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THE STRUGGLE TO "GREEN" GATT: FREE TRADE AND ENVIRONMENTAL RESPONSIBILITY IN THE WAKE OF THE UNITED STATES-MEXICO TUNA-DOLPHIN DISPUTE

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I. INTRODUCTION

On August 16, 1991, a General Agreement on Tariffs and Trade (GATT)¹ dispute panel ruled that a United States embargo of Mexican tuna products imposed pursuant to a U.S. dolphin-protection statute violated GATT rules.² The ruling sparked protest from a wide array of environmentalists and public interest groups and raised the question of what means national governments may employ to protect the environment while maintaining consistency with GATT. The ruling has been interpreted as a major setback for effective international environmental protection.

The GATT Panel Ruling brings the issue of harmonization of environmental protection and free trade laws to the fore at a crucial time for the United States, as the new administration attempts to successfully conclude two major free trade initiatives, the North American Free Trade Agreement and the Uruguay Round of GATT talks. Increasing concern regarding environment/free trade conflicts comes at a precarious time for both of these agreements. It is unclear what environmental ramifications the GATT panel will have on both agreements.

This Article presents a brief history of the events leading up to the August 1991 panel hearing, a summary of the panel's findings, and an update of subsequent developments. It examines reactions to the report and its impact on international trade and environmental regulations. In addition, the Article discusses proposals for resolving the conflicts between the panel's findings and important provisions of certain international agreements, concluding that the environmental and free trade policies

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1. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 1987.

2. *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, GATT Doc. DS21/R (submitted to the parties, August 16, 1991), 30 I.L.M. 1594 (1991) [hereinafter *Panel Report*].

agreements, concluding that the environmental and free trade policies would be served best by a compromise measure allowing at least a limited use of unilateral measures within the existing GATT provisions.

Although more than a year-and-a-half has passed since the panel made its findings, little closure has been achieved with regard to the dispute. Notwithstanding the results of the panel hearing and the efforts of Mexico and the United States to reach a bilateral understanding, the embargo remains in place. Meanwhile, the European Community and the United States are engaged in an embargo-related dispute hearing of their own, and a GATT Committee is re-examining the environmental aspects of the GATT provisions. The panel and the committee's findings are not expected until the end of the year.

II. BRIEF HISTORY OF THE DISPUTE

The Mexican tuna-dolphin dispute arose from United States enforcement action pursuant to the Marine Mammal Protection Act of 1972 (MMPA).³ MMPA was enacted in 1972 to reduce the number of dolphins being killed as a result of purse-seine nets used for tuna fishing. These nets are devastatingly effective and can be used to surround and capture entire schools of tuna. Unfortunately, their thoroughness makes them highly wasteful, because they take in everything they encircle, whether it is destined for processing or not. In the Eastern Tropical Pacific Ocean (ETP), dolphins frequently swim in the company of schools of tuna. This dolphin behavior is unique to dolphins swimming in the ETP, and, in combination with the practice of purse-seine net fishing, has led to an alarming dolphin-kill rate estimated to be over 300,000 per year during the early 1970s.⁴ The purpose of the MMPA was to bring this appalling rate of incidental dolphin-taking to more acceptable levels.

Under MMPA, if a country's fishing operations incidentally take more than one and a quarter times the number of marine mammals (e.g., dolphins) incidentally taken by the United States during the same time period, the Secretary of the Treasury bans imports of that country's fish and fish products. The Secretary also bans imports from other countries

3. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988 & Supp. 1992).

4. 134 CONG. REC. S16,336, S16,344 (daily ed. Oct. 14, 1988)(statement of Sen. Breaux).

which buy fish for re-export from the offending country.⁵

Under the pressure of a federal district court order⁶, the Bush Administration reluctantly issued a ban on imports of tuna and tuna products from Mexico and Venezuela effective February 22, 1991. The Earth Island Institute, a California lobbying group which brought suit to compel the government to issue the embargo, compelled the pro-trade Bush Administration was to enforce the act. On March 15, 1991, the National Marine Fisheries Service announced a second embargo on Italy, France, Spain and Britain to be effective May 24, 1991.⁷ It was imposed because these countries imported tuna from the countries against whom the first embargo was directed.

Mexico objected to the imposition of the tuna embargo, and on January 25, 1991 it requested that a GATT dispute panel hear the matter, in accordance with official GATT procedures.⁸ The Panel found in Mexico's favor on August 16, 1991, and declared that the United States embargo violated several GATT principles.⁹ The panel held that both the direct and the intermediary embargoes violated Article XI:1, which forbids quantitative restrictions on imports.¹⁰ Neither Articles XX(b) or XX(g) justified the direct embargo against Mexico. Articles XX(b), (d) or (g), which provide exceptions for measures necessary to protect human, animal or plant life or health; measures necessary to secure compliance with laws or regulations, which are not inconsistent with GATT; or measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption did not validate the indirect embargo against European Community.¹¹

In addition, the panel found that the Pelly Amendment, which gives the President discretion whether to impose an embargo on fishery or

5. 16 U.S.C. § 1371(a)(2)(B)(ii)(V)(C).

6. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 975-76 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

7. *Taking and Importing of Marine Mammals*, 56 Fed. Reg. 12,367 (1991).

8. GATT, *supra* note 1, art. XXIII.

9. *Panel Report*, *supra* note 2, para. 7.1(a), (b).

10. "No prohibitions or restrictions . . . 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" GATT, *supra* note 1, Article XI:1, as cited in *Panel Report*, *supra* note 2, para. 5.18.

11. *Id.*, para. 7.1(b).

wildlife products for the violation by other countries of "international fishery or endangered or threatened species programs,"¹² was not inconsistent with the GATT "as such."¹³ This determination was based on the distinction that enforcement was discretionary and on the fact that the Pelly Amendment explicitly states that such prohibition be implemented to the extent that it is sanctioned by GATT.¹⁴

Finally, the panel determined that the Dolphin Protection Consumer Information Act's labeling provisions did not violate GATT's most-favored nation provision¹⁵ because the restrictions on the right to use the "Dolphin Safe" label applied equally to all countries fishing in the Eastern Tropical Pacific Ocean and "thus did not distinguish between products originating in Mexico and products originating in other countries."¹⁶

The United States argued that even if Mexico were correct in arguing that these measures violated certain GATT provisions, the embargoes were valid exceptions of the kind GATT allows under Art. XX. The GATT panel interpreted the Art. XX exceptions quite narrowly and decided the issue in Mexico's favor. The panel stated that such a literal interpretation of the broad language used in the exception provisions would lead to abuse. Because the exceptions did not themselves "specify criteria limiting the range of life or health protection policies, or resource conservation policies, for the sake of which they could be invoked", it was thus incumbent on the contracting parties themselves "to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse."¹⁷ The panel suggested that instead of seeking an Art. XX exception, the United States should initiate an amendment or supplement to the provisions of GATT, or apply for a waiver of GATT obligations.¹⁸

The Panel also held that Article XX only protects conservation measures within a country's own jurisdiction. Countries "may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."¹⁹ The panel discouraged

12. Pelly Amendment to the Fishermen's Protective Act of 1967, Pub.L. No. 95-376, 92 Stat. 714 (1978) (codified as amended at 22 U.S.C. § 1978 (1982)).

13. *Panel Report*, *supra* note 2, para. 5.21.

14. 22 U.S.C. § 1978(a)(4).

15. GATT, *supra* note 1, art. I:1.

16. *Panel Report*, *supra* note 2, para. 5.43.

17. *Id.*, para. 6.3.

18. *Id.* note 2, para. 6.3.

19. *Id.*, para. 6.2.

unilateral conservation measures. The United States had not proven that it sufficiently pursued GATT-consistent measures, such as the negotiation of international cooperative arrangements to achieve its objectives.²⁰

In its concluding remarks, the panel hastened to add that GATT actually imposed few constraints on the ability of signatory nations to implement their environmental policies domestically.²¹ The panel determined that nations may "tax or regulate imported products and like domestic products" as long as those taxes and regulations "do not discriminate against imported products or afford protection to local producers" ²²

III. EVENTS SUBSEQUENT TO THE PANEL RULING

Because Mexico did not press the GATT Council to adopt the panel report, the ruling has no legal force.²³ During this dispute, Mexico and the United States were negotiating the North American Free Trade Agreement (NAFTA), and Mexico was concerned about disrupting these negotiations. At the March 18, 1992 meeting, Mexico told the GATT Council that Mexico and the United States were concluding a bilateral agreement for the protection of dolphins which would render the enforcement of the panel verdict unnecessary.²⁴ The two countries negotiated eighteen changes in their own laws aimed at achieving a satisfactory level of dolphin protection within two years.²⁵

The United States agreed to lift the tuna embargoes and Mexico and Venezuela agree to a five-year moratorium on the effect of purse-seine nets on dolphin populations, to begin March 1, 1994. This agreement was embodied in an amendment to the MMPA entitled the "International Dolphin Conservation Act of 1992,"²⁶ which President Bush signed into

20. *Id.*, para. 5.28.

21. *Id.*, para. 6.2.

22. *Id.*

23. *U.S. Comes Under Pressure Over Tuna Embargo*, The Reuter Library Report, Apr. 30, 1992, available in LEXIS, Nexis Library, Lbyrpt File.

24. *GATT Keeps Tuna Fish Dispute Alive*, Inter Press Service, Mar. 19, 1992, available in LEXIS, Nexis Library, Inpres File.

25. *Id.*

26. International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 (1992).

law on October 27, 1992.²⁷

While Mexico and the United States worked to end the dispute by means outside of GATT, the European Community and several Latin American countries urged the GATT Council to adopt the panel ruling and threatened to pursue independent complaints if the Council did not. The European Community insisted on the adoption of the Panel Report "because the principles involved [were] too important to be set aside" and it presented "an ideal chance to 'put a modicum of order into the relationship between trade and the environment.'"²⁸ The European Community representatives even hinted at possible collusion between Mexico and the United States, citing a "'growing tendency' of the United States to make bilateral deals with [some of its] trading partners --- deals . . . that tend to squeeze out the European Community and other trading partners."²⁹

IV. ECONOMIC CONSEQUENCES OF TUNA EMBARGO

The embargo was not without economic side-effects. The world tuna market collapsed as non-dolphin-safe tuna which was denied entry into the United States flooded other markets.³⁰ The tuna Latin American countries could not sell to the United States flooded Europe and Europe was also denied the ability to serve as an intermediary exporter between those countries and the United States.³¹ As a result, an oversupply of tuna in the European Community market depressed prices and hurt the European Community's own tuna fishing industry, which had a better dolphin protection record than Mexico, because its fishing vessels operate in the Atlantic and Indian Oceans where tuna and dolphin do not swim

27. *Bush Signs Bill to Protect Dolphins, Says Certain Provisions Advisory Only*, 9 Int'l Trade Rep. (BNA) 1872 (Oct. 28, 1992).

28. *EC Urges Adoption of Tuna Report But U.S., Mexico Claim Accord is Near*, 9 Int'l Trade Rep. (BNA) 524 (Mar. 25, 1992).

29. Joel Havemann, *EC Calls California Recycling Law a Trade Issue*, L.A. TIMES, April 10, 1992, at D2.

30. *Fisheries Conservation: GATT Council Agrees to Panel on US Tuna Embargo*, EUR. ENV'T, July 28, 1992, available in LEXIS, Nexis Library, Eurenv File.

31. *GATT: Mexican Timidity Behind EC Request for US Tuna Ban Panel*, EUR. ENV'T, June 30, 1992, available in LEXIS, Nexis Library, Eurenv File.

together.³²

European Community leaders considered a ban of their own on non-dolphin-safe tuna during this time.³³ The European Community Fisheries Commissioner, Manuel Marin, commented that "the European Community would 'invite' Mexico and other countries to stop using encircling nets."³⁴ Marin sought a ban like that of the United States on non-dolphin-safe tuna, but the other Commissioners opposed it as inconsistent with the European Community's GATT obligations and the position it was defending in the tuna dispute panel.³⁵ The European Community fisheries ministers did agree October 19, 1992, to ban the use of purse-seine nets on European Community tuna fishing vessels, but no ban on dolphin-unsafe tuna imports was forthcoming.³⁶

A report prepared by the external economic relations committee for the European Parliament criticized the European Community Commission for its reaction to the United States-Mexico Tuna Dispute, suggesting that its interest in the dispute was motivated more by economic than by environmental concerns. According to the report's authors, the European Community Commission "only began to show an interest in the animal welfare aspects of the case when it seemed that the impending moratorium might lead to the emergence on the European market of the one million tons of canned tuna [then] lodged in Mexican warehouses."³⁷

As this sequence of events reveals, well-intentioned, environmentally-motivated trade sanctions can have damaging economic side-effects and can lead to ever-widening cycles of protectionist behavior -- behavior which may be engaged in with or without the accompanying pretense of environmental concern. GATT enforcement authorities must be able to draw the line at some point, in order to prevent the agreement from collapsing. The question is how and through what means.

On July 14, 1992, the same day that the European Community Commission asked Mexico and Venezuela to stop their use of purse-seine

32. *EC Moves to Protect Dolphins in the Pacific*, The Reuter Library Report, Oct. 19, 1992, available in LEXIS, Nexis Library, Lbyrpt File.

33. *Fisheries Conservation*, *supra* note 30.

34. *European Community Demands End to Dolphin Killing*, Notimex Mexican News Service, July 15, 1992, available in LEXIS, Nexis Library, Notimx File.

35. *Fisheries Conservation*, *supra* note 30.

36. *EC Moves to Protect Dolphins in the Pacific*, *supra* note 32.

37. *EC Parliament Adopts Two-Year Moratorium on GATT Panel Environmental Decision*, Daily Report for Executives (BNA), Jan. 26, 1993, available in LEXIS, Nexis Library, Drexec File.

nets, the GATT Council finally agreed to the European Community's request for the establishment of a dispute panel on the United State's intermediary embargo of European Community tuna products. By September 4, 1992, selection of panel members was underway.³⁸ The first set of hearings on the intermediary embargo were held March 30 and 31st, 1993.³⁹ Due to the confidentiality of the hearings, the arguments are not presently available to the public and presumably will not be available until a final decision is reached, which may be as late as September 1993.⁴⁰

Although GATT and European Community officials have defended the correctness of the panel ruling, both GATT and the European Community are now re-evaluating their policies with regard to environmental protection and free trade. On January 26, 1993, the European Parliament endorsed its external economic committee's proposal calling for a two-year moratorium on GATT panel hearings regarding environmental issues.⁴¹ Apparently the European Parliament realizes that consistent and satisfactory rulings require a more settled policy than currently exists. Further clarification of GATT policy is expected by the end of 1993, when the GATT Council will debate the findings of its Group on Environment and Trade, which has been resurrected after a long period of inactivity.⁴²

V. REACTION TO THE DISPUTE RULING

A. Criticisms of the Ruling

The GATT panel ruling was vehemently denounced by environmentalists, who claimed that the ruling threatened to unravel much of the progress that has been made in international environmental protection. Representative Henry A. Waxman, Chairman of the House Energy and Commerce Committee's Subcommittee on Health and the

38. *GATT: USTR Says Selection Underway for Second GATT Panel on Tuna Embargo*, Int'l. Trade Daily (BNA), Sept. 4, 1992.

39. Telephone interview with Serena Wilson, official with the National Marine Fisheries Service (April 8, 1993).

40. *Id.*

41. *EC Parliament Adopts Two-Year Moratorium*, *supra* note 37.

42. *GATT Group Agrees to Step Up Work on Trade, Environmental Coordination*, 15 Int'l Env'tl. Rep. (BNA) 831 (Dec. 16, 1992).

Environment, called the ruling "a worst-case scenario come true -- repeal of a vital environmental law because of conflict with a trade agreement."⁴³ The ruling is regarded as a threat to the enforcement provisions of the Montreal Protocol on Substances That Deplete the Ozone Layer,⁴⁴ which allows the use of import and export bans not only on the basis of what the products themselves contain⁴⁵ but on the basis of what substances were used in their production.⁴⁶ The ruling also poses difficulties for the United Nations Conference of the Environment and Development's commitment to make product prices reflect the environmental costs incurred in their manufacture.⁴⁷

Both of these environmental measures conflict with the principle in the panel report that no less favorable treatment be accorded an imported product "as a product" than is given to a like domestic product. Consideration of the difference in environmental costs of producing each product is not allowed, because it would restrict a country's importation of a product "merely because it originates in a country with environmental policies different from its own."⁴⁸ Environmentalists argue that the UNCED Climate Change Convention, the Rio Declaration on Environment and Development, and the UNCED's "Agenda 21" all imply that environmentally-motivated unilateral measures are appropriate under international law.⁴⁹

B. Defenses of the Ruling

As a test case for establishing the appropriateness of unilateral environmental protection measures, the Mexican Dolphin-Tuna dispute has certain undeniable weaknesses. Although the wastefulness of incidental dolphin kills from purse-seine net fishing is startling, and the unnecessary deaths of creatures as appealing and intelligent as dolphins readily invites

43. Stuart Auerbach, *GATT Rule on Wildlife Stirs Alarm: Environmentalists Say U.S. Laws Hurt*, THE WASH. POST, Oct. 1, 1991, at D1.

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

45. *Id.*, art. 4(1)-(3).

46. *Id.*, art. 4(4).

47. *Official Defends Environmental Policy, Says GATT Rules Give Scope for Protection*, 15 Int'l Trade Rep. (BNA) 595 (Sept. 23, 1992).

48. *Panel Ruling*, *supra* note 2, para. 6.2.

49. *Official Defends Environmental Policy*, *supra* note 47.

public concern, the fact remains that dolphins are not an endangered species.⁵⁰ The most damaging aspect of the United States' case was that the language of the MMPA and the circumstances of its implementation suggested protectionist motives at least as readily as environmental concern. The method used to set the limit on incidental dolphin takings for non-United States tuna vessels is especially susceptible to a protectionist interpretation.

The MMPA sets "a prospective absolute yearly ceiling" for domestic vessel incidental dolphin takings, but then requires that "foreign tuna producers meet a retroactive and varying ceiling for each period based on actual dolphin taking by the domestic tuna fleet in the same time period."⁵¹ To avoid a ban on its tuna products, the country would have to retrospectively calculate what 125% of the United States dolphin capture level was for the past year and meet that limit. This practice appears to give the United States tuna fishing industry considerably greater leeway over its competitors fishing in the Eastern Tropical Pacific. In light of its previous finding, the panel found it unnecessary to conclude that Mexican tuna was being treated less favorably than United States tuna, but the panel felt that this aspect of the MMPA's requirements "could give rise to legitimate concern. . ."⁵² This difference in methods of calculating limits for domestic versus foreign fishing vessels clearly contributed to making the United States' case less sympathetic.

Those wishing to downplay the effect of the decision note that the GATT Council still has not adopted the panel report, implying that its precedential value is weak. However, panels have been known to cite unadopted panel reports as authority,⁵³ therefore, the report would arguably have a greater effect in the context of GATT than would be the case in a system with an established doctrine of "stare decisis."

Supporters of the decision also note that the panel report did not eliminate the use of import restrictions in all cases.⁵⁴ It merely reasserted the fundamental free-trade principle that domestic goods cannot be accorded treatment more favorable than imports. Restrictions may legitimately be placed on imports for environmental reasons, but only if

50. *The Greening of Protectionism*, THE ECONOMIST, Feb. 27, 1993, at 25.

51. *Panel Ruling*, *supra* note 2, para. 5.16.

52. *Id.*

53. See "United States-Measures Affecting Alcoholic and Malt Beverages," para. 5.79, as cited in Steve Charnovitz, *GATT and the Environment*, 4 INT'L ENVTL. AFF. 203, 233 n. 146 (1992).

54. *Official Defends Environmental Policy*, *supra* note 47, at 596.

these restrictions are applied equally so as not to discriminate in favor of domestic products.⁵⁵

C. Defenses of GATT Provisions

GATT officials defend GATT against accusations by environmentalists that its provisions are incompatible with adequate levels of international environmental protection. The chairman of the Group on Environment and Trade has said that "[i]t is essential to dispel any misperception that GATT contradicts or puts in jeopardy collective efforts to address environmental problems."⁵⁶ GATT apologists assert that its provisions are consistent with UNCED accords as well as other international agreements, and that GATT has not challenged any of the international environmental agreements environmentalists have cited.⁵⁷ Furthermore, "UNCED agreements such as Agenda 21 support GATT positions by calling for an open world market and the removal of unjustified unilateral trade restrictions."⁵⁸

VI. THE PRESENT STATUS OF THE DISPUTE

Even though GATT officials have been quick to defend the panel report, their reconvening of the Group on Environment and Trade (the Ukawa Committee) after a long period of inactivity indicates the officials opinion that at least some degree of re-evaluation may be in order. At the Annual General Meeting of GATT in December 1992, the newly-elected GATT chairman, Ambassador B.K. Zutshi of India, said that it was important for GATT to "make development of trade and the environment mutually supportive."⁵⁹ At that meeting, the reconvened Ukawa Committee "work[ed] along three parallel tracks:

- To examine the relationship between GATT's rules and trade

55. *Panel Report*, *supra* note 2, para. 5.11.

56. *GATT Group Agrees to Step Up Work on Trade, Environmental Coordination*, *supra* note 42.

57. *Official Defends Environmental Policy*, *supra* note 47, at 596.

58. *Id.*

59. *Id.*

provisions contained in existing multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer . . .

- To examine the trade effects of national environmental regulation and their relationship to GATT; and
- To study the trade effects of new packaging and labelling requirements aimed at protecting the environment."⁶⁰

A GATT Council debate on the relationship between trade and the environment is anticipated upon the Ukawa Committee's production of definitive findings, but such findings are not expected until the end of 1993.⁶¹ The GATT Council will keep the Ukawa Committee's work under review until then. In the meantime, it may be useful to look at each of these areas in turn and to investigate what approaches the Committee might consider.

VII. GATT AND ITS RELATIONSHIP TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

The panel expressed a preference for "international cooperative agreements"⁶² over unilateral actions as a means for protecting the environment. But environmentalists fear that the panel ruling may seriously limit the effectiveness of international cooperative agreements aimed at protecting endangered species and the environment, many of which rely on trade sanctions for their enforcement.⁶³ In particular, critics have expressed concern over the viability of the Montreal Protocol, which explicitly provides for import and export bans on products containing CFCs⁶⁴ or which used CFCs in their production.⁶⁵

The panel stressed the illegitimacy of restrictions that discriminate between domestic and imported products based on distinctions other than

60. *Id.*

61. *Id.*

62. *Panel Report*, *supra* note 2, para. 5.28.

63. *Official Defends Environmental Policy*, *supra* note 47, at 596.

64. Montreal Protocol, *supra* note 44, art. 4(1)-(3).

65. *Id.*, art. 4(4).

their characteristics as products "as such."⁶⁶ According to the ruling, discrimination based on production methods or different environmental standards observed in production processes are not legitimate grounds for imposing discriminatory measures on imports.⁶⁷ This aspect of the ruling constitutes a direct threat to the enforcement provisions of one of the most effective environmental agreements the international community has produced. It also undermines any effort to implement a system of pricing that would include the environmental cost incurred during production. Such an attempt to account for environmental cost by internalizing the environmental externalities of production constitutes discrimination based on characteristics other than those of the product "as such". The exercise of the Montreal Protocol's enforcement provision is therefore incompatible with the panel report's interpretation of GATT principles.

Exclusive reliance on international environmental agreements is problematic in a number of respects. International agreements often take a long time to negotiate and implement. In order to secure the desired number of signatories, they often become less restrictive and less binding than originally intended. Many of them, including the International Convention on the Regulation of Whaling (ICRW) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁶⁸, have lenient opt-out provisions. Contracting states to the ICRW may withdraw from the Convention with as little as six months notice (five months in some cases).⁶⁹ The ICRW places responsibility for punishing violations on the governments having jurisdiction over the violators.⁷⁰ It was the very inability of the International Whaling Commission to sanction noncomplying nations under the ICRW which motivated the United States Congress to enact unilateral conservation programs such as the MMPA.⁷¹

IX. THE GATT AND NATIONAL TRADE REGULATION

66. *Panel Report*, *supra* note 2, para. 5.11.

67. *Id.*, para. 5.15.

68. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085.

69. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. XI, 62 Stat. (2) 1716, 161 U.N.T.S. 72.

70. *Id.*, art. IX(1), (3).

71. BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 409-410 (2d ed. 1990).

The conflict between enforcement of GATT obligations and national environmental regulation have inevitably led to political friction between GATT authorities and the rule-making bodies of individual contracting states. Congressional outrage over the panel decision resulted in the introduction of a resolution calling on the president to "make GATT rules compatible with existing United States health, safety, labor, and environmental laws."⁷² A legislative body such as Congress, which does its work in a public forum through the efforts of elected officials, naturally objects to the judgement of its measures by a panel of three nonelected and obscure trade bureaucrats operating in secrecy.

The ineffectiveness of international agreements has spurred the promulgation of national environmental laws that implement trade regulation as an enforcement mechanism.⁷³ Effective enforcement schemes that do not employ at least some form of economic coercion remain elusive. Economic self-interest is the dominant motivating force, and it is hard to imagine how an effective system of environmental regulation can operate without use of this primary motivating force.

The effectiveness of national trade regulation in persuading recalcitrant parties to "come to the table" and negotiate international agreements should not be overlooked. The negotiation of CITES, for example, was preceded by a unilateral ban on the importation of endangered species by the United States in 1969.⁷⁴ The United States has been seeking an international dolphin protection agreement for the last two decades.⁷⁵ It is unlikely that the dolphin protection measures negotiated with Mexico could have been elicited without the twin inducements of the embargo and NAFTA.

The GATT dispute panel held that unilateral national regulations affecting behaviors outside a state's jurisdiction are illegitimate attempts by one nation to impose its environmental standards on another.⁷⁶ There are circumstances, however, where such unilateral measures would be appropriate and even desirable. In a situation such as the imminent extinction of a species combined with the inability of the international community to ratify an effective international cooperative agreement, a

72. *House Subcommittee Votes to Reject Trade Pacts Contradicting U.S. Law*, Int'l Env't Daily (BNA) (May 13, 1992).

73. *Panel Report*, *supra* note 2, para. 5.28.

74. Steve Charnovitz, *GATT and the Environment*, 4 INT'L ENVTL. AFF. 203, 207 (1992).

75. *Id.* at 207.

76. *Panel Report*, *supra* note 2, para. 5.27.

unilateral act could create an environmental and moral duty. Another example would be United States action under the Pelly Amendment⁷⁷ and Packwood-Magnuson Amendment⁷⁸ against a signatory who has opted out of the ICRW and demonstrated an intent to hunt a whale species to extinction.

X. TRADE EFFECTS OF PACKAGING AND LABELING REQUIREMENTS

The panel report looked favorably on the use of the "Dolphin Safe" label and found that measures restricting access to the label's use to tuna caught in the ETP without the use of purse-seine nets were not contrary to GATT.⁷⁹ The panel noted that these measures did "not restrict the sale of tuna products",⁸⁰ nor did they "establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the 'Dolphin Safe' label."⁸¹ The use of consumer choice rather than government-imposed trade restrictions as a device with which to influence industries to operate in a more environmentally responsible manner is an appealing free market approach that would appear to serve both the causes of environmental protection and free trade. The weakness of this approach is that it could result in sales too low to support the environmentally responsible alternative if the premium for the environmentally-responsible product is too high for the more price-conscious consumer to accept.

Packaging requirements pose even larger problems. A German packaging law, which became effective in 1991, limits the amount of non-reusable packaging in the country, forcing companies to either develop recyclable packages for their products or collect their discarded packages and take them out of Germany.⁸² If the foreign company cannot collect

77. Pelly Amendment, *supra* note 12.

78. Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976, Pub. L. No. 96-61, § 3(a), 93 Stat. 407 (1979) (codified as amended at 16 U.S.C. § 1821 (1982)).

79. *Panel Report*, *supra* note 2, para. 5.44.

80. *Id.*, para. 5.42.

81. *Id.*

82. Joel Havemann, *Recycling Law Ignites Trade Barrier Debate*, L.A. TIMES, April 7, 1992, at World Report 7.

and recycle the packaging itself, it must pay for someone else to do so.⁸³ Because it is easier and cheaper for domestic companies to retrieve and recycle their used packaging, foreign companies argue that the practice is equivalent to a trade barrier against their products.⁸⁴ Nonetheless, this measure would be acceptable under the provisions of GATT as expounded by the first tuna dispute panel. The German law treats imports no less favorably than domestic products. That higher costs are incurred by firms operating outside of Germany importing their products into the country is no fault of the law but is rather a logistical fortuity which the German law apparently need not address.

XI. PROPOSALS FOR RESOLVING THE CONFLICTS BETWEEN ENVIRONMENTAL AND FREE TRADE GOALS

A. *Replace GATT*

During the June 1992 Global Forum in Rio de Janeiro, a caucus of non-governmental organizations (NGOs) negotiated an Alternative Treaty to replace GATT.⁸⁵ The NGOs suggested replacing the GATT rules and its secretive and undemocratic procedures with "an alternative International Trade Organization . . . designed with a participatory and democratic structure ensuring transparent, accountable, and equitable decision-making in accordance with the public interest instead of the corporate interest."⁸⁶ Although complaints about the secretive and undemocratic aspects of GATT procedures are certainly on target, the prospects for starting over, negotiating an alternative treaty with which to replace GATT, and securing enough signatories to make it a workable alternative seem quite unlikely. Despite all the criticism of GATT, it is the most important trade agreement of the post-war era. No other trade agreement has been as successful in increasing world living standards. GATT is responsible for much of the economic prosperity of the period and is not to be tossed aside lightly.

83. *Id.*

84. *Id.*

85. *Alternative Treaties Adopted by NGO's Cover Climate Change, Debt, Other Areas*, 15 Int'l. Env'tl. Rep. (BNA) 443 (July 1, 1992).

86. *Id.*

B. Amend GATT and Interpret it in an Environmentally-Sensitive Manner

A more practical alternative would be to negotiate an amendment to Article XX of GATT allowing countries to impose regulations "relating to" protection of both their own environment and the global environment.⁸⁷ The country imposing the regulation would have to satisfy the burden of proof as to the consistency of the measure with its internal environmental policies, thereby establishing that it did not constitute a protectionist measure in disguise.⁸⁸

The European Community panel dispute presents an opportunity for resolving the issue in the least-GATT-disruptive manner. The first panel hearing and the debate which followed it provided an opportunity for GATT, United States officials and the international community to become better informed of the complex interactions involved in the dispute and reconsider their positions. The solution which would be least disruptive to GATT procedures and the GATT text would be for the United States Congress initially to amend the MMPA and change the method it uses to calculate the limit on incidental takings of dolphins.⁸⁹ The explicit use of United States vessels' practice as a reference standard is too suggestive of bias. A more objective standard needs to be developed that protects dolphins but does not so readily evoke suspicions of protectionist motives.

The GATT panel might then be more willing to reconsider the previous panel ruling and adopt a broader interpretation of the restrictions on GATT's Article XX exceptions than was adopted by the first panel, especially with regard to its restrictive interpretation of "necessary" measures.⁹⁰ If GATT authorities would commit themselves to the prudent exercise of the discretionary powers granted them to distinguish between "disguised restriction[s]" on international trade and good faith environmental protection measures, a considerable degree of harmonization of environmental and free trade goals could be achieved within GATT with a minimum of upheaval.

XII. CONCLUSION

87. Eliza Patterson, *GATT and the Environment*, 26 J. WORLD TRADE 99, 107 (1992).

88. *Id.*

89. 16 U.S.C. § 1371(a)(2)(B)(ii)(II).

90. *Panel Report*, *supra* note 2, para. 5.28 (referring to limit-setting language of 16 U.S.C. § 1371(a)(2)(B)(ii)(II)).

The insistence of the European Community in pursuing its own panel dispute at the same time that the United States and Mexico have been seeking a bilateral understanding has undoubtedly been a source of annoyance to the United States. On the other hand, the European Community was right in suggesting that the issues involved should not just be set aside. The opportunity should be seized to "put a modicum of order into the relationship between trade and the environment,"⁹¹ although not necessarily in the manner in which the European Community has set its hopes. Unilateral enforcement measures have a role to play within GATT, even if only a restricted one.

Beyond their immediate consequences to the parties directly involved in them, the panel hearings have served an important role in elevating the consciousness of both the international trade and environmental communities as to the need for greater harmonization of their seemingly conflicting goals, as well as of the mechanisms that have been instituted for achieving them. The increased scrutiny of environmental aspects of NAFTA, the ongoing negotiation of the Uruguay round, the second GATT panel hearing, and the Ukawa Committee's study of environmental and trade issues are all either direct consequences of the first panel report or have been strongly influenced by it and the reactions that followed its release. Each of the above is scheduled to be completed by the end of this year, and the results reached in each should make this a pivotal year in the development of effective policies and mechanisms for resolving trade and environmental conflicts in international law.

91. *EC Urges Adoption of Tuna Report*, *supra* note 28.

TIME-TABLE OF TUNA-DOLPHIN DISPUTE RELATED EVENTS

1972	Marine Mammal Protection Act becomes law.
2/22/91	Date on which United States ban on Mexican tuna imports became effective; embargo imposed under compulsion of District Court order.
1/25/91	Mexico requests GATT panel hearing.
3/15/91	Announcement by National Marine Fisheries Service of secondary embargo to be imposed on Italy, France, Spain and Britain.
8/16/91	GATT panel issues ruling in favor of Mexico.
10/10/91	President Salinas of Mexico announces intent to defer enforcement of ruling and hopes for a bilateral solution to the dispute with the United States without recourse to GATT procedures; bilateral negotiations ensue.
2/18/92	GATT Council meeting: majority of contracting states including European Community request adoption of panel report; Council postpones decision to next Council meeting due to opposition of United States and Mexico.
3/10/92- 3/11/92	GATT environmental committee meets and decides to begin work toward harmonization of environmental treaties (e.g., the Basel Convention, the Montreal Protocol) with international trade rules. ⁹²
3/18/92	GATT Council meeting: European Community and other countries renew request to keep Tuna Dispute on GATT Council agenda; Council agrees to keep Dispute on agenda for next meeting April 30; United States and Mexico claim to be on verge of bilateral agreement which would resolve

92. *GATT Keeps Tuna Fish Dispute Alive*, *supra* note 24.

the dispute.⁹³

- 4/9/92 European Community issues eighth annual report on United States Trade and Investment Barriers decrying United States unilateral trade actions as evidence of increased barriers to trade and growing protectionism.
- 4/30/92 GATT Council meeting: European Community and several Latin American countries urge Council to adopt GATT panel report; European Community states it is in bilateral negotiations with United States in accordance with GATT's formal disputes procedure; if no solution worked out before next GATT council meeting on June 16, 1992, then next step is to seek a full GATT dispute panel on the issue.
- 5/12/92 House subcommittee approves resolution (H.R. Con. Res. 246) "warning that Congress will not approve any trade agreement that jeopardizes United States health, safety, labor, or environmental laws."⁹⁴
- 6/18/92 Mexico and Venezuela agree to halt killing of dolphins by March of 1994 in exchange for lifting of embargo; Rep. Gerry Studds (D-Mass.) introduces bill lifting the embargo; formal agreement with the two Latin American countries expected after the International Dolphin Conservation Act becomes law; Act requires Mexican commitment to stop the killing of dolphins for five years beginning March 1, 1994.
- 6/18/92-
6/19/92 GATT Council meeting: GATT Council, following dispute settlement procedure, delays decision whether to establish panel until next meeting of the Council on July 14, in order to allow parties in the dispute to hold bilateral discussions.⁹⁵

93. *Id.*

94. *House Subcommittee Votes to Reject Trade Pacts Contradicting U.S. Law*, Int'l Env't. Daily (BNA), May 13, 1992, available in LEXIS, Envir Libary, Bnaied File.

95. *GATT: Mexican Timidity*, *supra* note 31.

- 7/14/92 GATT council agrees to European Community request for dispute panel on United States tuna embargo; 2nd GATT panel hearing begins.
- European Community Commission asks Mexico, Venezuela and others to stop use of encircling nets in tuna fishing, claims proposal and panel hearing unrelated.⁹⁶
- 9/4/92 Panel members are selected for European Community-United States intermediary embargo hearing.
- 9/24/92 United States House of Representatives approves the "International Dolphin Conservation Act into law, by which embargoes on Mexican and Venezuelan tuna may be lifted conditional to dolphin conservation measures, including a moratorium on purse-seine net use.
- 10/19/92 European Community fisheries ministers agree to ban purse-seine net tuna-fishing by European Community vessels.
- 10/27/92 President Bush signs International Dolphin Conservation Act into law.
- 12/16/92 United States and European Community hold bilateral negotiations as preliminary step to panel hearing; European Community seeks clarification of changes in United States law concerning definition of "intermediary" nation.
- 1/26/93 European Parliament endorses external economic relations committee proposal calling for two-year moratorium on GATT-panel judgements concerning the environment.
- 2/4/93-
2/5/93 GATT environmental committee discusses harmonization of international trade and environmental protection treaties, but reaches no conclusions.

96. *European Community Demands End to Dolphin Killings, supra* note 34.

- 3/24/93 "Resolution Supporting Whaling Moratorium" (1993 H.R. Con. Res. 34) reported in the Senate after having passed in the House February 16, 1993; resolution states that the sense of the Congress is that "the United States policy should promote the conservation and protection of whale, dolphin, and porpoise populations."⁹⁷
- 3/30/93 Panel hearing held on European Community-United States tuna embargo; proceedings 3/31/93 to be kept confidential at least until final panel hearing, to be held no earlier than July 1993.⁹⁸
- 5/11/93 Scheduled date for submission of simultaneous response briefs by both European Community and United States⁹⁹

97. H.R. Con. Res. 34(1), (2), 103rd Cong., 1st Sess. (1993).

98. Telephone interview with Serena Wilson, official with the National Marine Fisheries Service (April 8, 1993).

99. *Id.*