⁰ In response to this, the panel found that alternative pleading was not only acceptable, but desirable.¹⁵¹ Second, confirming earlier panel decisions, this panel found:

Article XX is a limited and conditional exception from the obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.¹⁵²

The panel then examined Article XX(b), the first of the two exceptions cited by the United States, and found that provision to be inapplicable for two distinct reasons.¹⁵³ First, it found that the legislative history of the Article indicated that it was not intended to address situations like this, but that it was intended to preserve the right of an individual country to utilize "sanitary measures" to safeguard life or health of humans, animals or plants.¹⁵⁴

Second, the panel found that, because it would be contrary to the fundamental underpinnings of GATT, Article XX(b) could not be interpreted to give extraterritorial application to the United States requirements under the MMPA.¹⁵⁵ Obviously, this is a crucial part of the finding and is a substantially more definitive statement on the topic than had been found in GATT "law" previously. The panel found that, "[i]f the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine

150. *See id.*, at 1605, ¶ 3.28-29.

151. *Id.*, at 1619, ¶ 5.22.

152. *Id.* (citations omitted).

153. *Id.*, at 1620, ¶¶ 5.25-7.2.

154. *Id.*, at 1620, ¶ 5.26. It should be noted that at least one other commentator seems to share this view of the legislative history. *See* Steven Shrybman, *International Trade and the Environment: An Environmental Assessment of Present GATT Negotiations*, 20 *ECOLOGIST* 30, 33 (1990); *see also*, *Hearing*, *supra* note 5, at 12-13 (testimony of Steven Shrybman).

155. *See Panel Report: Dolphin/Tuna*, *supra* note 3, at 1620, ¶ 5.27.

the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."¹⁵⁶

Additionally, the panel concluded that the United States had not demonstrated that the MMPA provisions were "necessary," as required in the introductory portion of Article XX, for two reasons.¹⁵⁷ First, the panel found that the United States had not exhausted other avenues before unilaterally imposing the trade restrictions. More specifically, the panel found that the United States had not exhausted its ability to negotiate multinational agreements on the dolphin issue.¹⁵⁸ Second, the panel found that the United States' actions were not "necessary." The panel did not find the method of calculation embedded in the MMPA to be "necessary", to safeguard the health or lives of dolphins, because it was unpredictable and generally unfair to countries other than the United States.¹⁵⁹

The panel then turned to the applicability of Article XX(g), finding two reasons why the MMPA was not protected by that exception to the basic GATT articles. First, the panel reiterated its conclusion that these exceptions could not be extended extra-territorially, holding "[i]f the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the agreement."¹⁶⁰

Second, the panel addressed the computation issue once again, finding "[a] limitation on trade based upon such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins."¹⁶¹

Those are the specific findings of the panel. Procedurally, the panel report would go to the GATT Council for its views and, if it were approved, for consideration of what steps to take relative to the United States. It is apparent that the first such step would be to seek the amendment of the domestic U.S. legislation. Theoretically, sanctions could be a threat in the future.

156. *Id.*, at 1620, ¶ 5.27.

157. *Id.*, at 1620, ¶ 5.28.

158. *Id.*

159. *Id.*

160. *Id.*, at 1621, ¶ 5.32.

161. *Id.*, at 1621, ¶ 5.33.

In the meantime, however, the quasi-diplomatic nature of the GATT dispute resolution process is triggered. At the same time, the negotiations relative to the Uruguay Round remain underway, and it is the suggestion of the U.S. Trade Representative's General Counsel that some vaguely enunciated form of the resolution to this dispute may lie in that process.¹⁶² It is also reported, however, that negotiations are underway with Mexico on a bilateral basis; some environmentalists speculated that the heart of any such negotiated process would include Mexico embracing some further dolphin protective steps, the United States amending the MMPA to remove a number of the contested provisions, and Mexico withdrawing its GATT complaint.¹⁶³ Obviously, therefore, it remains to be seen what specifically will be done as a consequence of this particular panel report.

H. The Panel Report - The Broader Implications

Interestingly, the panel report did not limit itself to the foregoing specific technical analysis of the GATT Articles. Rather, the panel addressed the broader question of the role of environmental concerns in the GATT process generally.¹⁶⁴ Its relatively conclusory and clear statements on the topic, when coupled with the ruling on extraterritorial application discussed above, constitute the clearest statement regarding the role of environmental matters in GATT decisions to date. As an introduction, the panel stated "that its task was limited to the examination of this matter 'in the light of the relevant GATT provisions', and therefore did not call for a finding on the appropriateness of the United States' and Mexico's conservation policies as such."¹⁶⁵ The panel added that "the provisions of the General Agreement impose few constraints on a Contracting Party's implementation of domestic environmental policies."¹⁶⁶ Yet, after reiterating the extraterritorial finding, the panel stated, "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."¹⁶⁷

162. *Hearing*, *supra* note 5, at 8-9 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative).

163. *Id.* at 61-62 (testimony of David Phillips).

164. *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1622-23, ¶ 6.1-.4.

165. *Id.*, at 1622, ¶ 6.1.

166. *Id.*, at 1622, ¶ 5.2.

167. *Id.*, at 1622, ¶ 6.2.

The panel refined that thought, addressing the question of whether GATT as it presently exists can address environmental issues that clash with or are impacted by the trade related requirements of GATT. The panel made it clear that the GATT articles should not be expanded by panel and Council interpretation in order to achieve that purpose, but that any such change should be brought about by an amendment to GATT.¹⁶⁸

It seemed evident to the Panel that, if the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse.¹⁶⁹ If the CONTRACTING PARTIES were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpretation of Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the CONTRACTING PARTIES to impose such limits and develop such criteria.¹⁷⁰

This raises an interesting point, which also will be addressed in connection with the pollution control hypothetical in Section IV below. In essence the panel here has stated that the fundamental impediment to an overlay of environmental concerns and standards on trade policy is the lack of a comprehensive set of GATT-approved, internationally accepted, environmental norms. While GATT as a set of internationally negotiated, accepted, and periodically amended rules governs trade activities, no similar body of comprehensive international agreements exists with respect to environmental concerns and standards. Therefore, attempting to interpret the GATT Articles in such a way as to create such rules by some further development of GATT jurisprudence merely seeks to match up two important topic areas where one has an established set of rules and the other has few. Assuming for the moment that one were to think it important to the world community to have such a set of environmental guidelines, agreements, and standards¹⁷¹ and for the provisions of GATT to be made consistent with such,

168. *Id.*, at 1623, ¶ 6.3.

169. *Id.*

170. *Id.*

171. The vagueness of this terminology is intentional. The terms "standards" and "harmonization" already have become terms of art in the debate. As important as the fine-

obviously the first question to ask is what entity should formulate such internationally negotiated, agreed upon, and periodically amended environmental guidelines, agreements, and standards.

IV. POLLUTION CONTROL HYPOTHETICAL

A. Introduction

The hypothetical involved here is as follows: The United States imposes pollution control statutes and regulations on its manufacturing industry for product A. Other Contracting Parties do not impose similar obligations on the manufacture of identical products in their countries. The practical effect of the imposition of the U.S. manufacturing standards is to raise the production costs of product A in the United States by ten percent above the production costs in the countries of the Contracting Parties that do not impose similar requirements. After deducting the costs of transportation from those countries to the United States, product A as imported from the other Contracting Parties will cost several percentage points less in the United States than the identical product produced in the United States. The question presented is whether the United States under these circumstances can, consistent with its obligations under GATT, impose any requirements as those imports that will place domestically produced product A on a level footing with the imports.

GATT "law" on the topic does not stem so much from a discussion of dispute resolution panel opinions as it does from the fundamental principles enunciated in the GATT Articles, a seminal GATT document,¹⁷² and the writings of the commentators, including those of environmentally oriented commentators.¹⁷³ Those "authorities" would indicate that this particular issue is not subject to a great deal of interpretation under the current GATT law.¹⁷⁴ Under the present provisions of the GATT Articles, the United States in this hypothetical has virtually no options with respect to regulating imports in order to avoid the obviously negative financial results for the domestic production of product A under those environmental restrictions.

tuning of such terms may be eventually, at present, these comments are intended to address the broader issues.

172. See generally *GATT/Industrial Pollution Control*, *supra* note 12.

173. See, e.g., Shrybman, *supra* note 154, at 30-35.

174. *Id.* at 30-31.

Nor does the United States have any options with respect to the secondary forces such a negative result creates in connection with continued domestic support for strong environmental regulation regarding production of product A and other products (*i.e.*, the creation of forces that drive U.S. companies either out of business or outside of the United States). While the GATT paper goes on for some thirty-four pages, much of which is directed to this very hypothetical, it would seem that the heart of the argument against allowing the United States some relief in this situation comes down to three specific points:

1. If one were to begin allowing import charges aimed at balancing foreign and domestic production costs where the differentials are generated in the countries and their societies, by doing that with environmental matters one opens the doors to such an overwhelming array of differential production cost factors (such as labor costs, energy costs, and taxes) that world trade would virtually grind to a halt.¹⁷⁵
2. The costs of environmental compliance in the most stringent countries, while large from a dollar perspective, are relatively modest from the perspective of a percentage of GNP, thereby not justifying some specialized treatment for environmental matters in this regard.
3. It is a natural, and perhaps desirable, result in world trade for the manufacture of particular items to move to an area of low production costs, particularly if such an area is in need of economic development.

B. Analysis

As noted above, in 1971 the GATT Secretariat submitted a paper to the United Nations Conference on the Human Environment regarding GATT's "survey [of] certain issues that national anti-pollution measures might raise for international trade."¹⁷⁶ In comparison to the analysis in this article regarding the United States-Mexico tuna dispute, the following analysis might seem to be rather superficial. The hypothetical is included, however, not because of its undecided or presently contested legal situation.

175. As noted in the discussion of the Mexico tuna panel report, this has been a rather consistent theme in GATT panel decisions. Note the finding in the Mexico tuna panel report: "Thus, under the national treatment principle of Article III contracting parties may apply broader tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes)." *Panel Report: Dolphin/Tuna*, *supra* note 3, at 1618, ¶ 5.13.

176. See generally *GATT/Industrial Pollution Control*, *supra* note 12, at 1.

On the contrary, this hypothetical is included by virtue of its apparently decided situation and the attitudes and approaches of the GATT machinery that it illustrates.

In reviewing the 1971 GATT Secretariat paper, one must bear in mind that it is twenty years old. However, the author could locate nothing in the literature, or the GATT dispute resolution panels decisions, that would lead to the conclusion that the statements rendered in the 1971 paper are not reflective of the contemporary approach. Interestingly, from a timing perspective, the United Nations is undertaking preparations for the Earth Summit in Rio de Janeiro in 1992,¹⁷⁷ which is apparently a twenty-year anniversary and revival of the Stockholm Convention. Whether GATT participates in that process in some fashion, perhaps either confirming or revising their 1971 position, remains to be seen.

Beyond its application to this hypothetical, the document contains a couple of particularly interesting points. First, it appears that the document's author has a limited background in environmental matters. The document fundamental premise seems to be that each country essentially has an environmental checkbook and that no country really begins to write checks until some unspecified point in the ecological downgrading of the country at which nature is overwhelmed.¹⁷⁸ This basic quasi-scientific premise ultimately drives much of the document subsequent analysis and would seem to be a rather simplistic point of view for one addressing the entire planet. Second, the document's author focuses on translating this environmental checkbook analysis to an analysis of the movement of "dirty" industry from one country to another. The document sets forth as a "conclusion" or "solution" to avoid trade problems inconsistent with GATT:

One possible result of national responses to the environmental problem would be an accelerated transfer of industries or processes causing the most pollution to countries facing a less urgent pollution problem. The transferring country would thereby assist the industrialization efforts of the receiving country while at the same time insuring that imports from this source would not be inflated by anti-pollution costs.¹⁷⁹

Interestingly, especially because this document was pre-

177. For a description of this conference see *Earth Summit News*, *supra* note 18, at 1.

178. *GATT/Industrial Pollution Control*, *supra* note 12, at 5.

179. *Id.*, at 29.

pared twenty years ago, the thrust of the paper is that the United States was imposing limited pollution control requirements, while other parts of the industrialized world were imposing far more stringent controls. Therefore, the implication is that the United States at that time would have been the beneficiary of the type of analysis involved in the GATT paper. Perhaps the tables have turned, at least in some measure, in the intervening twenty years and the hypothetical posed here is probably more reflective of the United States posture. It is doubtful, however, from what has been reviewed in the preparation of this article that the GATT approach to this topic will have changed.

One interesting argument, although perhaps only of academic interest at the moment, did surface during the research on this topic. A 1988 law review article advances the proposition that a country's failure to implement pollution control measures in its manufacturing sector constitutes a subsidy prohibited by GATT.¹⁸⁰ Therefore, the argument runs that a "subsidy by omission" can in and of itself serve as the foundation for relief under GATT, whether by virtue of GATT ordering the offending country to cease the subsidy by imposing the pollution control requirements or face retaliatory import charges on the products so produced when they arrive in countries not furnishing such a "subsidy by omission."¹⁸¹ The article acknowledges that in order to establish a "subsidy by omission" one must demonstrate some international legal standard requiring the omitted act.¹⁸² The article's author fashioned that international standard from rather vaguely stated sources of international law and the general evolution of pollution control throughout the world over recent years, generally arguing that the world society has matured in this respect far enough to establish certain baseline norms for pollution control which are in essence international minimums.

While that is an interesting theory, there does not seem to be a great deal of belief in its viability. The issue is addressed by one commentator, when discussing certain proposals in the Uruguay Round that relate to a further reduction of import controls:

The reduction of import controls may undermine efforts to establish or maintain top environmental protection measures

180. Kenneth S. Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 Hous. J. Int'l. L. 189, 193-94 (1988).

181. *Id.* at 190-94.

182. *See id.* at 209.

and standards in both the developing and the developed world. For a country wanting to maintain stringent environmental standards, while not undermining the competitiveness of its domestic industry, the choices are simple:

- (a) Establish import tariffs to offset pollution control costs so that domestic producers will not be at a disadvantage when competing with imports from jurisdictions without similar environmental regulations, or;
- (b) Subsidize the cost of environmental protection with general revenues by underwriting pollution control costs.

Both of these options, however, are at odds with GATT, which explicitly limits the rights of governments to implement tariffs, and which prohibits the use of certain subsidies, and renders others vulnerable to measures which will neutralize their impact. The only alternative for creating a "level playing field" that does not violate the principles of liberalized trade, is the reduction of pollution control costs by de-regulation or by not regulating in the first place. *"The failure of a government to regulate has never been challenged as representing a subsidy, and there is no precedent for such a complaint".*¹⁸³

While the "subsidy by omission" may be somewhat ahead of its time, the concept could appear sound if there were an agreed set of minimums or guidelines to work against, regardless of how the world might go about setting such minimums or guidelines. The recent Mexico tuna dispute panel report would seem to push the world community toward such an agreed set of guidelines, which could be applied in the context of international trade, including GATT. How one gets there is an entirely different question.

V. CONCLUSION

Regardless of the position one might take with respect to what should be done next, from an analytical perspective it would seem relatively clear from the United States-Mexico tuna panel report that GATT in its present form allows for virtually no substantive consideration of environmental matters in addressing trade related issues on an international level.¹⁸⁴ Some

183. Shrybman, *supra* note 154, at 31 (citing Komoroski, *supra* note 180, at 189).

184. In stating this conclusion, however, I acknowledge the fact that, procedurally, the panel report must be accepted by the Contracting Parties in the GATT Council before it is technically final. In researching this article, I reviewed nothing in GATT "law" or in the history of the Council's review of panel reports that would lead me to believe that there is any substantive likelihood that the GATT Council will overrule or substantially modify the panel report in this instance.

might consider that to be appropriate,¹⁸⁵ while others would suggest that such an approach will result in substantially reducing the ability of countries to effectively maintain appropriate environmental standards in a competitive world, make it very difficult to establish any sort of enforceable environmental controls relative to the shared water and air of the earth, render unenforceable certain domestic legislation and a number of already existing multilateral international environmental agreements,¹⁸⁶ and further encourage reduced environmental responsibility in nations that presently do not address such matters effectively.¹⁸⁷ Prior to the United States-Mexico tuna panel report, there appeared to be three principal avenues for addressing environmental matters within the context of international trade: first, there was the possibility of some "greening" of GATT by virtue of the interpretation of its articles. Second, there were suggestions by commentators that the GATT Articles should be amended to address specifically such issues. Third, other multilateral processes, such as that of the United Nations, claim to be targeted on establishing international agreements and standards relating to environmental concerns. The United States-Mexico tuna panel report for all practical purposes would seem to foreclose the first option.

The next logical step in the analysis leads to an issue beyond the scope of this article. What, if anything, can and should be done with respect to achieving a greater degree of compatibility between the important interests of the global environment and international trade? A threshold question, inherently involved in this issue, is: Which body or bodies on an international and national level have the appropriate expertise and motivation to decide which, if any, environmental concerns and standards

185. See, e.g., *supra* note 89 and accompanying text.

186. The Lacey Act, 16 U.S.C. §§ 701-718 (1988); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-136(y) (1988); Endangered Species Act, 16 U.S.C. §§ 1531-1544; Magnuson Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-1882; African Elephant Conservation Act, 16 U.S.C. §§ 4201-4205; Forest Resources Conservation and Shortage Relief Act, 16 U.S.C.A. § 620 (a-j) (West Supp. 1991); Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T. 1087; International Convention for the Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079; Migratory Bird Treaty, Aug. 16, 1916, U.S.-Can., 39 Stat. 1702; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 6, 1987, 26 I.L.M. 1541 (entered into Force Jan. 1, 1989), *amended by* U.N. Environment Programme Report, UNEP/L.Pro. 2/3 (June 29, 1990); Cartagena Caribbean Convention, Dec. 14, 1979, 32 U.S.T. 5283; Convention on the Conservation of Fisheries, Apr. 29, 1958, 17 U.S.T. 138.

187. See generally Shrybman, *supra* note 154; *Hearing, supra* note 5 (testimony of Steve Shrybman, David Phillips, and Ralph Nader).

should be addressed in the course of seeking such coordination of environmental and trade issues? Should it be the trade officials in their various organizational structures? Should the international approach to environmental matters instead be resolved separately by entities whose organizational mission and professional qualifications have a more scientific orientation and then be memorialized in revisions to GATT and similar trade agreements? It seems likely that the substantive nature of the resulting coordination of trade and environmental issues, if it ever occurs, will be a reflection of how that threshold issue is resolved.

It appears to be relatively clear that the initial procedural discussions will address the possibility of an amendment to GATT.¹⁸⁸ Whether that is a realistic option or even a desirable

188. In fact, quite significant activity is underway in that regard. On December 20, 1991, the GATT Secretariat distributed to the Contracting Parties the *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, which incorporates a variety of environmentally related proposals, both substantive as to standards and procedural with respect to the panel process. The Contracting Parties have been called upon for comment, but the cloak of secrecy remains a challenge to undermine in a timely fashion by an ordinary citizen. Yet, vigorous critical analysis emerged virtually immediately. See Lori Wallach, The December 20, 1992 Uruguay Round "Final Act" Text Is Worse Than Expected on Environmental, Health and Consumer Issues (Dec. 26, 1991) (unpublished manuscript, on file with the *Tulane Environmental Law Journal*). A similar caution appears in the United States Congress in a proposed concurrent resolution, H.R. CON. RES. 246, cosponsored by 73 members of Congress, introduced on November 21, 1991, by the Ways and Means Committee and the Energy and Commerce Committee, but not yet acted upon. It provides:

CONCURRENT RESOLUTION

Expressing the sense of Congress with respect to the relation of trade agreements to health, safety, labor, and environmental laws of the United States.

Whereas a General Agreement on Tariffs and Trade (hereinafter in this resolution referred to as the "GATT") dispute resolution panel decreed on August 16, 1991, that certain provisions of the Marine Mammal Protection Act of 1972 designed to protect dolphins are a barrier to trade and must be eliminated;

Whereas the GATT panel ruling additionally declared that nations may not have laws that protect health, safety, or the environment beyond that nation's geographic borders, or laws that take into account the process or conditions under which a product is produced or harvested;

Whereas the GATT panel ruling may also jeopardize other United States laws and international agreements intended to protect global resources, including provisions that protect the stratospheric ozone layer, provisions to save endangered species, provisions to discourage driftnet fishing, and provisions for the protection of whales; and

Whereas ongoing negotiations for the Uruguay Round of the GATT, reflected in the December 1990 draft agreement and the United States-Mexico Free Trade Agreement, could weaken United States health, safety, labor, and environmental laws, including laws adopted by State and local authorities: Now, therefore, be it

initial option exceeds the scope of this article. However, one cannot be blind to the obvious. It has taken many years for GATT to make it through each of the various rounds required for fundamental amendments.¹⁸⁹ In those instances, the Contracting Parties have been dealing with the relatively familiar, albeit controversial, issue of trade. Charging GATT with formulating a body of internationally acceptable and implementable environmental principles would present that institution with an entirely new set of issues, with relatively little internationally agreed upon guidance and undoubtedly substantial international controversy. Is GATT as an institution prepared to or capable of engaging in such an enterprise? The current draft of the Uruguay round documents would suggest that there is some movement in GATT to take hold of these issues. Are there any practical alternatives?

Turning to the formulation of the United States' position on this issue, at the outset one must recognize that a variety of important interests in the United States come to this issue from substantially differing perspectives. Once again, an analysis of those interests, how they might best interplay to their mutual benefit, and how the best interests of the country might be served by their collective activity is beyond the scope of this article. It would appear, however, that the country should be looking to an appropriate interaction between the executive branch, Con-

Resolved by the House of Representatives (the Senate concurring)

SECTION 1. PRESIDENT,

The Congress calls upon the President to initiate and complete negotiations, as part of the current Uruguay Round GATT talk, to make the GATT compatible with the Marine Mammal Protection Act and other United States health, safety, labor, and environmental laws, including those laws that are designed to protect the environment outside the geographic borders of the United States.

SEC. 2. LEGISLATION.

The Congress will not approve legislation to implement any trade agreement (including the Uruguay Round of the GATT and the United States-Mexico Free Trade Agreement) if such agreement jeopardizes United States health, safety, labor, or environmental laws (including the Federal Food, Drug, and Cosmetic Act and the Clean Air Act).

189. Leaving aside the intricacies of negotiating the substance of any amendment, bringing about an amendment to GATT by the very terms of the Agreement is not an insignificant task. Article XXX provides that any amendment to Part I (which includes Article I - does this need to be amended relative to the environment?) requires an agreement by all of the Contracting Parties. Article XXX goes on to provide "and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties" See, PESCATORE ET AL., *supra* note 4, at 13 n.21 and accompanying text.

gress,¹⁹⁰ environmental concerns and those with expertise in that area, the business community, and the international trade community, all interacting in a fashion that will allow for the formulation of some cohesive and coherent national approach to this topic. Certain aspects of this article could be taken as a criticism of the role that the U.S. Trade Representative has taken in this arena. That, however, is not the intent. The Office of the USTR has been given a large, difficult and important mission. It was not until many years into the process that the question of "but what about the environment" began to be considered. That does not imply that the environmental concerns are unimportant or secondary, nor does it seek to sidestep the question raised at this point by environmentalists with respect to why nothing more substantive has been done in this trade arena relative to the environment over the now substantial number of years that environmental issues have had a place in the process. It merely addresses the present reality which all of the participants in GATT now face: an institutional organization and approach which serves one purpose, trade, adequately but runs the risk of serving another important concern for the world community, the environment, poorly. The challenge presented by this institutional conflict would seem to provoke at least the following questions for the United States regarding the Office of the USTR: Can a single entity be given such divergent missions and then be asked to successfully and appropriately coordinate them? Does this particular entity have the present expertise or the organizational flexibility to obtain appropriate expertise in

190. It will be particularly interesting to see what role the U.S. Congress takes in connection with the formulation of the United States' strategy and its interaction with other countries. Will it be a proactive role, as seems to be suggested by Representatives Studds and Waxman in the opening statements to the September 27, 1991 hearing of the Subcommittee on Health and the Environment? See *Hearing, supra* note 5 (opening statement). Will it be to merely broadly suggest relatively vague and probably unenforceable policy, as Congress does in the Clean Water Act:

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

33 U.S.C. §§ 1251-387, § 1251(c) (1988). Will it involve the formation of an international group of legislators attempting to act independently, such as GLOBE? See *supra* notes 14-15 and accompanying text. Or will the role of Congress be a combination of the above or something else altogether?

order to allow it to deal with this new issue area on an informed basis? If one undertakes the analysis suggested by those questions, however, it would seem logical ultimately to ask a more fundamental question. If the Office of the USTR is not the appropriate entity to take the national lead on coordinating the formulation of the United States position, what realistic alternatives are there?

I readily acknowledge that I do not have the answers. It would seem, however, that the questions should be asked, analyzed, and dealt with by those who are in a position to take action. We should wish them well. These are difficult questions which do not appear to have easy answers. As environmental awareness and issues have grown, the GATT process has been further drawn into friction with a subject area it did not originally contemplate. The United States-Mexico tuna panel report forthrightly articulates that reality in rather unequivocal terms. The challenge is now back into the hands of those responsible for formulating such far reaching multilateral international decisions. Powerful emotional, economic, political, and scientific forces are at work. Many would suggest that time is of the essence. How these decisionmakers respond and the path they take to the future will undoubtedly be both interesting and important to us all. This article, covering some forty years of GATT history and approximately twenty years of environmental awareness, represents merely the first chapter in that broader story. The dolphin-tuna battles continue on the United States' domestic front; GATT begins to more directly grapple with environmental issues in the Uruguay Round; and the United Nations will proceed with Earth Summit during the summer of 1992. Other forces undoubtedly are at work on other fronts. The next chapter will be interesting. Very few more chapters remain before the result becomes determinative for all of us.