

16 June 1994

**UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA**

*Report of the Panel*  
(DS29/R)

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## I. INTRODUCTION

1.1 On 11 March 1992, the European Economic Community ("EEC") requested the United States to hold consultations under Article XXIII:1 on restrictions maintained by the United States on the importation of certain tuna products (DS29/1). The consultations were held on 10 April 1992. As they did not result in a satisfactory adjustment of the matter, the EEC, in a communication dated 5 June 1992, requested the CONTRACTING PARTIES to establish a panel to examine the matter under Article XXIII:2 (DS29/2). On 3 July 1992, the Kingdom of the Netherlands ("the Netherlands"), on behalf of the Netherlands Antilles, requested the United States to hold consultations pursuant to Article XXIII:1 concerning the same restrictions (DS33/1). These consultations were held on 13 July 1992. Since they did not result in a satisfactory adjustment of the matter, the Netherlands, in a communication dated 14 July 1992, requested to be joined, as a co-complainant, in the panel to be established pursuant to the request of the EEC (DS29/3).

1.2 The Council, at its meeting on 14 July 1992, agreed to establish a panel on the matter, with the EEC and the Netherlands as co-complainants. It authorized the chairman of the Council to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/258). At that meeting, Australia, Canada, Colombia, Costa Rica, El Salvador, Japan, New Zealand, Thailand, and Venezuela reserved their rights to participate in the Panel proceedings as third parties, and Singapore registered its interest in the case.

1.3 On 6 August 1992, the EEC informed the Director-General that the parties to the dispute had been unable to agree on the composition of the Panel, and requested him to compose the Panel by virtue of paragraph F(c)5 of the Decision of the CONTRACTING PARTIES of 12 April 1989 (BISD 36S/61). On 25 August 1992, the Chairman of the Council announced that the Director-General had decided that the Panel would be composed as follows (DS29/4):

Chairman:	Mr. George A. Maciel
Members:	Mr. Winfried Lang
	Mr. Alan Oxley

As the Parties had not agreed otherwise within twenty days from the establishment of the Panel, standard terms of reference applied<sup>1</sup> as follows:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the EEC and by the Netherlands relating to measures by the United States restricting imports of tuna (DS29/2, DS29/3), and to make such findings as would assist the CONTRACTING PARTIES in making recommendations or rulings as provided for in paragraph 2 of Article XXIII."

1.4 On 10 October 1992, the EEC requested the Panel to observe a pause in its proceedings until such time as the EEC had been adequately informed of and had assessed recent changes in the United States legislation at issue. On 30 October 1992, the Netherlands also requested a pause in the Panel procedures for the same purpose. On 16 November 1992, the Chairman of the Panel announced that, at the request of the EEC, and with the agreement of the other Parties, the work of the Panel had been suspended until further notice (DS29/5). On 18 November 1992, the EEC proposed that supplementary consultations take place under Article XXIII:1 on the changes to the United States legislation (DS29/6). On 25 November 1992, the Netherlands also requested supplementary consultations with the United States under Article XXIII:1 (DS29/7). The United States agreed to this request, explicitly reserving the question whether these were supplementary

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<sup>1</sup> Decision on "Improvements to the GATT Dispute Settlement Rules and Procedures", adopted 12 April 1989, BISD 36S/61, 63-64, para. F(b)(1)

consultations or initial consultations under a new dispute settlement proceeding. These consultations took place on 16 December 1992. As a result of the consultations, the parties to the dispute, without prejudice to the rights of any party to the dispute, reached an understanding on the United States legislative provisions, enacted in October 1992, that could be considered in the course of the Panel proceeding. Those provisions were:

- (a) the amendments to Section 3 of the Marine Mammal Protection Act of 1972 made by Section 2(c) of the International Dolphin Conservation Act and by Section 401(a) of the High Seas Driftnet Fisheries Enforcement Act;
- (b) the new Section 305 of the Marine Mammal Protection Act of 1972, as added by Section 2(a) of the International Dolphin Conservation Act; and
- (c) the amendments to Section 101 of the Marine Mammal Protection Act of 1972 made by Section 401(b) of the High Seas Driftnet Fisheries Enforcement Act.

The Panel agreed with the Parties that the amendments could be considered by the Panel.

1.5 On 3 February 1993, the parties to the dispute informed the Panel that they were prepared to resume the proceedings. The Panel met with the parties on 31 March and 22 June 1993. It met with interested third parties to the dispute on 31 March 1993. On 1 October 1993, the Chairman of the Panel informed the Chairman of the Council that as a result of unforeseen circumstances the Panel had been unable to complete its work within the 6-month period provided in paragraph F(f)6 of the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures (L/6489). The Panel submitted its report to the parties to the dispute on 20 May 1994.

## **II. FACTUAL ASPECTS**

### **A. Purse seine fishing of tuna**

2.1 Tuna are commonly caught in commercial fisheries using large "purse seine" nets. A fishing vessel using this method sends a small boat carrying one end of the net around a school of tuna. The other end of the net remains attached to the fishing vessel. Once the boat has encircled the school of tuna and returned its end of the net to the vessel, the vessel winches in cables at the bottom and the top of the net, thus "pursing" it and gathering its contents.

2.2 In the eastern tropical Pacific Ocean, but not in other waters, schools of tuna often swim below herds of dolphin that are visible swimming at or near the surface. Tuna fishermen in the eastern tropical Pacific therefore commonly use dolphins to locate schools of tuna, and encircle them intentionally with purse seine nets on the expectation that tuna will be found below the dolphins. Since the 1960's, the practice of intentionally setting purse seine nets on dolphins to catch tuna has resulted in the incidental killing and injury of many dolphins. In 1986, an estimated 133,000 dolphins were killed in this way. By 1991, the number killed had been reduced to an estimated 27,500, due to the growing consensus on the need to reduce dolphin mortality, and the introduction of improved fishing methods and equipment. The number of dolphins in the eastern tropical Pacific, after a decline in the 1970's and 1980's, is now stable at current levels of mortality.

## **B. International efforts to reduce dolphin mortality**

2.3 International efforts to reduce dolphin mortality resulting from the use of purse seine nets in commercial fisheries in the eastern tropical Pacific have been pursued within the Inter-American Tropical Tuna Commission ("IATTC"). These efforts were initiated and urged by the United States. Established by the United States and Costa Rica in 1949 for the purpose of conserving tuna, the IATTC now includes as members most (but not all) states whose vessels engage in purse seine tuna fishing in the eastern tropical Pacific. The IATTC broadened its responsibilities in 1976 to encompass the treatment of problems arising from the tuna-dolphin relationship in the eastern tropical Pacific. In 1986, an IATTC observer program, including all nations with fleets of large tuna vessels operating in the eastern tropical Pacific, became fully operational. As part of the program, the IATTC places observers on all tuna vessels capable of fishing for tuna in association with dolphin in the eastern tropical Pacific. The observers gather detailed information that is used for research purposes, the enforcement by flag nations of national regulations, and as the basis of the "dolphin safe" classification used by some tuna processors. The program also includes basic and statistical research on dolphins, development of fishing gear less harmful to dolphins, and training of captains and crews of the international fleet.

2.4 In June 1992, IATTC member governments signed an Agreement<sup>2</sup>, to take effect in January 1993, aimed at progressively reducing dolphin mortality in the eastern tropical Pacific to levels approaching zero, through the setting of annual limits. Under the Agreement, the annual permissible mortality of dolphins, set at 19,500 in 1993, will fall to less than 5,000 in 1999. The Agreement also aims at seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins, while maintaining the population of yellowfin tuna at a level permitting maximum sustainable catches. A Review Panel, established under the Agreement to review and report on compliance, is composed of five voting members of governments with fishing vessels participating in the fishery, two non-voting members of environmental organizations, and two non-voting members of the tuna-fishing industry.

## **C. Marine Mammal Protection Act of 1972**

2.5 The US Marine Mammal Protection Act of 1972<sup>3</sup> prohibits the "taking", including the harassing, hunting, capturing or killing, of any marine mammal, whether directly, or incidentally in connection with the harvesting of fish. The Act further prohibits the import into the United States of any marine mammal or marine mammal product, and any fish or fish product harvested through the incidental taking of marine mammals.<sup>4</sup> These prohibitions are subject to exceptions, set out in section 101 of the Act, in the case of the yellowfin tuna fishery in the eastern tropical Pacific. The stated purpose of the Act is to conserve marine mammals which may be in danger of extinction or depletion.

### ***1. Restrictions affecting domestic tuna and tuna fishing***

2.6 The Act prohibits the taking, including the incidental taking, of marine mammals by any person or vessel subject to the jurisdiction of the United States, or within any area subject to the fisheries jurisdiction of the United States. The Act further prohibits, in any commercial fishery, the use by United States flag vessels of any method of fishing contrary to regulations issued under the Act,<sup>5</sup> and the use of a port or other place within the jurisdiction of the United States in

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<sup>2</sup>Agreement reached in June 1992 between Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, the United States, Vanuatu and Venezuela.

<sup>3</sup>Marine Mammal Protection Act of 1972, PL 92-522, 86 Stat 1027. As amended, hereinafter referred to as the "Act".

<sup>4</sup>Sec. 101 (a)

<sup>5</sup>Sec. 102 (a)(5)

connection with the taking. Violation of any prohibition under the Act can lead to a civil penalty of up to \$10,000 for each violation.<sup>6</sup>

2.7 Persons or vessels under the jurisdiction of the United States may however take marine mammals incidental to commercial fishing operations, if they obtain a permit granted under the Act.<sup>7</sup> The regulations governing the issuance of the permit aim to reduce the incidental kill or serious injury of marine mammals in the course of commercial fishing to insignificant levels approaching zero.<sup>8</sup> With respect to purse seine fishing of yellowfin tuna, this goal is considered to be met through the requirement of the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable.<sup>9</sup>

2.8 The United States has granted only one permit under the Act, to the American Tunaboat Association. Conditions to the permit were added by the International Dolphin Conservation Act of 1992. The permit specifically requires that: vessels not deploy purse seine nets on, or encircle, any school of dolphin in which eastern spinner dolphin or coastal spotted dolphin are observed; total dolphin mortalities not exceed 800 for the period 1 January 1993 through 1 March 1994; purse seine nets not be set after sunset; explosive devices not generally be used; and vessels carry an official observer certified by the United States or by the Inter-American Tropical Tuna Commission.<sup>10</sup> Under the terms of a moratorium provided for in the International Dolphin Conservation Act of 1992, the permit expires on 1 March 1994, unless by that date no major purse seine tuna fishing country has made a formal commitment under the Act to the United States relating to yellowfin tuna harvesting practices in the eastern tropical Pacific.<sup>11</sup> In that case, the permit is extended to 31 December 1999, on the condition that the permit holder reduce dolphin mortality "by statistically significant amounts each year to levels approaching zero" by the expiry of the permit.<sup>12</sup>

## **2.        *Restrictions affecting direct imports of tuna*** ***("primary nation embargo")***

2.9 The Act prohibits the import of any commercial fish or fish products harvested by a method that results in the incidental kill or incidental serious injury of marine mammals in excess of United States standards. These standards will be deemed not to be exceeded if the fish exporting country provides evidence to United States authorities that it has a comparable regulatory program and a comparable rate of incidental taking.

2.10 United States authorities therefore require reasonable proof of the effects on ocean mammals of the commercial fishing regulatory program in effect for such fish or fish products exported to the United States.<sup>13</sup> In the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific, the government of the harvesting nation must meet a number of specific conditions. First, the harvesting nation must have adopted a regulatory program governing the incidental taking of marine mammals in the course of harvesting that is comparable to that of the United States, and that includes regulations on activities such as encircling marine

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<sup>6</sup>Sec. 105 (a)(1)

<sup>7</sup>Sec. 101 (a)(2); Sec. 101. (a)(4)(A)

<sup>8</sup>Sec. 101 (a)(2)

<sup>9</sup>Sec. 104 (h)(2)(B)(ii)

<sup>10</sup>Sec. 104 (h)

<sup>11</sup>Sec. 306 (a)(1)-(3)

<sup>12</sup>Sec. 306 (a)(4)

<sup>13</sup>Sec. 101 (a)(2)(A)



mammals and conducting sundown sets.<sup>14</sup> Second, the vessels of the harvesting nation must have a rate of incidental taking of marine mammals comparable to the that of United States vessels.<sup>15</sup> This comparability is defined as an average rate of incidental taking by vessels of the harvesting nation of no more than 1.25 times that of United States vessels during the same period.<sup>16</sup> Third, the vessels of the harvesting nation must not incidentally take in a given year more than 15% of eastern spinner dolphin and not more than 2% of coastal spotted dolphin as a proportion of the total number of marine mammals taken by such vessels.<sup>17</sup> Fourth, the rate of incidental taking by the harvesting nation must be monitored by the Inter-American Tropical Tuna Commission or under an equivalent approved program.<sup>18</sup> Fifth, the harvesting nation must comply with all reasonable requests by the United States for cooperation in specified research programs.<sup>19</sup>

2.11 The primary nation embargo does not apply if the harvesting country opts to enter into a formal agreement with the United States containing certain specified commitments. These commitments require that the country: ban the practice of harvesting tuna through the use of purse seine nets deployed on, or to encircle, dolphins or other marine mammals, beginning 1 March 1994 for a period of five years, unless terminated earlier under prescribed conditions;<sup>20</sup> require an observer on each vessel engaging in purse seine fishing in the eastern tropical Pacific, subject to certain conditions;<sup>21</sup> and reduce dolphin mortality resulting from purse seine net operations conducted by its vessels in the period 1 January 1993 through 28 February 1994 to a level that is lower than such mortality in 1992, by a statistically significant margin. The Act provides that the United States will periodically determine whether each country having made commitments is in fact fully implementing them.<sup>22</sup> If the Secretary to the Treasury determines that such country is not implementing its commitments then, fifteen days after having notified the President and Congress of this determination, the Secretary will prohibit the import from that country of all yellowfin tuna and yellowfin tuna products.<sup>23</sup> Unless the country concerned certifies and provides reasonable proof within 60 days of the import ban that it has fully complied with its commitments, the President will direct the Secretary of the Treasury to prohibit the import from that country of one or more other fish and fish product categories that together amount to at least 40% of total fish and fish product imports from that country.<sup>24</sup>

### **3. *Restrictions affecting indirect imports of tuna*** ***("intermediary nation embargo")***

2.12 The Act provides that any nation ("intermediary nation") that exports yellowfin tuna or yellowfin tuna products to the United States, and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct prohibition on import into the United States, must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months.<sup>25</sup>

2.13 The definition of intermediary nation has been modified since the original intermediary nation embargo provisions of the Act took effect on 24 May 1991. At that time, the United States

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<sup>14</sup>Sec. 101 (a)(2)(I)

<sup>15</sup>Sec. 101 (a)(2)(B)

<sup>16</sup>Sec. 101 (a)(2)(B)(II)

<sup>17</sup>Sec. 101 (a)(2)(B)(III)

<sup>18</sup>Sec. 101 (a)(2)(B)(IV)

<sup>19</sup>Sec. 101 (a)(2)(B)(V)

<sup>20</sup>Sec. 305 (a)(1)

<sup>21</sup>Sec. 305 (a)(2)

<sup>22</sup>Sec. 305 (b)(1)

<sup>23</sup>Sec. 305 (b)(1)(A), (B)

<sup>24</sup>Sec. 305 (b)(2)(A), (B)

<sup>25</sup>Sec. 101 (a)(2)(C); Sec. 3(5), 3(17)

interpreted the definition of "intermediary nation" as requiring it to obtain with respect to each shipment of yellowfin tuna or tuna products from a country identified as an intermediary nation a special Yellowfin Tuna Certificate of Origin, and a declaration by the importer that, based on appropriate inquiry and written evidence in his possession, no yellowfin tuna or tuna product *in the shipment* were harvested with purse seine nets in the eastern tropical Pacific from a country subject to the primary nation embargo. The intermediary nations identified at that time were Costa Rica, France, Italy, Japan, and Panama.

2.14 This initial interpretation of "intermediary nation" was rejected by a United States court order on 10 January 1992.<sup>26</sup> The court's interpretation required the United States to receive certification and proof from an official of each country identified as an intermediary nation that the country had *prohibited* the import of any tuna that was barred from direct importation into the United States. The court interpretation led to the addition effective 31 January 1992 of more countries to the list of intermediary nations: Canada, Colombia, Ecuador, Indonesia, Korea, Malaysia, the Marshall Islands, Netherlands Antilles, Singapore, Spain, Taiwan, Thailand, Trinidad and Tobago, the United Kingdom, and Venezuela.

2.15 In response to the court order, the United States administration introduced an interim final rule, effective 11 September 1992, modifying the regulatory definition of intermediary nation.<sup>27</sup> Corresponding amendments to the Act were subsequently made by Section 401 of the High Seas Driftnet Fisheries Enforcement Act<sup>28</sup> and Section 2(c) of the International Dolphin Conservation Act of 1992.<sup>29</sup> As a result, the tuna exporting country was no longer required to certify that it had itself prohibited the import of tuna and tuna products which were prohibited from import into the United States, but only that it had not imported such tuna or tuna products in the previous six months. Shortly after the new definition became effective, the United States began removing a number of countries from the list of those subject to the intermediary nation embargoes, either because they showed that they were not in fact intermediary nations under the new definition, or because they complied with the requirements of the new definition by themselves instituting import prohibitions. On 26 October 1992, as a consequence of the new definition of intermediary nation, France, the Netherlands Antilles and the United Kingdom were withdrawn from the list of intermediary nations, leaving Costa Rica, Italy, Japan and Spain still covered by the intermediary nation embargo.

### III. MAIN ARGUMENTS

#### A. Findings and recommendations requested by the Parties

3.1 The EEC and the Netherlands requested the Panel to:

- a) find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101 (a)(2)(C) of the Marine Mammal Protection Act (the "intermediary nation embargo") were contrary to Article XI of the General Agreement, did not qualify as a border adjustment under Article III and the relevant note to that Article, and was not covered by any of the exceptions under Article XX;
- b) find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101 (a)(2) and Section 305 (a)(1) and (2) of the Marine Mammal

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<sup>26</sup>*Earth Island Institute v. Mosbacher* (10 January 1992, U.S. District Court for the Northern District of California)

<sup>27</sup>56 Federal Register 41701; modifying 50 CFR 216.3

<sup>28</sup>P. L. 102-582 (2 November 1992)

<sup>29</sup>P. L. 102-523 (26 October 1992)

Protection Act (the "primary nation embargo") were contrary to Article XI of the General Agreement, did not qualify as a border adjustment under Article III, and was not covered by any of the exceptions of Article XX; and

- c) recommend that the United States take all the necessary steps to bring its legislation into conformity with its obligations under the General Agreement.

3.2 The United States requested the Panel to:

- a) find that the import prohibition on tuna and tuna products imposed pursuant to Section 101 (a)(2)(C) of the Marine Mammal Protection Act (the "intermediary nation embargo") was consistent with the General Agreement, since it came within the scope of paragraphs (g), (b) and (d) of Article XX;
- b) find that the import prohibitions imposed pursuant to Section 101 (a)(2) of the Marine Mammal Protection Act (the "primary nation embargo") did not nullify or impair any benefits accruing to the EEC or the Netherlands, since the primary nation embargo did not and, under current EEC laws, could not apply to the EEC or the Netherlands;
- c) find that, in examining the primary nation embargo for the purposes of determining that the intermediary nation embargo was consistent with the General Agreement, since it came within the scope of paragraph (d) of Article XX, the primary nation embargo was also consistent with the General Agreement, since it came within the scope of paragraphs (b) and (g) of Article XX;
- d) find that it is not possible to determine at this time whether any import prohibitions that might be imposed pursuant to Section 305(a) (1) and (2) of the Marine Mammal Protection Act of 1972 in the future would be inconsistent with the General Agreement, or whether these measures would be within the scope of paragraphs (g) and (b) of Article XX, since these measures would be imposed in the context of a specific agreement between sovereigns, yet to be concluded and whose terms had not all been defined, including the relation between that agreement and measures taken pursuant thereto and the General Agreement; and
- e) reject the complaint by the EEC and the Netherlands.

**B. Intermediary nation embargo**

***1. Articles XI and III***

3.3 The **EEC** and the **Netherlands** claimed that the measures taken by the United States under the intermediary nation embargo were a quantitative restriction of tuna and tuna products that was *prima facie* contrary to Article XI:1 of the General Agreement. Sub-paragraphs (a) and (b) of Article XI:2 were clearly not applicable. Sub-paragraph (c) did not apply since under the Act there was no restriction on the quantity of the like domestic product (tuna) permitted to be marketed or produced. The United States administration itself considered that the measures at issue constituted an import prohibition, as shown in court proceedings in the United States in February 1992. During these proceedings, the United States Department of Justice argued that, for the purpose of determining the jurisdiction of domestic courts, the measures constituted an embargo.

3.4 The EEC and the Netherlands further maintained that measures taken under the intermediary nation embargo could not be seen as the enforcement at the time or point of importation of an internal law, regulation or requirement which applied equally to the imported product and the like domestic product, within the meaning of the Note ad Article III. A border measure was merely a convenient way of enforcing an internal law, regulation or requirement; it could not be a substantially different measure, as in the present case. The internal measure limited the incidental killing of dolphins in the fishery for yellowfin tuna, but did not restrict the landing of tuna as such. The border measure prohibited the import of yellowfin tuna and tuna products from the countries concerned, until such countries certified that they had not, during the preceding six months, imported tuna of the kind subject to the primary nation embargo. The difference in the measures was demonstrated by the fact that, even after the adoption by the EEC of an internal measure similar to the United States internal measure, the EEC was still subject to the United States intermediary nation embargo.

3.5 The EEC and the Netherlands further argued that in any case the Note ad Article III covered only those measures which were applied to the product *as such*. The requirements of the Act affecting domestic tuna fishing applied to the fishing methods and did not apply to tuna and tuna products as such. They did not directly regulate the sale of tuna. On the other hand, the requirements of the Act relating to the intermediary nation embargo regulated the sale of tuna as a product, by prohibiting its import under certain circumstances. Thus, the intermediary nation embargo measures could not possibly be covered by the Note ad Article III. The EEC and the Netherlands stated further that, even if the Note ad Article III were to apply in this case, the intermediary nation embargo measures would not meet the national treatment standard of Article III:4. The total prohibition of imports of yellowfin tuna and tuna products from intermediary countries constituted treatment far less favourable than that accorded to the domestic product, which was affected only by certain fishing regulations, including the setting of a limit on the incidental killing of dolphins.

3.6 The **United States** replied that the EEC and the Netherlands bore the burden of proving that the United States measures at issue were in fact inconsistent with obligations under the General Agreement. However, this was almost an academic exercise, since the measures were clearly within the scope of Article XX of the General Agreement, and Article XX provided that nothing in the General Agreement is to be construed to prevent a contracting party from adopting or enforcing measures within the scope of that Article. The United States did not assert to the Panel that these measures were within the scope of Article III. Furthermore, it was inconsistent to assert that the United States measures were inconsistent with both Article III and Article XI, since it is established that measures are either of the type specified in Article XI of the General Agreement or are of the type specified in Article III.

## 2. *Article XX*

3.7 The **United States** maintained that the intermediary nation embargo, even if inconsistent with Articles III or XI, was justified under the terms of Article XX(g) as a measure relating to the conservation of dolphins, an exhaustible natural resource, and under Article XX(b) as a measure necessary to protect animal life or health. It further maintained that the measure was within the scope of Article XX(d), as a measure necessary to secure compliance with the primary nation embargo.

### *a) Preliminary observations*

3.8 The **United States** proceeded to make some preliminary observations. The United States maintained that it had for years been concerned with protecting dolphins from incidental mortality

associated with purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean. As a result of this concern, the United States had worked with other countries to develop effective dolphin protection measures and had adopted measures to promote dolphin protection, including those in the Marine Mammal Protection Act of 1972 that were the subject of this Panel proceeding. Although these measures had resulted in significant reductions in dolphin mortality, dolphins were still in need of conservation and protection measures.

3.9 The United States further maintained that this dispute was of great significance since it represented a challenge under the General Agreement to the ability of sovereign nations to adopt and enforce measures to safeguard resources in the global commons, in which all countries had a shared interest. The United States noted that this was an area which was currently the subject of extensive consideration in a working group established by the CONTRACTING PARTIES: the Group on Environmental Measures and International Trade. At a time when resolution of issues involved in safeguarding the global commons was becoming critical, the work of that group and of the CONTRACTING PARTIES should not be pre-empted by having a dispute settlement panel legislate with respect to this area to find that these environmental concerns were outside the meaning of the environmental exceptions in Article XX.

3.10 The United States stated that in becoming contracting parties to the General Agreement, countries did not agree to surrender their ability to take affective action to protect the environment, including the global commons. In drafting the General Agreement, the contracting parties created a set of obligations that permitted safeguarding the global environment, in particular through the provisions of Article XX. Their efforts and intent should be recognized as so permitting. Accordingly, the United States maintained that its measures to conserve a unique global commons resource, dolphins, were compatible with the General Agreement.

3.11 The United States argued that the issues involved in this dispute would become even more important over time, in light of the fact that environmental issues were increasingly recognized as global in nature, including transboundary effects and effects on the global environment. More and more, actions in one part of the world would have significance for other parts of the world. In this respect, this dispute was not a typical trade dispute. This was not an instance, for example, where one contracting party was concerned about actions by another party to protect its market. It was thus different from the recent action of the EEC to restrict imports of tuna in order to protect its domestic fishing industry. In this case, there had been no suggestion that the challenged measures were motivated by a desire to restrict imports or to protect domestic production. Indeed, all sides agreed that the United States restrictions on tuna imports were based on conservation concerns shared by governments, including the parties to this dispute, non-governmental organizations, and private citizens around the world. If the rules of the General Agreement should be re-examined in the light of the increasing complexity of issues regarding trade and the environment, that re-examination had to be conducted by the contracting parties, not a panel. The 1982 Ministerial Declaration on dispute settlement explicitly provides that panel decisions "cannot add to or diminish the rights and obligations provided for under the General Agreement." (BISD 29S/13). The United States considered that admonition to be especially apt in this case.

3.12 The United States said that any attempt to portray the United States measures as an effort "to force other states to follow its policy of conservation outside its own jurisdiction by applying trade sanctions to them" or alternatively as an attempt "unilaterally to enforce its own environmental and conservationist policies internationally, outside its jurisdiction" were mischaracterizations of the United States measures.

3.13 The United States argued that it was not obligated by an international agreement to maintain these measures, and noted that in fact, the vast majority of measures taken by sovereign

nations in all fields of activity were "unilateral" in this sense. However, the United States stated that the categorization of measures as "unilateral" had no relevance to the provisions of the General Agreement. There was no provision in the General Agreement that supported the use of this term in a reasoned legal analysis of the obligations of contracting parties under the General Agreement. There was nothing in the General Agreement that distinguished between "unilateral" measures and other types of measures. In fact, the term "unilateral" appeared nowhere in the General Agreement, including Article XX, Article XI, and Article III. The United States further observed that the lack of any such distinction illustrated that this dispute also affected the extent to which the General Agreement could accept trade restrictive measures included in multilateral treaties on the environment. Since there was no distinction in Article XX between "unilateral" and other measures, any analysis of Article XX would apply to all types of measure, no matter whether they were classified as "unilateral" or pursuant to multilateral environmental agreements.

3.14 The United States maintained furthermore that the United States measures at issue were consistent with and directly furthered the objectives of an international environmental agreement. Through the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the international community had sought to protect certain species of animal and plant life by restricting trade in such species. All species of dolphins involved in the fishery in the eastern tropical Pacific were listed in CITES Appendix II. Moreover, while the United States was not obligated under CITES to adopt the measures at issue, CITES specifically provided for these measures in providing for "stricter domestic measures" in order to further the objectives of that agreement. The United States measures were stricter domestic measures, as explicitly contemplated under CITES, taken to protect species of dolphins that CITES protects. These measures were in addition to the restrictions on trade in specimens of the dolphins themselves that are required under CITES.

*b) Jurisdictional location of the resource or living thing*

3.15 The **EEC** and the **Netherlands** objected that Article XX(g) or (b) could not be invoked in this case to conserve natural resources or to protect the life or health of living things located outside the jurisdiction of the party taking the measure. Although the text of these paragraphs did not explicitly restrict the location of the resource or living thing to be protected, this did not mean that such a limitation was not contained in the provision. It was necessary to interpret Article XX(b), in its context, in accordance with the rules of treaty interpretation expressed in the Vienna Convention on the Law of Treaties.

3.16 The **United States** argued that the jurisdictional location of the resource to be conserved or the living things to be protected was not relevant for the purposes of Article XX(g) or (b). The *ordinary meaning* of the terms of Article XX(g) and (b) contained no territorial or jurisdictional limitation on the location of the resources to be conserved or the living things whose life or health was to be protected. The broader *context* of the General Agreement confirmed this interpretation. Each paragraph of Article XX dealt with different issues, some of which necessarily related to activities in the territories of other states. Paragraph (a) of Article XX was not relevant to this case, since the dispute did not concern an issue of public morals. Paragraph (e), on measures relating to "products of prison labour", was concerned with measures relating to prison labour outside a country's territorial jurisdiction. Paragraph (c), on measures "relating to the importation or exportation of gold or silver", was clearly not limited to gold or silver within a country's territorial jurisdiction, even though the provision contained no explicit language to that effect. Similarly, Articles XIX, XX, and XXI were not one context. They each dealt with different issues. Both Articles XX and XXI clearly related to measures that are not purely domestic. Article XXI referred, for instance, to "the maintenance of international peace and security", which were not domestic issues.

3.17 The United States further maintained that, by their nature, international agreements dealt with matters in the international sphere and not within the jurisdiction of just one nation. There was therefore no general principle of treaty interpretation by which a treaty's provisions were interpreted not to have effect outside the jurisdiction of the country taking the measure. The Vienna Convention on the Law of Treaties contained no such interpretative principle. The United States noted that, while it was not a party to this Convention, it agreed that the provisions cited reflected customary international law. International tribunals had routinely interpreted treaty provisions to apply outside of the jurisdiction of the country taking the measure. This was illustrated in the 1989 case of *Jens Soering*<sup>30</sup>, in which the European Court of Human Rights held that the United Kingdom was bound by its obligation in Article 3 of the European Convention on Human Rights to ensure that no one should be subjected to inhuman or degrading treatment or punishment, even with respect to a person within the United Kingdom whose extradition was requested, for a capital offence, in the United States. Although the United States was not a party to this Convention, the Court determined that the United Kingdom would violate its obligations under the treaty solely on the basis of conditions that existed in the United States.

3.18 The United States further argued that, in the light of the *object and purpose* of Article XX, it would have been surprising to find a jurisdictional limitation on the policy objectives contained in it, since so many living things and other natural resources occurred outside any country's territorial jurisdiction. Such a limitation would have precluded the conservation of much of the world's resources, a result that could not have been intended. In such a case, no country could take measures to conserve resources not in any country's jurisdiction, contrary to the principles of the Stockholm Declaration. The United States measures, consistent with Principle 21, were taken to ensure that activities within its jurisdictional control (the United States market) did not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. Further, these measures were not contrary to Principle 12: the requirement that "unilateral actions should be avoided" did not imply a prohibition of unilateral actions under the General Agreement. Much of the General Agreement concerned one contracting party's ability to act unilaterally within its jurisdiction in response to matters outside its jurisdiction. For example, Article III allowed a contracting party to adopt requirements for products produced outside that party's territorial jurisdiction and imported into the party, without requiring international agreement. Similarly, Article VI provided for anti-dumping and countervailing duties imposed unilaterally by a contracting party in response to behaviour outside the party's territorial jurisdiction. There were no Articles in the General Agreement which supported the jurisdictional limitation on Article XX proposed by the EEC and the Netherlands. Furthermore, arguments that the United States measures were an extrajurisdictional application of law were misdirected. The United States measures concerned activity within United States jurisdiction -- importation and consumption of tuna in the United States market. The United States measures governed access to the United States market; the United States was not claiming the ability to enforce its law outside its jurisdiction.

3.19 The United States noted that previous adopted panel reports examining Article XX(g) had found no jurisdictional limitation within that Article. The panel in *United States - Prohibition of imports of tuna and tuna products from Canada* found no such limitation, in spite of the fact that the panel stated that it was providing a "complete report", and that the resources being conserved were outside the jurisdiction of any country.<sup>31</sup> It further decided that the issues it had examined had no bearing "whatsoever" on fishery jurisdiction.<sup>32</sup> The interpretation of the unadopted report

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<sup>30</sup>ILM 1989, p. 1063 ff

<sup>31</sup>BISD 29S/98, para. 4.3

<sup>32</sup>Para 4.16. See also the report of the Panel on "Canada - Measures affecting exports of unprocessed herring and salmon", para 3.3.

of the panel in *United States - Import restrictions on tuna* was based not on the language of Article XX(g), nor on its history, but solely on a policy argument.

3.20 The United States agreed with the EEC and the Netherlands that, in accordance with Article 31 (3)(a) of the Vienna Convention on the Law of Treaties, there were no *subsequent agreements* among the parties to the General Agreement regarding the interpretation or application of Article XX(g) or (b).

3.21 The United States maintained however, that *subsequent practice* of parties did exist in the sense of Article 31 (3)(b) of the Vienna Convention on the Law of Treaties. This subsequent practice was that of the contracting parties to the General Agreement pursuant to Articles XX(b) and (g), which included their practice with respect to international environmental treaties. Subsequent practice of the contracting parties with respect to international environmental treaties negotiated after the General Agreement revealed that many provided for the protection by a country of plants and animals outside that country's territory. These treaties included both sanitary and conservation measures, and often required trade restrictions. At no time were these treaties challenged as being inconsistent with the General Agreement because they conserved or protected plants and animals located outside the territory of a signatory of the treaty. Some of these agreements were:

- (a) Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933. Article 3 of this treaty provides that

"the import of trophies which have been exported from any territory to which the present Convention is applicable in full ... shall be prohibited except on production of a certificate of lawful export ...".

The United States noted that the Conventions's restrictions on hunting and killing apply within the parties' respective territories. However, the restrictions on importation required application to activities beyond the territorial jurisdiction of the importing party, and were designed to protect resources outside the importing party's jurisdiction.

- (b) Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1940. Article IX of this treaty provides that

"each contracting government shall take the necessary measures to control and regulate the importation, exportation and transit of protected fauna and flora or any part thereof by the following means:

1. The issuing of certificates authorizing the exportation or transit of protected species of flora or fauna, or parts thereof
2. The prohibition of the importation of any species of fauna or flora or any part thereof protected by the country of origin unless accompanied by a certificate of lawful exportation as provided for in Paragraph 1 of this Article."

The United States noted that Article IX of the Convention restrict flora and fauna beyond the territory of the importing state. The Convention covers migratory



birds, which are defined in Article I as "birds of those species, all or some of whose individual members, may at any season cross any of the boundaries between the American countries". This definition includes all migratory birds in the Western Hemisphere, not just those found in the territories of the parties.

- (c) International Convention for the Protection of Birds, 1950. Article 3 of this treaty provides that

"the import, export, transport, sale, offer for sale, giving or possession of any live or dead bird or any part of a bird killed or captured in contravention of the provisions of the Convention, during the season in which the species concerned is protected, shall be prohibited."

The United States noted that Article 9 specifies that "each Contracting Party shall regulate trade in the birds protected by this Convention and take all necessary measures to limit the expansion of such trade." It was clear that the treaty was intended to protect birds located outside the territory of the party taking the measure.

- (d) Agreement on the Conservation of Polar Bears, 1973. Article V of this treaty provides that

"a Contracting Party shall prohibit the exportation from, the importation and delivery into, and traffic within, its territory of polar bears or any parts or product thereof taken in violation of this Agreement."

The United States noted that the treaty protects polar bears living in the arctic region. This region includes parts of the territory of states in the arctic region, as well as areas over 200 miles beyond the territory of any state, that are considered to be the high seas. The import prohibition applies to polar bears from anywhere in the arctic region. The treaty was therefore intended to protect resources outside the party taking the measure, whether within the territory of another party, or on the high seas within the global commons.

- (e) Convention on Conservation of North Pacific Fur Seals, 1976. Article VIII:2 of the treaty provides:

"Each Party also agrees to prohibit the importation and delivery into, and the traffic within, its territories of skins of fur seals taken in the area of the North Pacific Ocean mentioned in Article III ..."

The United States noted that the treaty defines the North Pacific Ocean region as including high seas areas beyond the 200 mile exclusive economic zone. The treaty therefore obligates parties to protect resources outside the jurisdiction of the party taking the measure, whether within the territory of another party, or on the high seas within the global commons.

- (f) Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific (adopted in 1989, not yet in force). Article 3 of this treaty states

"(1) Each Party undertakes

- (a) not to assist or encourage the use of driftnets within the Convention Area; and
  - (b) to take measures consistent with international law to restrict driftnet fishing activities within the Convention Area, including but not limited to
    - (i) prohibiting the use of driftnets within areas under its fisheries jurisdiction; and
    - (ii) prohibiting the transshipment of driftnet catches within areas under its jurisdiction.
- (2) Each party may also take measures consistent with international law to
- ...
- (c) prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet;
- ..."

The Convention Area defined in Article 1(a) includes all the waters under the fisheries jurisdiction of the parties to the treaty, as well as areas in the global commons. The treaty therefore obligates parties to protect resources outside the jurisdiction of the party taking the measure, whether within the territory of another party, or on the high seas within the global commons.

3.22 The United States noted that the treaties it had cited provided for straightforward import prohibitions, and did not provide merely for the supervision and enforcement of export licensing systems. For example, neither the International Convention for the Protection of Birds nor the Agreement on Conservation of Polar Bears provided any jurisdictional limitation on the import and export prohibitions that they contained. In the case of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, import prohibitions were only required on species of fauna or flora protected by the country of origin. However, those species subject to protection included any species, such as migratory birds, that would "cross any of the boundaries between the American parties". The United States pointed out that any characterization of these treaties as "mutual help" agreements was not relevant. All international agreements could be characterized as "mutual help" in some form, since presumably no two sovereign nations entered into an agreement that did not provide for some mutual benefit. The relevant fact was that these treaties provided for measures to conserve resources outside the territorial jurisdiction of the country taking the measure. Why countries might choose to take such measures to conserve and protect these resources was of no relevance to this dispute.

3.23 The United States also noted that under *current practice* countries were continuing to negotiate international agreements requiring them to take measures to conserve and protect the environment outside their jurisdiction. The Montreal Protocol on Substances that Deplete the Ozone Layer provided one example of countries seeking to protect life and health of humans, animals and plants without regard to their location. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) required that "all trade in specimens and species included in Appendix I [to the Convention] shall be in accordance with the provisions of [Article III of the Convention]". The United States measures at issue were consistent with and directly furthered the objectives of the CITES. While the United States was not obligated under CITES to adopt the measures at issue, CITES specifically provided for these measures in

permitting "stricter domestic measures" in order to further the objectives of that Agreement.<sup>33</sup> Finally, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal prohibited the import and export of hazardous waste to ensure its environmentally sound disposal. The United States further argued that, even between GATT members who were signatories to these treaties, it was not at all evident that such treaties could clearly be considered as "successive treaties relating to the same subject matter" in the sense of Article 30 of the Vienna Convention on the Law of Treaties.

3.24 The United States also argued that current practice of the CONTRACTING PARTIES demonstrated that there was no jurisdictional limitation on the location of the resources or living things in Article XX. The Working Group on Domestically-Prohibited Goods and other Hazardous Substances had developed a proposed "Decision on Products Banned or Severely Restricted in the Domestic Market". Although the United States had objected to some elements of the draft Decision, these objections did not concern any issues concerning the jurisdictional location of the resources or living things sought to be conserved or protected. Under the draft Decision, it was implicit that a contracting party could invoke Article XX for measures to protect human, animal or plant life or health or the environment *outside* that contracting party's territory. No objection had been raised by any of the contracting parties participating in that working group, including the EEC, that the draft Decision was incompatible with Article XX, including any supposed jurisdictional limitation. Article III:1 of draft Decision stated:

"any contracting party adopting measures to ban or severely restrict in its domestic market any of the products concerned, should examine whether the reasons for such measures would also require the adoption of equivalent measures for exports of the same products."

The "products concerned" were those that "present serious and direct danger to human, animal or plant life or health or the environment in its territory, and which for that reason are banned or severely restricted in the domestic market of that contracting party".<sup>34</sup> Under Article II of the draft Decision, all measures to regulate international trade in the "product concerned" were to be consistent with the General Agreement. This meant that any export restrictions taken under the decision would have to be justified under Article XX. The EEC thus supported a draft Decision which implicitly accepted that Article XX could be invoked for measures to protect animal life or health or the environment outside the territory of the contracting party taking the measure.

3.25 The United States also noted that the present position of the EEC and the Netherlands with respect to measures taken to conserve or protect the life and health of animals located outside the jurisdiction of the country taking the measure was inconsistent with positions they had taken with respect to the same issue under Article 36 of the Treaty of Rome. In the 1990 case of *Gourmetteria Van Den Burg*<sup>35</sup>, before the European Court of Justice, the issue was raised whether Article 36 of the Treaty of Rome permitted measures to protect the life or health of a particular species of bird occurring only outside the territory of the country taking the measure. The EC Commission and the Netherlands made the argument in that case that Article 36 which, like the corresponding provision in the General Agreement, contained no jurisdictional limitation in the text, permitted measures to protect bird life not only in the country's territory, but also outside of it.

3.26 The United States concluded that, since the meaning of paragraphs (g) and (b) of Article XX were clear and unambiguous when interpreted in the light of Article 31 of the Vienna

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<sup>33</sup>CITES, Article 14.

<sup>34</sup>Article 1:2 of the draft Decision.

<sup>35</sup>Case C-169/89, 1990 ECR p. 1-2143 ff.

Convention on the Law of Treaties, there was no need to resort to *supplementary* means of interpretation referred to in Article 32 of the Convention. However, even if such supplementary means of interpretation were taken into account, they confirmed the view that there was no jurisdictional limitation on the location of the resource or living thing in Article XX(g) and (b).

3.27 According to the United States, the drafting history showed that during the negotiations of the provision corresponding to Article XX(b) of the Draft Charter of the ITO, the requirement for corresponding domestic safeguards in the importing country had been dropped. The requirement would have required a country to put equivalent domestic safeguards in place when it applied measures *outside* its jurisdiction. The fact that this requirement had at first been discussed, showed that the negotiators had contemplated a country applying measures outside its jurisdiction. Article XX(b) was not intended merely to cover sanitary measures. It could also cover, for example, measures prohibiting the importation of weapons. The relative importance of sanitary measures did not imply that the provision was exclusive of other measures.

3.28 The United States also argued that the drafting history also supported the view that there was no jurisdictional limitation on Article XX(g). While the earlier London draft of the ITO Charter provided for no general exceptions, Section 37 of the New York Draft excepted measures, *inter alia*,

"relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made in conjunction with restrictions on domestic production or consumption".

In the United States view, the fact that conservation measures could be undertaken either "pursuant to international agreements" or "in conjunction with [domestic] restrictions" necessarily implied that nations could take unilateral conservation measures in addition to multilateral measures. The fact that the reference to international agreements was later dropped from the text showed that there was no intent to limit the use of unilateral measures. In any case, however, there was no reference in the provision to the location of the resource being protected.

3.29 The United States maintained that negotiators of the ITO had in mind the wording of earlier commercial and environmental treaties, and domestic legislation, when drafting Article XX(g) and (b), and therefore there had been little need for discussion of this exception during the negotiations. Little debate had occurred during the drafting of the provision of the ITO Charter corresponding to Article XX(b) because it had already taken place during the negotiations of the 1927 Convention for the Abolition of Import and Export Restrictions and earlier treaties. The 1927 treaty, which contained language nearly identical to that of Article XX(b), made it clear that the exception included the protection of life or health of plants and animals outside the jurisdiction of the contracting party maintaining the measures. Article 4 of the 1927 Abolition Convention permitted "prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites".<sup>36</sup> The scope of this article was clarified in an accompanying Protocol which stated that "the protection of animals and plants against disease also refers to measures taken to preserve them from degeneration or extinction and to measures taken against harmful seeds, plants, parasites and animals". This wording showed that the exceptions to the Convention were not limited to purely domestic concerns or to sanitary measures alone, but included measures in support of international conservation. This was consistent with earlier treaties, including the 1911 Convention for

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<sup>36</sup>1927 U.N.T.S. Add 405.

Preservation and Protection of Fur Seals and the 1916 Convention for the Protection of Migratory Birds.

3.30 The United States further said that United States domestic legislation in force at the time of the negotiation of the 1927 Abolition Convention contained import and export restrictions solely for conservation purposes. The Alaska Fisheries Act, as amended in 1926,<sup>37</sup> prohibited domestic salmon fishing in certain waters and during certain times of the year for the preservation of salmon stocks. It also prohibited the importation of "salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act." The Lacey Act of 1900 prohibited the importation of wild animals and birds without special permit.<sup>38</sup> The Underwood Tariff of 1913 prohibited the import of certain feathers and plumes of wild birds.

3.31 The United States noted that, between the 1927 Abolition Convention and the negotiation of the General Agreement, several multilateral conservation treaties containing trade restrictions were concluded. During the same period, numerous bilateral commercial treaties were concluded using essentially the same exceptions provision. These included, for example:

- a) Trade Agreement between the United States and Canada, Article XII (2)(b), 199 L.N.T.S. 92, signed 17 November 1938, ("designed to protect" life and health);
- b) Trade Agreement between the United States and the United Kingdom, 200 L.N.T.S. 294, signed 17 November 1938, ratifications exchanged 24 November 1939, ("imposed for protection" of life and health);
- c) Commercial Agreement between the United States and Nicaragua, Article VI (2)(a)(3), 1936 L.N.T.S. 142, signed 11 March 1936, entered into force 1 October 1936, ("designed to protect" life)
- d) Commercial Agreement between the United States and Switzerland, 1936 L.N.T.S. 232, signed 9 January 1936, ratifications exchanged 7 May 1936, ("designed to protect" life or health)

The United States observed that such historical material had been used as an interpretative guide by other panels, as for example in the panel on *United States - Customs User Fee*, that, in interpreting the General Agreement, referred to a 1923 international agreement<sup>39</sup> and to past United States bilateral agreements.

3.32 The United States maintained that, since there are no jurisdictional limitations in the provisions of the General Agreement as they are currently written, to apply such a limitation would be essentially legislating on the ability of contracting parties to adopt and enforce measures related to environmental protection. A dispute settlement proceeding was not the forum in which to negotiate new disciplines on the use of measures by contracting parties. That was properly the province of the CONTRACTING PARTIES, which were free to pursue this issue, as they were currently doing, through a working group established for that purpose, or through negotiations.

3.33 The United States stated that this conclusion was not affected by the argument that "if there would be no jurisdictional limitation ..., each contracting party could unilaterally determine the international life and health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement." This was a policy

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<sup>37</sup>Act for the Protection of the Fisheries of Alaska, Sec. 1, 69 Cong., First Session, Chapter 621, Add. 752.

<sup>38</sup>Stat. 187- 88 (1900) (56th Cong. Sess. 1, Ch. 553).

<sup>39</sup>BISD 35S/245, 273, para. 71

argument, not an interpretation of the General Agreement as written, and it was not the province of dispute settlement panels to conduct a policy review of the General Agreement. Nowhere was there any evidence that the drafters of the General Agreement had these particular policy concerns in mind, either in the drafting history or the text of the general Agreement. Instead, the General Agreement was drafted to allow countries to take action to protect animal and plant health outside their borders. Additional conditions to deal with policy concerns were the province of negotiations. Accordingly, it was inappropriate for a dispute settlement panel to attempt to formulate its own resolution to a problem that was in fact a policy issue under debate by a political organ of the contracting parties, the Working Group on Environmental Measures and International Trade.

3.34 The United States further argued that it required circular reasoning to attempt to read into paragraphs (g) and (b) of Article XX limitations restricting their application to resources or living things within a contracting party's jurisdiction. It required assuming that the rights of contracting parties were of such a nature that they would be infringed unless there were a limitation, so of course by definition there had to be a limitation in order to avoid infringing those rights. This was faulty logic. Furthermore, such a jurisdictional limitation was unworkable. For example, many high seas resources never entered any country's jurisdiction. thus no contracting party could act to protect these resources, despite the international consensus that these resources need protection and should be conserved.

3.35 The **EEC** and the **Netherlands** could not agree with the United States that jurisdictional location of the resource to be conserved or the living things to be protected was not relevant for the purposes of Article XX(g) and (b). A *contextual* examination of paragraphs (g) and (b) of Article XX supported the view that a jurisdictional limitation applied to them. The other paragraphs in Article XX could only be interpreted this way. In paragraph (a), it could only make sense for a country to take border measures designed to protect its *own* public morals, not the public morals outside its national jurisdiction. The exception in paragraph (c) relating to the importation or exportation of gold and silver was for the protection of the internal economic interest of the party taking the measure. Likewise, the exception in paragraph (e) on the products of prison labour was not intended to combat prison labour practices in other contracting parties. There was very little that was humanitarian about this type of provision on prison labour, as was clear from the terms of the commercial treaty concluded in 1936 between the United States and Switzerland and cited by the United States. This treaty permitted trade restrictions for humanitarian reasons *in addition* to those relating to the products of prison labour.<sup>40</sup> Many, if not all, contracting parties operated systems of prison labour, not necessarily forced or hard labour. Contracting parties simply wanted to be able, if necessary, to protect themselves against the "unfair competition" resulting from the low-cost labour employed in the production of prison goods. Other exceptions provisions in the General Agreement, such as Article XIX (Emergency Action on Imports) and Article XXI (Security Exceptions), were also aimed at allowing a country to take exceptional measures only in its *own* interest and for its *own* protection. The EEC and the Netherlands further recalled that Article XX, as a whole, was an exception to the basic obligations of the General Agreement, and therefore had to be narrowly construed. In this respect, Article XX could be contrasted with the wider construction of Article XXI, under which a contracting party could benefit from an exception for "any action which *it* considers necessary".

3.36 The EEC and the Netherlands also stated that it was essential to examine paragraphs (g) and (b) of Article XX in light of their *object and purpose*, as provided in Article 31 of the Vienna Convention on the Law of Treaties. If there were no jurisdictional limitation to the objects of

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<sup>40</sup>Article XIV of the Commercial Agreement between the United States of America and Switzerland. Signed at Washington, 9 January 1936.

measures justified by these paragraphs, then each contracting party could unilaterally determine the international conservation, and life and health protection, policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. This argument, also advanced in the unadopted report of the panel in *United States - Restrictions on imports of tuna* (para 5.32), was based not on "policy", but on object and purpose, which under the Vienna Convention on the Law of Treaties was a primary means of interpretation. This argument was particularly pertinent to the intermediary nation embargo provisions applied by the United States, which were not aimed merely at forcing trading partners to follow United States conservation policies in international waters, but at forcing United States trading partners to force in turn other states into submitting to such unilateral United States conservation policies. It could not be said, as the United States affirmed, that much of the General Agreement concerned "one State's ability to act unilaterally in respect of extrajurisdictional application". Parallels drawn with Articles III and Article VI were totally inappropriate. Article III contained a basic principle of the General Agreement which, under very strict conditions, allowed border adjustment. However, the EEC had demonstrated that these conditions were not applicable in the present case. The rules in Article VI on dumping were also carefully circumscribed in the General Agreement and the Anti-Dumping Agreement. This was not comparable to the present case, where there was no agreement in the GATT and no agreement on the measures to be taken.

3.37 The EEC and the Netherlands argued that the two adopted panel reports cited by the United States did not support the United States position on the jurisdictional scope of objectives pursued under Article XX(g). Both panels simply had no need to decide the question, and did not consider it. The panel in *United States - Prohibition on imports of tuna and tuna products from Canada* found that the United States did not maintain any restrictions on the production or consumption of tuna, and therefore no decision on jurisdictional scope was necessary. The panel's statement that its report was intended to be a "complete report" simply meant that the panel intended to complete a report on the merits of the case, in spite of the fact that a partial settlement between the parties had been reached.<sup>41</sup> The statement by the panel that the case had no bearing "on fishery jurisdiction" was inspired by the fact that in early 1982, when the report of the panel was issued, negotiations on the UN Convention on the Law of the Sea were in full progress and decisions about the exclusive economic zone had not yet been taken. The panel in *Canada - Measures affecting exports of unprocessed herring and salmon* likewise did not deal with the jurisdictional scope of the measures taken by Canada, since there was no indication on the facts of that case that Canada had taken conservation measures outside its national jurisdiction. On the other hand, the jurisdictional considerations advanced in the unadopted report of the panel in *United States - Restrictions on imports of tuna* (paras. 5.31 and 5.32 of the Report) were well-reasoned, and applied to this case.

3.38 The EEC and the Netherlands stated that *subsequent practice* between the parties was a further primary source of treaty interpretation as set out in Article 31(3) of the Vienna Convention on the Law of Treaties. Of the three variants of subsequent practice mentioned in the Convention, only "relevant rules of international law applicable in relations between the parties" were pertinent to this case. Such rules included the relevant rules of customary international law, including the basic principle that a law should not be interpreted as having extra-jurisdictional effect, in accordance with the duty of non-intervention, unless there were explicit indications to the contrary. This reflected a principle applied by domestic courts, that a national law should be construed to be territorial in character, unless there were clear indications to the contrary. The International Court of Justice had also found that treaties should be interpreted in conformity, and in light of, customary international law.<sup>42</sup> The *Jens Soering* decision of the European Court of

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<sup>41</sup>Para 4.3 of the Report

<sup>42</sup>Rights of Passage Case, ICJ Reports 1957, page 142.

Human Rights cited by the United States simply applied a specific and long-standing rule of extradition law that extradition is not granted if the death penalty is applicable in the requesting state but not in the requested state.<sup>43</sup> This decision certainly did not constitute evidence of routine extraterritorial interpretation of treaty provisions, as asserted by the United States. With respect to treaty law between the parties to the General Agreement, it was important to note that, since not all GATT members were parties to the environmental treaties cited by the United States, such practice could not meet the terms of Article 31:3(c) which applied only to "rules of international law applicable in relations *between the parties*".

3.39 The EEC and the Netherlands maintained that, even if treaty practice among only some GATT members could be seen to affect the interpretation of the General Agreement with respect to all its parties, contrary to the Vienna Convention on the Law of Treaties, such treaty practice did not support the United States position. In the Convention Relative to the Preservation of Fauna and Flora, the import restrictions were clearly intended to enable contracting parties to verify the certificates of lawful export of other parties, a matter of mutual help in the enforcement of customs regulations. There was no intent expressed to protect resources outside the importing party's territory. This was confirmed by Article 1 of the treaty, on territorial scope. In the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Article 9 was drafted in terms of mutual help in the parties' enforcement of each other's certificates of lawful exportation. In the International Convention for the Protection of Birds, there was no clear indication in the text of Article 3 that the treaty applied to imports from all sources, including those outside the contracting parties to the treaty. Articles 8 and 9 were clearly territorial in scope. In the Agreement on the Conservation of Polar Bears, there was no indication in the text that the treaty covered the polar region as such. Since the treaty was concluded by all the states surrounding the polar region, the prohibition on the taking of polar bears could be implemented through the personality principle of jurisdiction. In the Agreement on the Conservation of North Pacific Fur Seals, Articles VIII and IX made it clear that the Agreement also regulated the management of the fur seal population, and a division of the spoils between the parties was provided for. The treaty therefore concerned the prohibition of importation as a measure of mutual assistance in the organization of the surveillance of trade in marked sealed furs. The treaty as a whole was based on a model of the International Fisheries Protection and Conservation Convention for the high seas. In the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Articles 3:1(b) and 3:2 required that all measures taken under these provisions be "consistent with international law". This reference would presumably include the General Agreement for its contracting parties. Hence any measure under this treaty would be in conformity with the General Agreement.

3.40 The EEC and the Netherlands thus considered that the agreements analyzed by the United States did not provide for measures to protect the life and health of living things, or to conserve natural resources, outside the jurisdiction of all the signatories. The signatories merely promised to take conservation measures within their own jurisdiction, and to help the others to supervise and enforce the export licence system (or the furs marking system, in the case of seals) that went with it. This was fundamentally different from a situation in which a country imposed import restrictions, not in order to help supervise and enforce the export licensing system of a treaty partner which had agreed to take identical measures within its own jurisdiction, but to enforce measures it had established for conservation or protection outside its own jurisdiction and that other countries had not agreed to.

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<sup>43</sup>28 I.L.M. 1063 (1989)



3.41 The EEC and the Netherlands emphasized that even treaties containing trade measures applying to non-parties would not create wide-spread problems in relation to the General Agreement if these treaties were, like the CITES, widely adhered to. In accordance with general international law such treaties would be regarded between the parties either as later-in-time treaties relating to the same subject matter, or as *lex specialis*. They would thus prevail, as between the parties, over any inconsistent provisions of the General Agreement. Few problems would arise since, by hypothesis, few members of the GATT would be non-parties. This was illustrated by the fact that the application of CITES to marine mammals and marine mammal products had not caused any problems between the EEC and the United States. Subsequent practice relating to multilateral environmental treaties containing trade restrictive provisions was therefore not at all relevant for the general interpretation of Article XX(b), in relation to trade measures by a single country with a view to enforcing health measures for animals located outside its national jurisdiction.

3.42 The EEC and the Netherlands concluded that, since paragraphs (g) and (b) of Article XX, interpreted in their context, and in light of their object and purpose, contained a clear jurisdictional limitation on the location of the resources to be conserved, and the living things to be protected, there was no reason to resort to the supplementary means of interpretation, such as the historical record, mentioned in the Vienna Convention on the Law of Treaties. In any case, drafting history and other means of supplementary interpretation could be used only to confirm, not to determine, the meaning derived through the primary means of interpretation. The reference by the panel in *United States - Customs User Fee* to historic treaties was not relevant since, in that case, the specific convention was reported to have been referred to "most frequently" during the drafting of the General Agreement. In the present case, there was no evidence that any of the treaties mentioned by the United States had been frequently referred to during the negotiations leading up to the conclusion of the General Agreement.

3.43 The EEC and the Netherlands maintained that, in any case, the historical record indicated that Article XX(b) was intended to be restricted to the safeguarding of the life and health of animals within the jurisdiction of the importing state. Concerning the *drafting history*, there was no evidence in the verbatim and summary records of the meetings concerning Article XX(b) that the negotiators had in mind earlier treaties and national laws which might have permitted the unilateral taking of animal health measures for animals outside the national jurisdiction. Furthermore, the fact that the phrase "if corresponding domestic safeguards under similar conditions exist in the importing country" had been considered for inclusion in, even if later deleted from, the final draft of Article XX(b), implied that the drafters had focused on safeguarding plant, animal, and human health and life *within* the jurisdiction of the importing country. A draft explanatory note which was to replace the deleted phrase made this point clear. The note read

"if a country decides to restrict the importation of goods in order to protect *its* human, animal or plant life or health, it should be able to provide proof, and it would take internal measures of protection corresponding to those it takes against imports, if the same conditions against which the protective measures are taken should prevail also in the importing country."<sup>44</sup> (emphasis added)

The EEC and the Netherlands further maintained that the early drafts of the ITO Charter made a clear distinction between restrictions adopted by a country, based on determinations regarding the need to protect human, animal or plant life or health or an exhaustible resource *inside* its own country, and restrictions based on international agreements regarding solely the conservation of

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<sup>44</sup>DOC/E/PC/T/WA/245, p. 1

fisheries resources, birds or wild animals. This latter provision was not carried through into the General Agreement. However, this distinction clearly indicated that drafters of the ITO Charter did not regard the taking of unilateral measures for the protection of animal health outside the jurisdiction of the country concerned, and measures pursuant to international agreements on fisheries conservation or wild life, as one and the same thing.

3.44 The EEC and the Netherlands further argued that the fact that a second condition contained in Article XX(g) was dropped during the negotiations (the phrase "pursuant to international agreements") did not imply that, after it was dropped, unilaterally-decided extrajurisdictional norms of conservation could be enforced by border measures. One condition had simply disappeared; it did not change the meaning of the remaining condition in Article XX(g).

3.45 The EEC and the Netherlands stated that *historic treaties* concluded prior to the negotiations of the ITO Charter and the General Agreement did not justify the view that measures for the conservation of resources or the protection of animal life or health outside the national jurisdiction were regarded at that time as normal. Article IV:4 of the Abolition Convention of 1927 was a normal phytosanitary provision, referring to "measures taken against harmful seeds, plants, parasites and animals." All the bilateral treaties mentioned by the United States were of the same nature, and did not in any way clearly establish a claim to the extrajurisdictional conservation or protection of resources or plant, animal and human life or health. The EEC and the Netherlands concluded that the historical record relating to the drafting of paragraphs (g) and (b) of Article XX confirmed their interpretation of that provision based on the contextual elements.

3.46 The EEC argued that the draft Decision on Products Banned or Severely Restricted in the Domestic Market could not be invoked by the United States to support its position. The EEC noted that the United States was the one GATT contracting party which had reserved its position on this document on very substantive points. The United States should thus be estopped from invoking a draft text which through its single opposition it had blocked from being agreed. In any case, the EEC stated that under generally accepted principles of treaty interpretation, the draft Decision could not in any way serve to interpret the General Agreement, as it did not fall under any of the categories of texts enumerated in Article 31 of the Vienna Convention on the Law of Treaties. The draft Decision could also not be viewed as *subsequent practice* in the application of the General Agreement, not only because no contracting party had ever acted on the basis of it, but also because such practice was deemed to establish the agreement of the parties regarding the interpretation of the treaty concerned. There was no such agreement, because the United States had not yet accepted the text of the draft Decision. This view was reenforced by the United States position that the draft Decision should not be a decision by all contracting parties interpreting the General Agreement, but only an "agreement among particular contracting parties". For the same reasons, the draft Decision could not be viewed as a *subsequent agreement* between the contracting parties regarding the interpretation of the General Agreement.

3.47 The EEC further maintained that the draft Decision did not in any case support the United States position. First, its preamble clearly stated as a principle that every contracting party had to assume full responsibility for decisions regarding its own imports. This notion was also contained in Article 3:2 of the draft, where it was stated that Article 3:1, on which the United States based its argument, "should not be construed in such a way as to affect .... the prerogative of individual contracting parties to determine whether to allow in their specific situations, the import and use of products which the exporting contracting party determines to be "products concerned". These parts of the draft Decision made it quite clear that the proposal could not be read as an extension of the territorial reach of Article XX(b). Moreover, the draft Decision was based on the General

Agreement as a whole, and not merely on Article XX(b). The preamble generally referred to all GATT rules as they related to products. The preamble noted that "no contracting party should be prevented from taking measures to ensure the quality of its export products". In this respect, it was relevant that a Secretariat Note to the Working Group drew attention to the fact that Article XI:2(b) allowed contracting parties to impose export restrictions necessary to meet certain quality standards, but on commodities only.<sup>45</sup> The draft Decision therefore should be interpreted as a clarification of the General Agreement in the sense that it made clear that contracting parties were allowed to ensure that *all* their products, including all their export products, fulfilled their quality standards. Finally, it had to be noted that the General Agreement allowed a contracting party to prohibit the export of goods that did not fulfil its standards, even if such goods could be exported to other contracting parties that had different requirements. Such a prohibition would not be contrary to Article XI:1, because no goods would be produced of which the export could be restricted. In such cases no recourse would be necessary to Article XX(b). Contrary to what the United States implied, the draft Decision was not an interpretation of Article XX(b), but a clarification of GATT laws as a whole.

3.48 The EEC further argued that the United States had misunderstood the *Gourmetterie Van den Burg* case. In that case, the Court had simply ruled that Article 36 of the Treaty of Rome could not be invoked by a Member State when a Community Directive provided for full harmonization of national legislation in the relevant policy area. The Court said nothing else concerning the interpretation of Article 36. In any event, Article XX of the General Agreement should not be interpreted by reference to Article 36 of the EEC Treaty, which had gone through a wholly different evolution of interpretation in the common market.

#### 4. Article XX(g)

3.49 The **United States** stated that, having shown that the location of the resource to be conserved was not relevant to the application of Article XX(g), it would proceed to demonstrate that the intermediary nation embargo fully met the stated requirements of Article XX(g).

##### a) "Relating to the conservation of exhaustible natural resources"

3.50 The United States maintained that dolphins were an exhaustible natural resource, consistent with previous panel determinations.<sup>46</sup> They were in need of conservation, as reflected in the international recognition of the duty to conserve dolphins resulting from the work of the Inter-American Tropical Tuna Commission and the United Nations Convention on the Law of the Sea. The intermediary nation embargoes were related to the conservation of dolphins, since they ensured that countries were not free to supply the United States market with yellowfin tuna from the eastern tropical Pacific, harvested in a manner injurious to dolphin stocks, through shipment of the tuna to intermediary nations. Prior to the institution of the dolphin protection measures of the United States, mortality attributable to the eastern tropical Pacific tuna fishery was at levels that threatened the sustainability of several species of dolphins. It was clear from the text of the Act and its legislative history that its purpose was to conserve marine mammals, including dolphins.

3.51 The United States further stated that there was no reference in Article XX to "predictability", and no basis in that Article or in the drafting history to support the argument that an "unpredictable relationship" meant that measures were not primarily aimed at conservation, particularly in light of the undisputed record that the United States measures were solely aimed at the conservation and protection of dolphins.

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<sup>45</sup>DPG/W/6, point 7.

<sup>46</sup>Report of the Panel in *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (BISD 29S/91, para 4.9); Report of the Panel in *Canada - Measures affecting Exports of Unprocessed Herring and Salmon* (BISD 35S/98)

3.52 The **EEC** replied that, although the United States and the EEC both agreed that dolphins were in need of conservation, this did not make them into an exhaustible natural resource. Since the CITES ensured that there was no trade in dolphin species, one could question whether dolphins were resources in any economic sense of the term.

3.53 In addition, they were not "primarily aimed at" the conservation of exhaustible natural resources.<sup>47</sup> Under present United States legislation, the unpredictable relationship between the actual dolphin taking rate for the United States and the "permitted" dolphin taking rate for vessels of other nationalities fishing in the eastern tropical Pacific, as described in the unadopted report of the panel in *United States - Restrictions on imports of tuna* (para 5.33 of the Report), persisted. A limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins. This was true for the primary nation embargo, and applied *a fortiori* for the intermediary nation embargo. In a market economy one could never be sure that private entrepreneurs would continue not to buy yellowfin tuna from countries which were subject to the primary nation embargo, unless an embargo contrary to Article XI of the General Agreement were instituted. Such an uncertain relationship between the intermediary nation embargo and the result meant that it was not primarily aimed at the conservation of dolphins.

***b) "Made effective in conjunction with restrictions on domestic production or consumption"***

3.54 The **United States** maintained that the measures at issue were made effective in conjunction with restrictions on domestic production or consumption. Even before the measures were in place, the United States had imposed comprehensive restrictions on domestic tuna production practices expressly to conserve dolphins. The United States had, since the beginning of its regulation of the tuna industry, required certain gear and fishing procedures. The United States also prohibited sets on dolphins after sundown; prohibited the use of explosives to herd schools of dolphin; regulated the number of speed boats that could be used in a purse seine operation; required that each vessel carry an observer; and enforced performance standards under which no United States vessel operator could exceed the rate of dolphin mortality set out in regulations. Violation of these regulations could result in vessel and cargo seizure, ensuring that the cargo could not be offered for sale. These domestic restrictions were in fact more stringent than the requirements for tuna produced by foreign vessels.

3.55 The United States further argued that the United States measures were primarily aimed at rendering effective the restrictions on the United States fleet. The measures were directed toward ensuring that the efforts to conserve dolphins were effective, since restricting United States vessel practices would not ensure the conservation of dolphins if other countries' vessels continued to cause dolphin mortality in the course of supplying the United States market for tuna.

3.56 The United States disagreed with the EEC assertion that the requirement of Article XX(g) that border measures "must be taken in conjunction with restrictions on domestic consumption or production" implied that the resources to be protected had to be within the jurisdiction of the country taking the measure. On the contrary, there was no inconsistency in a country restricting consumption in its territorial jurisdiction of a product in order to protect exhaustible natural resources located outside its territorial jurisdiction. Numerous international environmental agreements required parties to take measures within their territorial jurisdiction to conserve resources beyond their borders.

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<sup>47</sup>Report of the Panel on *Canada - Measures affecting exports of unprocessed herring and salmon*, BISD 35S/98

3.57 The United States also noted that if an intermediary nation took measures with respect to the importation of yellowfin tuna harvested in a manner injurious to dolphins, those measures themselves could fall within the scope of Article XX(g) and (b).

3.58 The **EEC** replied that the text of paragraph (g) clearly stated that the border measure concerned must be taken in conjunction with restrictions on domestic consumption or production. As the unadopted report of the panel in *United States - Restrictions on imports of tuna* pointed out, such restrictions could only effectively be enforced if they concerned production or consumption within a national jurisdiction.

3.59 The **EEC and the Netherlands** stated that the United States measures were not primarily aimed at rendering effective the restrictions on the United States fleet. The tuna embargo could not be said to be primarily aimed at rendering effective domestic restrictions, since the domestic restrictions did not affect the harvesting or the production of tuna, only the fishing techniques. The border measures and the internal measures restricting domestic production or consumption had to relate to the same product. Furthermore, even if the internal restrictions were considered to be restrictions on the dolphin by-catch of the United States tuna boats, these were not primarily rendered effective by the intermediary nation embargo, as the import prohibition on yellowfin tuna was not dependent on the dolphin mortality registered for EEC vessels, but only on whether the EEC imported any yellowfin tuna from a particular country. The imposition or lifting of the intermediary nation embargo would make no difference for the conservation of dolphins. This interpretation of Article XX(g) had been accepted in past adopted panel reports.

## 5. *Article XX(b)*

3.60 The **United States** stated that, having shown that the location of the human, animal or plant life or health to be protected was not relevant to the application of Article XX(b), it would proceed to demonstrate that the intermediary nation embargo fully met the stated requirements of Article XX(b).

3.61 The United States first made some preliminary observations. It stated that the United States was a major importer of yellowfin tuna, and that the eastern tropical Pacific was a key source of supply. Tuna harvested in the eastern tropical Pacific would result in high levels of dolphin mortality unless special dolphin protection practices were undertaken. In the absence of the United States measures, tuna would be harvested for the United States market in a manner causing needless death and severe injury to large numbers of dolphin, since deliberately encircling schools of dolphin with purse seine nets resulted in serious death and injury to dolphins. In particular, where there were "disaster sets" this meant scores of dolphins needlessly slaughtered.

3.62 The United States further observed that, in order to avoid these needless deaths, it had established requirements for tuna production that reduced or eliminated these deaths. Yellowfin tuna harvested in the eastern tropical Pacific using purse seine nets and imported into the United States had to be produced under a program providing for harvesting methods to reduce dolphin mortality. Furthermore, in the case of vessels other than those of the United States, after 1991 the resultant mortality had to be not greater per set than 25 percent more than the average mortality per set for United States vessels during the same period, and the mortality of two stocks especially vulnerable to depletion could not exceed specified percentages of overall mortality. These measures were directly and explicitly to prevent dolphin deaths or severe injury.

3.63 The United States maintained that the intermediary nation embargoes were necessary to ensure that these dolphin protection techniques were followed in the case of tuna entering the United States market, and that accordingly it was clear that the measures of the United States were necessary to protect animal life and health.

*a) "Necessary"*

3.64 The **United States** argued that the import prohibitions taken under the intermediary nation embargo were "necessary" in terms of Article XX(b) to ensure the life and health of dolphins. In this regard, the term "necessary" in Article XX(b) had to be interpreted in accordance with its normal meaning. "Necessary to protect human, animal or plant life or health" would normally be construed to mean that the measure was *needed* to protect such life or health. Any interpretation of this word as meaning "least inconsistent" with the General Agreement was needlessly complex and unpredictable, and had no basis in the text or drafting history of the General Agreement. Under that interpretation, the contracting party invoking Article XX(b) had first to prove a negative, that is, the non-existence of other measures. The contracting party then had to establish the range of alternatives available and rank them according to "least inconsistency" with the provisions of the General Agreement.

3.65 The United States further argued that a "least inconsistent" test would impinge on the sovereignty of each contracting party. Panels would dictate the specific measures to be adopted by the contracting party, since presumably there was only one measure among all the alternatives that was the "least inconsistent" with the General Agreement. This ran counter to the agreed course of practice for dispute settlement panels. Combined with a proposed "reasonableness" test, panels would be the final arbiter of what would be the "reasonable" thing for a government to do. In addition, such an interpretation would lead to great uncertainty. In practice, a contracting party would not be able to determine whether a measure it was considering would be consistent with its obligations under the General Agreement until after a panel had examined it, a procedure which would involve examination of complex technical questions and scientific judgements. Trade panels were not well-equipped to make such technical judgments. Moreover, the policy concerns which led to the proposed "least inconsistent" test were already met by the conditions in the preamble to Article XX.

3.66 The United States stated that the flaws in this approach were illustrated in the unadopted report of the panel in *United States - Restrictions on imports of tuna*. That panel had independently determined that the only "reasonable" avenue open to the United States would be the negotiation of an international cooperative arrangement. However, this outcome could not be considered as reasonable. Achieving such an arrangement was beyond the control of the United States, and it was impossible ever to prove that negotiations were exhausted.

3.67 The United States further stated that the issue of the proposed least-inconsistent test was unsettled, since the issues involved were under discussion in the Group on Environmental Measures and International Trade, and it had yet to be fully considered by the CONTRACTING PARTIES. This was also the view of governments at the recent United Nations Conference on the Environment and Development (UNCED), which had decided to "encourage" the GATT and other international organizations to "examine" a number of propositions, including the proposition that "trade measures chosen should be the least trade restrictive necessary to achieve the objectives". Panel reports interpreting the term "necessary" had not been consistent. The panel report on *United States - Imports of Certain Automotive Spring Assemblies*, adopted in 1983, had found that "necessary" in the context of Article XX(d) meant that the measure was "the only way under existing United States law" that the interest could be protected. This was very different from the elaborate series of tests proposed under a "least inconsistent" interpretation. The United States noted that prior panel reports have declared unambiguously that panels are not bound by the findings of prior panels. They must look at all issues afresh and draw their own conclusions. The 1988 challenges by Chile and the United States against the EEC's import regime on apples was the best example of this principle. There, the 1988 panels rejected the 1980 panels'

reasoning and results. The United States argued that this Panel should also reject the flawed interpretation of "necessary" of the prior panels.

3.68 The United States further argued that there was no drafting history relating to the term "necessary". No trade agreements prior to the Havana Charter had used the term "necessary" in reference to protecting plant and animal life and health.

3.69 The United States maintained that, even if the term "necessary" were not interpreted to mean "needed", but to mean "indispensable", "requisite", "inevitably determined", or "unavoidable", the United States measures met this standard. The United States emphasized that the Administration had exhausted all other options before taking measures under the Act. The United States had endeavoured for more than 20 years to reach multilateral agreement to protect dolphins in the eastern tropical Pacific purse seine fishery. The United States, since the passage of the Act in 1972, had regulated its own tuna fleet extensively. In 1988, when the specific measures at issue were enacted by the United States Congress, the United States fleet had ceased to become a major source of dolphin mortality in the eastern tropical Pacific. The United States was also a party to an Agreement negotiated in 1992 under the auspices of the Inter-American Tropical Tuna Commission. However, since this Agreement only became effective in January 1993, it was too early to gauge its effect on reducing dolphin mortality in the eastern tropical Pacific. Parties to the Agreement seemed to be complying with it in good faith, and mortality so far had been very low, well within the level of mortality scheduled in the agreement for the current year. However, the substantial reduction in the rates of dolphin mortality which had occurred in the past few years was clearly due not to the Agreement, but to the measures at issue taken under the Act.

3.70 The United States observed that it was inconsistent to argue that the presence of such an international agreement was relevant to determining whether a measure was "necessary" for the purposes of Article XX(b) while maintaining that there was a jurisdictional limitation in Article XX(b). If an international agreement was relevant to Article XX(b), then Article XX(b) must apply to measures to protect resources outside a country's jurisdiction. Otherwise, it was difficult to understand how an international agreement could ever be relevant since if there were a jurisdictional limitation, the measure could not be used in any event.

3.71 The **EEC** and the **Netherlands** replied that the ordinary meaning of the term "necessary" in Article XX(b) was "indispensable", "requisite", "inevitably determined", or "unavoidable". Necessary meant that there was no other way or means to achieve a result. This view was confirmed by contextual elements. Article XX(b) was an exception and had to be interpreted narrowly. In Article XX(a), a wide interpretation of the word "necessary" would obviously lead to a bias in the name of public morality, an issue which was normally strongly determined by specific religious and cultural traditions. Moreover, Article XX(d) used the same word and had been interpreted restrictively.

3.72 Adopted panel decisions on the interpretation of the word "necessary" in Article XX were based on this ordinary meaning. Thus the panel in *United States - Imports of certain automotive spring assemblies* decided that the United States exclusion order procedure was "the only way" in which a patent right could be protected effectively against the import of an infringing product.<sup>48</sup> This interpretation of "necessary" was further developed by the panel in *United States - Section 337 of the Tariff Act*. According to this panel, a measure inconsistent with another GATT provision could only be justified if no alternative measure which it could reasonably be expected to employ and which was not inconsistent with the General Agreement was available to the country taking the measure. If such an alternative were not available, the contracting party

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<sup>48</sup>Report of the Panel on *United States - Imports of Certain Automotive Spring Assemblies*, BISD 30S/17, paras 58, 60

concerned should have recourse to the measure least inconsistent with other provisions of the General Agreement.<sup>49</sup> The United States itself had requested the panel in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* to transfer these criteria from paragraph (d) to paragraph (b) of Article XX.<sup>50</sup> These panel reports had been adopted in the GATT Council by consensus, which included the United States. Such consensus constituted "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

3.73 The EEC and the Netherlands stated further that panels had tempered the notion of "necessary" by applying the criterion of reasonableness, in the sense of "reasonably available" to the government taking the measure. The reasonableness inherent in the interpretation of "necessary" was not a test of what was reasonable for a government to do, but of what a *reasonable government* would or could do. In this way, the panel did not substitute its judgement for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second-guessing of such actions.

3.74 In the view of the EEC and the Netherlands, the United States interpretation of the term "necessary" as meaning "needed" amounted to a rejection of adopted panel reports, which constituted agreed interpretations of the General Agreement. The EEC recognized that there was no *stare decisis* in the GATT, if only because there was no hierarchy between courts or arbitral bodies in the GATT. This was also the case for most international courts or tribunals. Nevertheless, such international courts and tribunals were always very careful about maintaining their own precedents and a certain coherence in their decisions. The GATT required such coherence in panel interpretations in order to provide stability within the international trading system.

3.75 The EEC and the Netherlands concluded that the intermediary nation embargo measures did not meet the "necessary" test as required by Article XX(b). The United States had not demonstrated, either during or after the procedures in the dispute examined in the unadopted report of the panel in *United States - Restrictions on imports of tuna*, that it had exhausted all reasonable measures available to it to pursue its dolphin conservation policy in international waters through means compatible with the General Agreement. The measure was not "necessary" for the protection of dolphins. An international understanding could have been attempted, had been attempted, and in fact had been concluded under the auspices of the Inter-American Tropical Tuna Commission. Dolphin deaths incidental to commercial tuna fishing had reached a new low of about 15,500 in 1992. Since this represented much less than 1 percent of the total dolphin population in the eastern tropical Pacific, it could not be said that the survival of the population was currently at risk. The EEC further argued that even if the United States were to establish a potential causal link between the intermediary nation embargo measures and a reduction in the killing of dolphins in the eastern tropical Pacific, this did not make a measure "necessary", nor even "needed", as proposed by the United States. Moreover, a measure which incited other contracting parties to take restrictive measures contrary to the General Agreement could not be deemed "necessary" under Article XX(b), not even for the protection of animal health and life *within* the jurisdiction of another contracting party.

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<sup>49</sup>Report of the Panel in *United States - Section 337 of the Trade Act*, BISD 36S/345 and ff., para. 5.26.

<sup>50</sup>Report of the Panel on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, paras 22-23, p. 72 and ff.



3.76 The EEC and the Netherlands added that the existence of agreed norms in international agreements could be relevant to determining whether a trade restriction were "necessary", as noted in the unadopted report of the panel in *United States - Restrictions on imports of tuna*. However, trade measures taken under the resulting agreements were not by this fact alone excused under Article XX(b). An international agreement including environmental trade controls would not be excused under Articles XX(b) or (g) solely because it was an international agreement. The other conditions in Article XX, including the requirement not to have extra-jurisdictional objectives, had still to be met if the trade restrictions were to be applied against a GATT member who was not a signatory to the international agreement at issue.

3.77 With respect to the *supplementary* means of interpretation, the EEC and the Netherlands noted that the drafting history relating to "necessary" showed that negotiators were particularly preoccupied with the fear of abuse of Article XX(b). Discussions in the Preparatory Committee showed that the negotiators considered that a narrow interpretation of the term "necessary", in conjunction with the terms of the preamble to Article XX, was essential to ensure that this would not occur.

## 6. Article XX(d)

3.78 The **United States** argued that the import prohibitions taken under the intermediary nation embargo were justified by Article XX(d). They were necessary to secure compliance with import prohibitions under the primary nation embargo provisions, which were not inconsistent with the General Agreement. It was necessary for the United States to ensure that tuna subject to the primary nation embargo was not shipped to the United States by first being shipped to an intermediary nation. The discussion with respect to the interpretation of "necessary" would apply to Article XX(d) as well. There was no dispute that Spain and Italy were importing yellowfin tuna subject to a primary nation embargo and were exporting yellowfin tuna to the United States. It was irrelevant whether the primary nation embargo measures were directly consistent with the General Agreement, or only in conjunction with an exception under Article XX. A measure within the scope of another paragraph of Article XX was clearly a measure "not inconsistent with the provisions of" the General Agreement. Any other view was unfounded, and would render Article XX meaningless.

3.79 The United States also maintained that there was no difficulty in finding, and in fact it followed logically, that a measure primarily aimed at rendering effective restrictions on domestic production within the meaning of Article XX(g) was also "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of" the General Agreement within the meaning of Article XX(d).

3.80 The **EEC** and the **Netherlands** replied that, since the primary nation embargo measures were inconsistent with the General Agreement and could only be claimed, at most, to be justified under an exception to the General Agreement, Article XX(d) could not be relied upon. Article XX(d) referred to measures "not inconsistent with the provisions of this Agreement". The provisions here referred to were clearly the substantive provisions of the General Agreement, not the provisions related to other exceptions. Article XX stated that nothing should be construed to prevent the adoption or enforcement of measures which could be *justified* under the other exceptions of Article XX. That did not make the measures consistent with the General Agreement, only excusable. Moreover, if the United States approach to this issue were correct, Article XX(d) would be largely redundant. Its function was to "secure compliance with" laws or regulations that were not inconsistent with the General Agreement. However, the preamble to Article XX already provided for the enforcement of measures which were inconsistent with the General Agreement. Thus the enforcement of the primary nation embargo could already be ensured by the invocation of the exceptions of Article XX(b) and XX(g). In the present case, this

could not be done, since the primary nation embargo measures were not consistent with Articles XX(b) or XX(g).

3.81 The EEC and the Netherlands further stated that the term "necessary" in Article XX(d) had been interpreted restrictively, and would require the United States to demonstrate that there was no alternative measure which it could reasonably be expected to employ and that was either consistent or less inconsistent with other GATT provisions. The conclusion of an international agreement would have made both kinds of embargoes superfluous.

3.82 The EEC further considered that there was a fundamental contradiction between the United States defence under Article XX(g) and that under Article XX(d). It was impossible to argue at the same time that the intermediary nation embargo was justified under Article XX(g) because it was taken in conjunction with, and therefore primarily aimed at rendering effective, domestic restrictions on consumption and production, and that it was justified under Article XX(d) because it was an enforcement mechanism of the primary nation embargo. Under the latter view, it was a kind of secondary enforcement tool for the entire primary nation embargo, whereas under the former, it was primarily aimed at securing effectiveness for a part of the primary nation embargo only. In the EEC's view, the United States had to opt for one or other of these defences.

## **7. Preamble to Article XX**

3.83 The **United States** argued that the intermediary nation embargo measures were not applied in a manner that constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevailed. The intermediary nation embargoes applied in the same way to any country that was an intermediary nation, and the definition of an "intermediary nation" was identical for all countries. Nor were the measures of the United States a "disguised restriction on international trade". The sole intent of the measures was to conserve dolphins, to protect their life and health, and to secure compliance with the primary nation embargoes. They did not aim to, nor did they in fact, afford protection to domestic industry.

### **C. Primary nation embargo**

3.84 The EEC and the **Netherlands** stated that the provisions relating to the primary nation embargo were mandatory in nature. Although they did not currently apply to the EEC or the Netherlands, they were entitled to challenge them, since the objective of Articles III and XI was to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. The objective was not merely to safeguard current trade, but also to create the predictability needed to plan future trade. The panel in *United States - Taxes on petroleum and certain imported substances* had observed that "that objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade".<sup>51</sup> Further, the panel in *EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins* had stated that commitments which contracting parties exchanged in tariff negotiations under the General Agreement "are commitments on conditions of competition for trade, not on volume of trade". Therefore, even potential entrants into a trade had a legitimate interest in a breach of GATT provisions.<sup>52</sup>

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<sup>51</sup>BISD 34S/136, para. 5.2.2

<sup>52</sup>See also *United States - Taxes on petroleum and certain imported substances*, BISD 34S/136, para 5.1.4 ff.

3.85 The EEC further argued that it could not be said that the EEC could never become subject to a primary nation embargo by the United States. The EEC legislation was not identical to the United States legislation: if the EEC legislation were not wholly effective, the EEC incidental taking rate could rise above the required maximum of 1.25 times the United States level. Moreover, there was always the possibility of a primary nation embargo being imposed on the EEC, not on yellowfin tuna under Section 101 (a)(2)(B) of the Act, but more generally on the incidental taking of marine mammals under Sec. 101 (a)(2)(A) of the Act. These provisions were also mandatory and could be applied at any time. The EEC stated that Spain had in fact recently received a request, in a letter dated 10 May 1993 from the United States, to submit documentation in order to avoid being subject to a primary nation embargo.

3.86 The EEC and the Netherlands also argued that they had a fundamental legal interest in determining the consistency of the primary nation embargo with the General Agreement, since the United States had defended its intermediary nation embargo measures under Article XX(d), which required that the primary nation embargo measures not be inconsistent with the General Agreement.

3.87 The EEC further stated that it did not need to provide trade data in order to prove that it had suffered injury: *prima facie* nullification and impairment resulted from the demonstration of an infringement of GATT rules. However, it wished to point out that figures presented by the United States understated the effect of the embargoes on the tuna market. First, much of the tuna "imported" into the EEC was actually of EEC origin, since it was caught by EEC vessels although unloaded in ports of third states. This led to a minimalization of the proportion of EEC imports originating in countries subject to the United States primary nation embargo. Second, the United States figures were presented in US dollars. It was obvious that the EC market should be studied in terms of ECU prices. In ECU terms, a drop in prices could be seen at the moment of the imposition of the United States embargoes in late 1991 and early 1992. Thus nothing in the United States figures fundamentally contradicted the fact that EEC exports to the United States of frozen yellowfin tuna, and the prices for the product on the world market and in the Community, had suffered as a consequence of the embargoes.

3.88 The **United States** replied that there was no nullification or impairment of any benefit accruing to the EEC or the Netherlands under the General Agreement as a result of the primary nation embargoes. The primary nation embargoes did not and could not apply to the EEC, since the EEC had prohibited setting on dolphins. The evidence requested of Spain by United States authorities was intended simply to document the fact that the Spanish fishing industry was operating under a policy of not setting on dolphins. The United States government had since notified the government of Spain that, having reviewed the documentation of Spain's ban on setting on dolphins, Spain in fact was not subject to the primary nation embargo. The situation examined by the panel in *United States - Taxes on petroleum and certain imported substances* was quite different, since there was no question that the measures, although not yet in force, would apply to goods from Canada and the EEC. Further, the EEC allegation that United States measures had depressed the price of tuna in Europe was only speculative economic damage that could not constitute nullification or impairment of benefits under the General Agreement.

3.89 The United States further argued that it was contrary to the General Agreement to find that any contracting party could challenge the measure of any other contracting party, even where the trade of the challenging contracting party was unaffected. The dispute settlement process under the General Agreement was not designed to be a purely academic exercise where one contracting party asks panels to speculate whether particular measures of another contracting party are consistent with the General Agreement, even though the measures do not apply to that other contracting party. This would convert the dispute settlement process from one that helps governments resolve real disputes into a sterile exercise.

3.90 The United States noted that such an approach would yield peculiar results. For example, if a country breached its tariff bindings under the General Agreement for a product, another contracting party would be able to challenge that breach in a dispute settlement proceeding under the General Agreement even where the challenging party did not produce that product or export it to the other contracting party. It was not readily apparent what were the "benefits" accruing under the General Agreement to that challenging contracting party in that instance, or why the dispute settlement process should be invoked.

3.91 The United States noted that, in examining trade data from 1988 to 1992, and based on EEC trade data, it did not appear that the EEC was suffering from trade diversion resulting from the United States primary nation embargo. First, the aggregate level of EEC imports of frozen tuna from the embargoed countries had not risen as alleged by the EEC, but had actually dropped significantly over the past two years. Second, the proportion of total EEC imports originating from the embargoed countries had remained relatively constant, dropping somewhat in the partial year data for 1992. There was thus no evidence that the United States embargo was causing a diversion in trade of tuna products to the EEC market. Most likely, the heavy competition from dominant producers, especially Thailand, was causing the downward pressure on tuna prices. In any case, figures showed that only approximately \$700,000 of EEC trade was potentially affected by the United States measures. Such a small amount in the context of total trade between the United States and the EEC underscored for the United States the perception that the primary purpose of the EEC and the Netherlands in this dispute settlement proceeding was not to address trade concerns but to have the panel legislate new conditions on the availability of Article XX.

#### *1. Articles XI and III*

3.92 The **EEC** and the **Netherlands** argued that the direct ban of imports of yellowfin tuna and tuna products from countries which did not satisfy the target of 1.25 times the United States incidental kill of dolphins when fishing for tuna in the eastern tropical Pacific with purse seine nets was a quantitative restriction of trade contrary to Article XI of the General Agreement, and could not be justified under the terms of Article XI:2.

3.93 The EEC and the Netherlands further argued that the import prohibition was not an enforcement at the time or point of entry of the domestic requirement of the Act that yellowfin tuna in a certain ocean area should be harvested with fishing techniques designed to reduce the incidental taking of dolphins. The tuna harvesting requirements laid down by United States law did not apply to products *as such* and, therefore, could not qualify for adjustment at the point of importation, as noted in the unadopted report of the panel in *United States - Restrictions on imports of tuna*.<sup>53</sup> The EEC noted that the requirement that a measure apply to a product in order to qualify for adjustment at the border under the Note ad Article III had been discussed at length in the report of the panel in *United States - Taxes on petroleum and certain imported substances*. This panel found that taxes which were not directly levied on products were not eligible for adjustment at the border, and that the policy purpose of the tax was not relevant. If it were considered that taxes not directly levied on the product were eligible for adjustment at the border, and the policy purpose of the tax were relevant for these purposes, then Article III could be turned into an instrument through which certain contracting parties could freely impose what they considered socially desirable on other contracting parties. The EEC and the Netherlands further argued that, even if the United States tuna fishing regulations could be considered as eligible for adjustment at the border, they did not accord treatment no less favourable to the imported product

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<sup>53</sup>Paras. 5.11 - 5.15.

as required in Article III:4 of the General Agreement, for the reasons given in the unadopted report of the panel in *United States - Restrictions on imports of tuna*.<sup>54</sup>

## 2. *Articles XX(g) and XX(b)*

3.94 The **United States** maintained that the measures taken under the primary nation embargo were consistent with Article XX(g), for the reasons it had given in connection with the measures imposed under the intermediary nation embargo. The EEC and the Netherlands replied that the measures did not meet the requirements of Article XX(g), for the reasons they had given in connection with the United States measures imposed under the intermediary nation embargo. The EEC further considered, as had the panel in the unadopted report in *United States - Restrictions on imports of tuna*, that the uncertain relationship between the dolphin mortality for United States and non-United States vessels in the eastern tropical Pacific showed clearly that the primary nation embargo was not primarily aimed at the conservation of exhaustible resources. The EEC argued that this view was even shared by United States environmental circles, including a commentator who was otherwise critical of the reasoning of that panel, and who advised the United States to adjust its legislation on this point because it constituted a clear violation of the General Agreement.<sup>55</sup>

3.95 The United States also maintained that the measures taken under the primary nation embargo were consistent with Article XX(b), since they were necessary to protect dolphin life or health, for the reasons it had given in connection with the measures it had imposed under the intermediary nation embargo. The EEC and the Netherlands responded that the measures did not meet the requirements of Article XX(b), for the reasons they had given in connection with the United States measures imposed under the intermediary nation embargo.

## 3. *Preamble to Article XX*

3.96 The **United States** argued that, as in the case of the intermediary nation embargoes, the primary nation embargoes were applied in a manner consistent with the preamble to Article XX. The Act applied uniformly to all countries harvesting yellowfin tuna in the eastern tropical Pacific with purse seine nets. The United States further argued that the measures did not operate as a disguised restriction on trade. The measures were designed for the conservation of dolphins and were enacted and implemented solely for that purpose. The measures were not designed to, and in fact did not, afford protection to the United States fleet. The maximum dolphin kill level applied to foreign countries was in fact 25 percent higher than the level of the United States, providing more favourable treatment to foreign countries.

### D. **Embargo following a Sec. 305 commitment**

3.97 The **EEC** and the **Netherlands** argued that Sections 305 (b)(1)-(2) of the Act provided for import prohibitions on fish and fish products contrary to Article XI:1. These prohibitions did not fulfil any of the conditions for exceptions under Article IX:2. Nor did the import prohibitions constitute the enforcement at the border of an internal measure in accordance with the Note ad Article III, since the sanctions were totally independent of any internal measure. These measures could not be justified by Articles XX(b), since they were not necessary. Nor were they justifiable under Article XX(g), since the measures were not primarily aimed at rendering effective domestic restrictions, but in sanctioning another state for not having observed its commitment to the United States. The United States replied that the EEC and the Netherlands were asking the Panel to pass

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<sup>54</sup>Para. 4.15

<sup>55</sup>Charnovitz, General Agreement and the Environment, Examining the Issues, *International Environmental Affairs*, Volume IV, 1992, p. 203 and ff., at p. 221.

judgement on potential future agreements between sovereign states, an issue that a panel could not and should not decide. No commitments had yet been entered into under the section, nor had any measures been applied, nor could they be applied, with respect to any country. The United States also observed that it was premature to assume that any commitment provided under section 305 would not also contain some understanding between the United States and the other country regarding the relationship of the commitment, and any measures imposed pursuant to these agreements, and the General Agreement.

#### **IV. SUBMISSIONS BY INTERESTED THIRD PARTIES**

##### **A. Australia**

4.1 Australia stated that the present dispute concerned solely the selective import prohibitions by the United States on yellowfin tuna according to the country of origin of the product. The dispute did not concern prohibitions related to the fishing practices of certain countries, since the prohibition could apply to those countries even if they met or exceeded the standard for fishing practices for the product of United States origin. Nor did the dispute concern trade in marine mammals, or trade restrictions taken in accordance with any other international treaty or arrangement. The United States had confirmed in its submission that it was not obligated by any other treaty to maintain the trade restrictions against the EEC Member States. The Panel's findings would therefore have no implications for the GATT consistency of measures taken under any other existing or future treaty directed to conservation of the environment. Nor was the Panel being asked to examine arrangements under which contracting parties had agreed to waive their GATT rights and obligations between each other. The measures taken by the United States were based on unilaterally determined standards.

4.2 Australia further stated that the Panel was not being asked to determine whether contracting parties had the right to enforce unilaterally-determined standards. In circumstances where unilateral standards were not enforced by trade or trade-related measures, there was obviously no role for the GATT. In most instances, it was possible to enforce such standards without risk to GATT obligations, including GATT rules of non-discrimination. In other instances, GATT exceptions provisions might be invoked in line with sovereignty principles. The text of the General Agreement clearly respected the sovereign right of contracting parties to maintain their own standards. However, sovereignty was a two-way street in the GATT. A contracting party which claimed the right to take trade restrictions based on unilaterally-determined standards must expect other contracting parties to claim the right to justify trade restrictions against that contracting party on the same grounds. The United States intermediary nation embargo effectively denied other contracting parties subject to the embargo the sovereignty to set their own standards for the like product.

4.3 Australia further stated that the GATT had competence to examine the trade measures used to enforce the standards, but had no competence to evaluate that standard. It did not have the competence to evaluate the United States standards applying to yellowfin tuna of United States origin or to yellowfin tuna from countries subject to the primary nation embargo. The parties to the dispute had two different standards. The EEC standard did not have external application and did not therefore involve trade restrictions with GATT implications. Australia wondered whether the United States would accept the right under the General Agreement for another contracting party to maintain a prohibition of an intermediary character on imports from the United States, notwithstanding the fact that goods subject to the prohibition may have fully met a relevant United States standard, as well as the foreign standard applying to goods subject to the primary nation embargo, or under circumstances where compliance with the third-country standard involved a breach of a domestic standard. If the United States position were accepted, this could lead to the

forced imposition of domestic standards on other contracting parties. It could also lead to the exporting country being forced, under threat of trade embargo, to impose indirectly third-country standards on countries from which it imported, and risk breaching its GATT obligations to that third country. Acceptance of the United States view would lead to sovereignty over the environment within the territory or jurisdiction of exporting countries being severely compromised by trade measures applied with the intent of enforcing unilaterally-determined standards outside of the jurisdiction of the contracting party concerned. The balance of rights and obligations under the General Agreement, including the Article XX exceptions provisions, would also be severely compromised, in that there would be greater GATT security afforded to trade restrictions based on unilateral extra-jurisdictional standards than to those based on unilateral standards with no application outside the territory of the contracting party.

4.4 Australia stated that the standard for intermediary nations was not a production or a processing standard, but a trade standard unilaterally imposed by the United States, that required an intermediary nation to discriminate against goods from other contracting parties. The intermediary nation embargo was not limited to re-exports, nor to trade which would equate to the quantities of yellowfin tuna imported from a country subject to the primary nation embargo. The standards applying to prohibitions on imports of yellowfin tuna harvested in the eastern tropical Pacific from countries subject to the *primary* nation embargo were also relevant in respect of Article XX(d) of the General Agreement. The standard under the primary nation embargo did not involve a fixed ceiling for incidental dolphin mortality, as granted to United States producers in the same region. The internal standard applying to the sale of yellowfin tuna within the United States was also relevant. General prohibitions on sale of tuna products that were not dolphin safe would not come into effect until after 1 June 1994. Criminal penalties, attaching to persons engaging in certain fishing practices under the United States jurisdiction, would not enter into effect until after 28 February 1994, and even then could be avoided under the general permit accorded to the American Tunaboat Association. Civil penalties, however, were currently enforceable against persons who imported yellowfin tuna or other products subject to the primary nation import embargo. Under these circumstances, yellowfin tuna of foreign origin fished by methods comparable to or superior to the standard set for the United States product might be denied access to the United States market, even if the incidental dolphin mortality rate associated with the harvest by the foreign vessel was zero. The fact remained that the United States maintained discriminatory import prohibitions against like product according to a country of origin. The like product was yellowfin tuna, which remained like product irrespective of the trade-related policies or practices of the country subject to the United States import prohibition. This view was supported by the findings of the Belgian Family Allowances Panel.<sup>56</sup>

4.5 With respect to Article III, Australia argued that the import prohibitions against product from intermediary nations should not be examined under that Article, as the measures went beyond enforcement at the border. There was currently no regulation which would prohibit the internal sale, on a country-of-origin basis, of yellowfin tuna, although internal sale of the foreign product was effectively precluded by embargoes on yellowfin tuna import from certain countries. Such import prohibitions, while undoubtedly linked to competitive conditions of trade for domestic and foreign product, were more properly the subject of examination under the specific provisions of Article XI dealing with quantitative restrictions and prohibitions. The panel report on *United States - Section 337 of the Tariff Act of 1930*<sup>57</sup> and the Working Party Report on Border Tax Adjustments,<sup>58</sup> supported the view that the Note ad Article III covered only internal charges that were borne by products, rather than persons or corporations. The relevant provisions dealing with legal prohibitions on the internal sale of like yellowfin tuna of both domestic and foreign

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<sup>56</sup>BISD 1S/59.

<sup>57</sup>BISD 36S/345.

<sup>58</sup>BISD 18S/97.

origin<sup>59</sup> would not become effective until after 1 June 1994. The only product-related penalty provisions of Section 307 applying at the present time involved penalties on persons importing tuna or other product subject to the primary nation embargo. There were no comparable product-linked penalty provisions in Section 307 currently applicable to the domestic product. Nor was there any prohibition in Section 307 relevant to actions by persons involving products subject to the intermediary nation embargo.

4.6 Even if the United States measure were viewed as a border adjustment within the terms of the Note ad Article III, the United States measure against intermediary nations would not meet the "no less favourable" test of Article III:4. First, the product was "like" product, and the fact that an intermediary nation had imported yellowfin tuna from another country could not serve to transform its own exports to an unlike product. Even if processing methods were held to be relevant to like product concepts, the standards for the products subject to the intermediary nation embargo did not involve any consideration of the method of processing of that product.

4.7 Australia also noted that the "no less favourable treatment" provisions of Article III:4 did not require contracting parties to grant formally equal treatment. However, the United States would need to justify the application of different measures.<sup>60</sup> In the present dispute, the measures applicable to foreign and domestic products were vastly different. The domestic product put up for sale under permit accorded to the American Tunaboat Association was exempt from the prohibition whereas, in the case of foreign product harvested in the same region, periodical determinations by the United States authorities, in addition to a formal commitment by the country concerned, were a pre-condition to sale of the product on the domestic market. The conditions were even more uncertain for intermediary nations. Intermediary nations were given no opportunity to comply with United States standards applying to domestic product. Also, while Article III was relevant to standards, the application of an import ban arising from failure to meet standards must be considered separately, as confirmed by the report of the panel on *Canada - Administration of the Foreign Investment Review Act*.<sup>61</sup>

4.8 With respect to Article XIII, Australia noted stated that the import prohibition on yellowfin tuna was not of general application. It therefore failed to meet the requirement of Article XIII:1 that the importation of the like product of all third countries be similarly prohibited or restricted. Further, the origin of an imported product could not transform the domestic product of the importing country into an unlike product.

4.9 With respect to Article XX, Australia stated that it was important to realize that it was not the objectives or policies of a contracting party that were in dispute under Article XX, but the application of trade measures which might be used to enforce those objectives or policies. Objectives and intent were neither GATT-consistent nor GATT-inconsistent, as they lay outside the purview of the GATT. However, trade measures which might otherwise be GATT-inconsistent were not justifiable under Article XX simply because of their linkages with certain non-trade policies.

4.10 Australia stated that Article XX did not represent an automatic waiver from substantive GATT obligations. A contracting party could not justify non-observance of obligations under other GATT Articles merely because it maintained policies of the type specified in Article XX(a) to (j). In this context, Article XX could be contrasted with Article XXI (Security Exceptions). Article XXI(a) referred to information which a contracting party considered contrary to its

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<sup>59</sup>Section 307(a)(1)

<sup>60</sup>Report of the Panel on *EEC - Measures on Animal Food Proteins*, BISD 26S/65.

<sup>61</sup>BISD 30S/140.



essential security interests. Article XXI(b) referred to action which a contracting party considered necessary for the protection of its essential security interests. Article XXI(c) referred to any action (in pursuit of certain United Nations Charter obligations) by a contracting party. Article XX was more restrictive. Article XX exceptions could not be invoked to justify any trade measure applied for the purposes of adoption or enforcement of any policy or practice.

4.11 Australia observed that the exceptions provisions of Article XX had to be interpreted narrowly.<sup>62</sup> It was up to the contracting party invoking the measure to demonstrate that all the conditions of that Article were met. The United States had to demonstrate that the refusal of another contracting party to prohibit imports of a product from third contracting party represented a danger to animal or plant life or health. It also had to demonstrate that the specific measures taken, a total prohibition on imports of yellowfin tuna from that intermediary nation, did not go beyond what was necessary to protect animal life or health. It had also to demonstrate that it had fulfilled the preambular requirements of Article XX. The United States measures in force did not require the protection of all dolphin life or health in the eastern tropical Pacific, but were linked to feasible incidental mortality rates associated with particular fishing methods.

4.12 With respect to Article XX(b), Australia assumed that the United States was not claiming jurisdiction over all yellowfin tuna harvesting operations in the eastern tropical Pacific. However, through its invocation of this Article, it was effectively claiming jurisdiction over all yellowfin tuna from the region which was internationally-traded. If Article XX(b) were to have extra-jurisdictional application, the animal and plant life or health policies of individual contracting parties could be hostage to pressures arising from trade actions by another contracting party, even if the practices had no impact on the human or animal life or health within the jurisdiction of any other contracting party. There would be no security under the multilateral trading system for their exports, unless they adopted the same trade measures or non-trade practices of that contracting party. The drafting history of Article XX(b) indicated that its exceptions provisions related solely to life and health within the jurisdiction of the importing country. Any other interpretation would severely affect the balance of rights and obligations in the GATT and would have major repercussions for sovereignty within the multilateral trading system to pursue non-trade policies. Australia further observed that, even if this Article were considered to have extra-jurisdictional application, the United States would need to demonstrate that the import prohibitions did not go beyond what was strictly necessary to safeguard animal life or health. A measure could not be considered necessary if there were an alternative measure available which the contracting party could be reasonably expected to employ and which was not inconsistent with other GATT provisions.<sup>63</sup> If a GATT-consistent measure were not available, the contracting party was obliged to choose the least-GATT-inconsistent option open to it.

4.13 Regarding Article XX(d), Australia stated that the United States had to demonstrate not only that the primary nation embargo was GATT-consistent, but also that it was necessary to secure compliance with certain laws and regulations. If, as stated by the United States, the purpose of the intermediary nation embargo was to ensure that tuna subject to the primary nation embargo could not be processed or shipped to the United States, the United States had to demonstrate that a ban on all yellowfin tuna products from intermediary nations did not go beyond what was necessary to secure compliance with enforcement of the primary nation embargo. The United States would also have to demonstrate that the ban was not an arbitrary means of discrimination between countries where the same conditions prevailed.

4.14 Regarding Article XX(g), Australia stated that the United States had to demonstrate not only that the intermediary nation embargo was directed towards the conservation of exhaustible

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<sup>62</sup>Report of the Panel on *Section 337 of the United States Tariff Act*, BISD 36S/345.

<sup>63</sup>Report of the Panel on *United States - Section 337 of the United States Tariff Act*, BISD 36S/345

natural resources, but that the resource in question represented an exhaustible natural resource and that the measures were made effective in conjunction with restrictions on domestic production or consumption. The United States would also have to satisfy the preambular requirements of Article XX. None of the standards applied by the United States required limitations on the production or consumption (as compared to limitations on fishing practices) of yellowfin tuna of any origin, including domestic. The standard imposed by the United States did not require the conservation of all dolphins in the eastern tropical Pacific, but instead involved limitations on incidental dolphin mortality associated with the manner in which mortality occurred in this specific region. These limitations were fixed for vessels under United States jurisdiction, but an equivalent number of foreign vessels could achieve lower dolphin mortality rates and still be unable to avoid the import prohibition. Yellowfin tuna which was the product of intermediary nations could not avoid import prohibitions even if the vessels under their jurisdiction had eliminated all incidental dolphin mortality.

4.15 Australia further stated that the United States also had to show that the trade measures within the meaning of Article XX(g) were primarily aimed at rendering effective production restrictions. It could not be said that the measures taken under the intermediary nation embargo directly addressed the conservation of dolphins, since the like product from other than a primary or intermediary nation could escape the prohibition, even if the actual incidental dolphin mortality rate were higher than for countries subject to the prohibitions. Moreover, as stated in the unadopted report of the panel in *United States - Restrictions on imports of tuna*, a contracting party could only effectively restrict production or consumption to the extent that the production or consumption was under its own jurisdiction. As the United States did not restrict production or consumption of yellowfin tuna harvested in the eastern tropical Pacific, it could not claim the right to restrict trade in that product from outside that region.

4.16 Australia further stated that the drafting history of Article XX(g) did not support an extrajurisdictional interpretation of this Article. The provisions of Article 45(x) of the Havana Charter in respect of intergovernmental agreements relating to the conservation of fishery resources, migratory birds or wildlife were not incorporated in the General Agreement. Drafting history also implied that the intent of Article XX(g) was to permit exceptions to other GATT provisions relating to quantitative export controls on traded or tradable commodities. It was not within the purview of the GATT to consider whether objectives not contemplated by the GATT might be invoked to justify measures which were inconsistent with other GATT obligations<sup>64</sup>.

## **B. Canada**

4.17 Canada noted that there was increasing recognition of the importance of conserving and protecting the world's natural resources. While all agreed that there was a need to reduce dolphin mortality, the dispute centred on whether the relevant United States trade measures designed to achieve such ends were consistent with international obligations. In general, Canada supported the arguments put forward by the EEC and the Netherlands.

4.18 With respect to Article XI, Canada stated that the mandatory import prohibition under the intermediary nation embargo was a breach of this Article, and as such was *prima facie* evidence of nullification or impairment of benefits under the General Agreement. The import prohibition was applied against countries which had no control over the fishing policies and practices that

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<sup>64</sup>Report on the Panel on *EEC - Quantitative Import Restrictions on Imports from Hong Kong*, BISD 30S/129, in relation to social and economic objectives; Report of the Panel on *United States - Import Restrictions on Sugar from Nicaragua*, BISD 31S/67, in relation to problems outside the competence of the GATT; and Report of the Panel on *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/162, in respect of the polluter-pays principle.

resulted in the primary nation import prohibition. To either ensure or restore access to the United States market, intermediary nations would have to enforce the conservation standards unilaterally determined by the United States by adopting GATT-inconsistent import prohibitions or "administrative restraints" with the same effect.

4.19 With respect to Article III, Canada stated that the prohibition of tuna imports from intermediary nations could not be construed as the enforcement of internal measures at the border. The Note ad Article III applied only to products *per se*, whereas regulations concerning incidental dolphin mortality could not affect the physical characteristics of tuna as a product. Even if the import measure were found to be subject to the Note ad Article III, the treatment accorded to the domestic product was more favourable than that accorded to the foreign product. While domestically-caught yellowfin tuna might be sold even though the catching of such tuna involved incidental dolphin mortality, no yellowfin tuna from a designated intermediary nation could be imported even if that nation did not kill any dolphins in the taking of such tuna.

4.20 With respect to Article XX, Canada stated that this Article had to be interpreted narrowly, in accordance with past panel practice. The United States had to demonstrate that its measures met the conditions specified in the preamble, as well as the conditions in the sub-paragraphs of Article XX. In Canada's view, Article XX(b) did not apply to measures to protect animal life or conserve natural resources in areas outside the jurisdiction of the country imposing the measure. As well, the US prohibition of yellowfin tuna imports from intermediary nations was not "necessary" to safeguard the life or health of dolphins within the jurisdiction of the United States.

4.21 With respect to Article XX(g), Canada stated that the United States had to demonstrate that the prohibition on imports of yellowfin tuna from intermediary nations was primarily aimed at making effective the restrictions on dolphin mortality within its jurisdiction. Even if the measure could be applied to protect animal life or to conserve resources in areas beyond its jurisdiction, which in Canada's view it could not, the prohibition of *all* yellowfin tuna imports from intermediary nations was not a conservation measure *per se* as it was not related to incidental dolphin mortality. The import prohibition was not dependent on the dolphin mortality rate for the intermediary nation, but only on whether the intermediary nation imported yellowfin tuna from a primary nation and exported yellowfin tuna from any source to the United States.

4.22 With respect to Article XX(d), the United States had to demonstrate that the primary nation import prohibition was not inconsistent with the General Agreement. In Canada's view, the primary nation import prohibition was not consistent with Article XI:1. The primary nation import prohibition could not be accepted under Article XX(g), since it was not primarily aimed at making effective the restrictions on dolphin mortality within its jurisdiction. Even if the exception could be applied extra-jurisdictionally, it would not be primarily aimed at conservation, as the import prohibition was based on a dolphin mortality limit supplied by the United States to exporting countries in a particular period. Such limits were linked to the actual dolphin mortality achieved by the United States' fishermen. Thus exporting countries could not know, at a particular point in time, whether or not their tuna catches conformed United States dolphin protection standards. This uncertainty could be considered "arbitrary" within the meaning of the preamble to the Article.

### **C. Costa Rica**

4.23 Costa Rica stated that it had intervened as a third country because of its direct interest in the dispute, having been named as an intermediary nation for the purposes of the Marine Mammal Protection Act and its amendments. Costa Rica was very concerned over the increasing use of trade measures to fulfil environmental objectives. It was in favour of dialogue and international cooperation to decide how environmental protection should be pursued, and to avoid injury to world trade as a result of the application of unilateral measures. Although the objective pursued by the United States under the Marine Mammal Protection Act might be praiseworthy, the means used to attain the objectives constituted restrictions to trade applied unilaterally and extra-jurisdictionally. They therefore raised crucial issues of compatibility with GATT rules directly affecting the benefits accruing to Costa Rica under the General Agreement.

4.24 Costa Rica stated that it was not for the Panel nor even for the GATT to determine the environmental protection goals that a country could adopt within its territory based on its own needs. However, it was unacceptable to seek to impose on other countries - even ignoring the differences in levels of development between contracting parties - environmental protection models that had been defined under domestic legislation as suitable for the attainment of such goals. Even more serious was the attempt to impose a domestic environmental protection goal on another country by means of trade restrictions, as in the present case. Such practices could lead to the development of new protectionist policies and the creation of obstacles to sustainable development.

4.25 Costa Rica noted that some factual aspects of dolphin mortality warranted particular mention. The United States National Research Council had recently published a book entitled "Dolphins and Tuna Fishing", in which it stated that none of the dolphin populations associated with yellowfin tuna fishing were threatened. It further pointed out that there was no way of attaining a sustained level of tuna harvesting without using the purse seine method. Until other fishing techniques were developed, the existing alternative methods, though they could reduce dolphin mortality, would endanger stocks of tuna and other species. In addition, dolphin mortality had been decreasing significantly in recent years.

4.26 Costa Rica also pointed out that the raising of barriers to imports from developing countries had a negative impact on their capacity to achieve greater economic growth, which would in turn enable them to pursue environmentally-friendly development.

4.27 Costa Rica also stated that, although the volume of its yellowfin tuna exports to the United States was still fairly modest, that did not mean that the resulting injury to the country was negligible. Tuna exports were an important source of revenue for certain regions with acute economic and social problems. The United States received over 65 per cent of Costa Rica's tuna exports.

4.28 Costa Rica also argued that the trade restrictions applied by the United States to prevent or reduce dolphin mortality could not be applied beyond the limits of national jurisdiction. In dealing with environmental problems that extended beyond the national frontiers of a country, intergovernmental cooperation was the only way to seek solutions and to avoid the imposition of unilateral policies. Costa Rica therefore actively supported the work undertaken by the Inter-American Tropical Tuna Commission (IATTC), which was a step in the right direction in the search for a solution to the problem. The Government of Costa Rica had signed the IATTC Resolution of April 1992, based on agreements reached during intergovernmental meetings held at San José, Costa Rica, in 1990, and at La Jolla, California, in 1991 for drawing-up an international programme for reducing incidental dolphin mortality during tuna fishing with purse seine nets in the Eastern Tropical Pacific. The main aim of that Resolution was the adoption of a multilateral

programme for the gradual reduction and elimination of the incidental dolphin mortality during tuna fishing, by seeking ecologically reasonable methods of harvesting adult yellowfin tuna not associated with dolphins, while maintaining stocks of this type of tuna at levels which allowed for maximum sustainable catches.

4.29 Costa Rica stated that the prohibition of imports of tuna and tuna products from countries subject to the primary and secondary nation embargoes were quantitative restrictions inconsistent with Article XI:1 of the General Agreement and could not be justified by any exceptions. Costa Rica agreed with the findings of the previous panel examining the United States measures, and considered that the subsequent amendments to the Marine Mammal Protection Act had altered neither its nature nor its character. The restrictions could not be justified as internal regulations under Article III, since the prohibitions were typical border measures and could in no way be considered as the extension of any internal measure to cover an imported product. In addition, as noted by the previous panel, Article III and the Interpretative Note ad Article III covered only measures applied to the product itself. Even if the prohibitions were to be considered as internal regulations - which was not the case - there would be a violation of national treatment since imported tuna was not accorded treatment no less favourable than that given by the United States to domestic tuna.

4.30 Costa Rica also argued that the United States measures could not be justified by the provisions of Article XX(b) and XX(g). The measures did not meet the requirement of being "necessary" since the United States could not claim that it had exhausted all existing possibilities of achieving its goal of dolphin protection. On the contrary, specific solutions such as the negotiation of international cooperation agreements and the actions undertaken within the IATTC had been disregarded by the United States. Furthermore, it had not been demonstrated beyond doubt that the sole purpose of the measures taken by the United States was dolphin protection and that they did not rather constitute a disguised restriction on international trade.

4.31 Costa Rica also argued that Article XX exceptions could not be used to cover measures applied beyond the national territory of an importing country. The previous Panel examining the United States measures had rightly indicated that accepting the contrary view would imply that:

"each contracting party could unilaterally determine the life or health protection ... and conservation policies ... from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."

Costa Rica considered therefore that arguments put forward by the United States invoking Article XX to justify the primary and intermediary nation embargoes should be rejected.

4.32 Costa Rica urged the Panel to find that the primary and intermediary nation embargoes infringe Article XI of the GATT and that they could not be justified under any provision of the General Agreement, and that such measures nullified and impaired benefits accruing to Costa Rica under the GATT. Costa Rica considered that the CONTRACTING PARTIES should be recommended to request the United States to bring the legislation in question into conformity with its obligations under the General Agreement.

#### **D. Japan**

4.33 Japan considered that the US measures taken under the intermediary nation embargo were inconsistent with Article XI of the General Agreement. Japan further argued that the United

States measures could not be considered to come within the terms of Article III, since they did not meet the requirements of the Note ad Article III that the measure enforced at the time or point of importation be of the same nature as the corresponding internal measure. Moreover, Article XX, which was to be strictly interpreted, could not justify the United States measures.

4.34 With respect to Article XX(b), Japan stated that this Article was designed essentially to enable a contracting party to take quarantine or sanitary measures. It did not justify a wider scope of measures. Further, the scope of the justifiable measures should be confined to those which were truly "necessary" for the protection of human, animal and plant life or health. The United States standard on incidental taking of dolphins was established unilaterally, and therefore could be considered as an arbitrary standard. The United States measure was also a total import ban and went far beyond the extent of a "necessary" measure within the meaning of Article XX(b).

4.35 With respect to Article XX(g), the United States did not prove, as it was required to do, that its measures were "primarily aimed at the conservation of" dolphins. The United States measure was rather an instrument to force other nations to conform to a desired policy, established unilaterally by the United States, or as an instrument for sanction or punishment against other nations. Further, the United States did not restrict the marketing or the production of the like domestic product, yellowfin tuna caught in United States waters by the United States vessels. Therefore, the United States import ban was not justified under Article XX(g).

#### **E. New Zealand**

4.36 New Zealand stated that it was entirely sympathetic to the goal of conservation and shared the United States concern about the environment, which should be reserved for the use and enjoyment of future generations. It recognized the efforts of the United States in seeking to achieve multilateral agreement in a specific area being examined in the dispute, the preservation of dolphins in the eastern tropical Pacific.

4.37 However, New Zealand considered that measures to enhance conservation efforts in areas beyond the territorial jurisdiction of states should be in conformity with agreed rules and guidelines developed at an international level, as was the case with the Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific. In recent years, there had been a concerted effort in a number of international fora to develop the basis for such rules and guidelines, such as the 1992 United Nations Conference on Environment and Development, the OECD, and the GATT Group on Environmental Measures and International Trade. In this case, United States measures with respect to fisheries practices were being applied extrajurisdictionally and in advance of international agreement on what measures might be applied this way. While the conservation of dolphins was an important objective, parties were not permitted under international law (including under existing international agreements) to restrict imports of tuna from other countries as a means of encouraging them to reduce dolphin by-catches.

4.38 New Zealand considered that the United States measures were contrary to Articles XI and III, and could not be justified under Article XX. The United States interpretation of Article XX would mean that a party could in effect prescribe the environmental policies other countries had to adopt in order to trade with it. Furthermore, it would mean that an intermediary nation could be denied trading opportunities if it did not endeavour to influence the environmental policies of the nation subject to the primary nation embargo. The prescription of another country's policies through the withholding of access, based not on multilaterally-agreed rules but on that country's unilateral action, could not be justified under recognized principles of international law. These principles held that extrajurisdictional acts could only lawfully be the object of jurisdiction if the principle of non-intervention in a domestic or territorial jurisdiction of other states was observed.

This followed from the nature of the sovereignty of States and the fact that a state was supreme internally. Article II, paragraph 7, of the United Nations Charter reflected this principle in providing that the United Nations could not intervene in matters which were essentially within the domestic jurisdiction of a state. A related principle was that states could not normally exercise jurisdiction in areas beyond national jurisdiction. There were some situations in international law where such a jurisdiction was conferred, for example in relation to certain types of activities carried out by a state's nationals in areas beyond its territorial jurisdiction. But there was no established general basis in international law for the exercise of such a jurisdiction, particularly in relation to the activities of nationals of another state.

4.39 With regard to the drafting history of Article XX(g), New Zealand disagreed that the dropping of the phrase "if such measures are taken pursuant to international agreements". carried any implication of allowing extraterritorial jurisdiction. Moreover, the drafting history suggested that the main focus of the exception allowing domestic restrictions was on export restrictions. The plain meaning of Article XX(g) also indicated that measures taken in conjunction with restrictions on domestic production or consumption had to be aimed primarily at rendering effective those restrictions. This condition was adopted in the report of the panel on *Canada - Measure affecting exports of unprocessed herring and salmon*. In the present case, the measures were aimed at conserving dolphins although they restricted or prohibited importation of tuna or tuna products. With regard to the drafting history of Article XX(b), New Zealand considered that a plain reading of the provision in the 1927 Abolition Convention implied that it was intended to protect domestic animal and plant populations against importation of diseases, insects and harmful parasites. New Zealand also disagreed with the United States claim that the ordinary meaning to be given to the phrase "necessary to" in Article XX(b) should be "needed to". This interpretation was contrary to general GATT practice that exceptions are to be narrowly interpreted. The meaning of the term "necessary" in Article XX had been considered in detail by several panels. The panel on *Thailand - Restrictions on imports of cigarettes* concluded that there was no reason why the meaning of the term was not the same in Article XX(b) as in Article XX(d). The United States criticism of the established interpretation of "necessary" was not well-founded.

4.40 New Zealand concluded that the interpretation of the relevant GATT provisions should be in accordance with the general principles of international law which limited the extrajurisdictional competence of states. If Article XX(b), (d) and (g) had been intended to allow extrajurisdictional measures to be taken by individual contracting parties, this would have been clearly stated.

#### **F. Thailand**

4.41 Thailand stated that its point of view was clearly reflected in the unadopted report of the panel on *United States - Restrictions on imports of tuna*. The United States measures at issue, as that panel report rightly concluded, contravened Article XI:1 and were not justified by Article XX. Further, the United Nations Conference on Environment and Development had agreed on Principle 12 of the Rio Declaration and Section B of Agenda 21, which clearly stated that unilateral action should be avoided and that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus. Thailand subscribed to this principle.

#### **G. Venezuela**

4.42 Venezuela argued that it had a substantial interest in this proceeding since it was subject to a primary nation embargo on imports of yellowfin tuna and yellowfin tuna products pursuant to the Act. Further, the intermediary nation embargoes instituted by the United States had had a significant adverse impact on Venezuela. They had not only disrupted normal trade flows, but

had led to the imposition of a minimum reference price for imports of yellowfin tuna by the EEC, a major market for Venezuelan tuna.

4.43 Venezuela supported the grounds upon which the EEC and the Netherlands based their challenge to the United States tuna embargoes, and agreed with the findings in the unadopted report of the panel in *United States - Restrictions on imports of tuna*. Venezuela noted that, although the GATT imposed few constraints on a contracting party's implementation of domestic environmental policies, it did not permit a party to restrict imports of a product merely because the product originated in a country with environmental policies different from its own. If this were not the case, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement, as stated by the first tuna panel. This was the key message of this dispute. The issue of whether the GATT permitted the use of trade restrictions as part of a multilateral system for the conservation of plant or animal life, or of an exhaustible natural resource in a global commons, was not the issue before this Panel. The measures taken by the United States had never been agreed to multilaterally.

4.44 Venezuela considered that adopted GATT panel reports should be given great interpretative weight, since they were "subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation", as provided for in Article 31 of the Vienna Convention on the Law of Treaties. GATT panels were especially important in this case since neither the plain language of Article XX(b) or (g), nor the drafting history revealed whether the GATT permitted a contracting party to use trade restrictions to achieve a unilaterally-determined environmental law with respect to a resource outside that party's own territory. GATT panel reports had in fact interpreted Article XX narrowly. Otherwise, Article XX would effectively authorize trade restrictive measures aimed at achieving any of a myriad of goals, regardless of the endorsement of these goals by other nations. Allowing such trade restrictions based on unilaterally-established policies regarding natural resource conservation or the life or health of humans, animals or plants, was particularly alarming with respect to restrictions based on the *process* by which the restricted product was produced, rather than on the characteristics of the product itself. If the United States had the right to impose an import ban based on the processing method of tuna, why might not another country impose restrictions on products manufactured in countries where workers received relatively low wages, or were forbidden (or allowed) to smoke cigarettes, or were denied breaks in their work schedule to engage in religious practices? Why might not a country ban imports of agricultural products from countries that failed to administer food allocation programmes for the poor? The United States position failed to suggest how the contracting parties could prevent the broad use of trade restrictions for a wide range of purposes clearly not endorsed by even a significant minority of the GATT contracting parties.

4.45 Venezuela further argued that the view that unilateral trade sanctions were necessary to force certain countries, particularly less-developed countries, to implement mechanisms to protect the environment, was extremely short-sighted. Positive incentives could be used more productively to further global environmental protection. Further, it was not at all clear that the environmental standards of the more developed nations were always superior to those of the developing countries. For example, Venezuela's regulations on the use of driftnets were more stringent than those of the United States.<sup>65</sup> Likewise, while many less-developed countries signed the 1992 United Nations Biodiversity Convention, the United States initially refused to sign. It

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<sup>65</sup>Venezuelan law banned the use of large-scale pelagic driftnets over 1.5 km long, whereas US law permitted the use of such driftnets up to 2.5 km long.



was clear that the those nations best in a position to influence environmental policy by the use of trade sanctions were not always those which had the best approach to eco-system management.

4.46 The facts of this dispute illustrated the dangers associated with trade restrictions based on unilaterally-determined global environmental objectives. The protection of dolphins was an objective generally shared by most nations, including Venezuela. However, the extreme measures prescribed by the Act to achieve that objective lacked a basis in sound science. Contrary to the suggestions in its submission, the United States had officially knowledge that there was no evidence indicating that dolphin populations in the Eastern Tropical Pacific were in danger of extinction.<sup>66</sup> This illustrated that the dolphin population in the eastern tropical Pacific was not in danger of depletion, much less extinction, and demonstrated that the embargoes under the Act were neither necessary to protect dolphin life or health nor primarily aimed at conservation.

4.47 Moreover, the United States policy objectives actually frustrated a conservation objective that was equally as important as dolphin protection: the conservation of the tuna population in the eastern tropical Pacific. Since large mature tuna tended to swim with dolphin, but young tuna did not, the embargo provisions under the Act forced tuna fishermen in the eastern tropical Pacific to catch young tuna that were not associated with dolphin. Because the young tuna had not yet reproduced, the viability of the tuna population in the eastern tropical Pacific was threatened. Thus, the embargoes could be seen to undermine natural resource conservation. The embargoes under the Act were therefore not only barriers to trade, but to responsible eco-system management. On the other hand, the Agreement negotiated by the Inter-American Tropical Tuna Commission (IATTC) provided for very stringent dolphin mortality reductions without threatening the tuna population in the eastern tropical Pacific.

4.48 Venezuela considered that the 1992 amendments to the Act exacerbated the Act's inconsistencies with the General Agreement. The introduction of new and harsher unilateral embargoes, and sanctions for foreign nations' violation of moratorium agreements, were at least as inconsistent with the General Agreement as were the embargo provisions in the original Act. Venezuela and Mexico had officially expressed to the United States their opposition to the moratorium proposed under the 1992 amendments. Venezuela, Mexico and Colombia had jointly declared their opposition to any approach, like the moratorium, that was inconsistent with the IATTC dolphin protection agreement. Venezuela was committed to the multilaterally-established environmental protection goals of the IATTC which, unlike the goals which underlay the embargo provisions of the Act, reflected scientific consideration of the complete ecosystem, not political responses to concern for a single species in isolation.

4.49 Venezuela considered that the obvious solution to the embargo problem was the negotiation of an international agreement. The United States had in fact negotiated such an agreement under the auspices of the IATTC in April and June of 1992. The Agreement foresaw the reduction of incidental dolphin mortality in the eastern tropical Pacific to less than 5,000 by the end of 1999. The 5,000 figure represented less than 5/100 of 1 per cent of the dolphin population in the area, or less than 3/10 of 1 per cent of the most conservative estimate of net annual growth of this population - a statistically insignificant level of mortality. In addition to a research programme and a scientific advisory board, the agreement also established a review panel to ensure compliance with the dolphin mortality reduction mandates of the IATTC programme. However, at the current time, the need for sanctions applicable to non-participants in the Agreement was speculative, since all nations engaged in tuna fishing in the eastern tropical Pacific were in fact participants in the IATTC programme.

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<sup>66</sup>US National Oceanic and Atmospheric Administration, 55 Fed. Reg. at p. 11922 (March 30, 1990).

## V. FINDINGS

### A. Introduction

5.1 Since tuna are often found swimming below dolphins in the eastern tropical Pacific Ocean, fishing vessels in that region commonly encircle dolphins with purse-seine nets in order to capture tuna. In 1986, this practice resulted in the death of an estimated 133,000 dolphins. By 1991, changes in fishing equipment and methods reduced total deaths to less than 27,500. National efforts to reduce dolphin mortality have led to specific legislation in some countries. International efforts have taken place under the auspices of the Inter-American Tropical Tuna Commission ("IATTC"), which operates a research and development, training and observer program intended to reduce dolphin mortality. In 1992, the governments of major tuna fishing countries signed an agreement under the auspices of the IATTC aimed at reducing dolphin mortality to under 5,000 by 1999.<sup>67</sup>

#### 1. *United States restrictions affecting domestic tuna and tuna fishing*

5.2 The Marine Mammal Protection Act of 1972 prohibits any person or vessel under United States jurisdiction from taking any marine mammal in connection with the harvesting of fish.<sup>68</sup> The Act further prohibits the use of any fishing method contrary to regulations issued under the Act, and imposes civil penalties for violations.<sup>69</sup> Persons or vessels under the jurisdiction of the United States may however take marine mammals incidental to commercial fishing operations, subject to the conditions of a permit granted under the Act.<sup>70</sup> The only permit issued by the United States has been to the American Tunaboat Association. This permit specifically requires that: vessels not deploy purse seine nets on, or encircle, any school of dolphin in which eastern spinner dolphin or coastal spotted dolphin are observed; total dolphin mortalities not exceed 800 for the period 1 January 1993 through 1 March 1994; purse seine nets not be deployed after sunset; explosive devices not generally be used; and vessels carry an official observer certified by the United States or by the IATTC.<sup>71</sup> The permit expires on 1 March 1994. If by that date no major purse seine tuna fishing country has entered into an agreement with the United States on yellowfin tuna harvesting practices in the eastern tropical Pacific Ocean, the permit is extended to 31 December 1999, on the condition that the permit holder reduce dolphin mortality by a significant amount each year to levels approaching zero by the expiry of the permit.<sup>72</sup>

#### 2. *United States restrictions affecting direct imports of tuna ("primary nation embargo")*

5.3 The Act also prohibits the import into the United States of tuna or tuna products harvested by a method that results in the incidental killing or serious injury of marine mammals in excess of United States standards.<sup>73</sup> In order to meet this requirement, the tuna exporting country must

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<sup>67</sup>Agreement reached in June 1992 between Colombia, Cost Rica, Ecuador, Mexico, Nicaragua, Panama, the United States, Vanuatu and Venezuela.

<sup>68</sup>Marine Mammal Protection Act of 1972, P.L. 92-522, 86 Stat 1027 (1972); Sec. 101. (a)

<sup>69</sup>Sec. 102 (a)(5); Sec. 105 (a)(1)

<sup>70</sup>Sec. 101 (a); Sec. 101 (a)(4)(A)

<sup>71</sup>Sec. 104 (h)

<sup>72</sup>Sec. 306 (a)

<sup>73</sup>Sec. 101 (a)(2)

prove that it has fishing technology and a rate of incidental taking comparable to those of the United States. In the case of exports of yellowfin tuna from the eastern tropical Pacific, the following requirements must be met.<sup>74</sup> First, the exporting country nation must have adopted a regulatory program governing the incidental taking of marine mammals in the course of harvesting that is comparable to that of the United States, and that includes regulations on activities such as encircling marine mammals and setting nets at sundown. Second, the vessels of the harvesting nation must have a rate of incidental taking of marine mammals comparable to that of United States vessels. This comparability is defined as an average rate of incidental taking by vessels of the harvesting nation of no more than 1.25 times that of United States vessels during the same period. Third, the vessels of the harvesting nation must not incidentally take in a given year more than 15% of eastern spinner dolphin and not more than 2 % of coastal spotted dolphin as a proportion of the total number of marine mammals taken by such vessels. Fourth, the rate of incidental taking by the harvesting nation must be monitored by the IATTC or by others under an equivalent approved program. Fifth, the harvesting nation must comply with all reasonable requests by the United States for cooperation in specified research programs.

5.4 The primary nation embargo does not apply if the harvesting country opts to enter into a formal agreement with the United States, containing certain specific commitments. These require that the country: ban the practice of harvesting tuna through the use of purse seine nets deployed on, or to encircle, dolphins or other marine mammals, beginning 1 March 1994 for a period of five years, unless terminated earlier under prescribed conditions; require an observer on each vessel engaging in purse seine fishing in the eastern tropical Pacific, subject to certain conditions; and reduce dolphin mortality resulting from purse seine net operations conducted by its vessels in the period 1 January 1993 through 28 February 1994 to a level that is lower than such mortality in 1992, by a statistically significant margin.<sup>75</sup> The Act provides that the United States will periodically determine whether each country having made commitments is in fact fully implementing them.<sup>76</sup> If the Secretary to the Treasury determines that such country is not implementing its commitments then, fifteen days after having notified the President and Congress of this determination, the Secretary will prohibit the import from that country of all yellowfin tuna and yellowfin tuna products.<sup>77</sup> Unless the country concerned certifies and provides reasonable proof within 60 days of the import ban that it has fully complied with its commitments, the President will direct the Secretary of the Treasury to prohibit the import from that country of one or more other fish and fish product categories that together amount to at least 40% of total fish and fish product imports from that country.<sup>78</sup>

### **3. *United States restrictions affecting indirect imports of tuna*** ***("intermediary nation embargo")***

5.5 The Act provides that any nation ("intermediary nation") that exports yellowfin tuna or yellowfin tuna products to the United States, and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct prohibition on import into the United States, must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months.<sup>79</sup> This provision, effective 26 October 1992, is an amendment of an earlier provision, interpreted by a United States court to require that proof be made that each country identified as an intermediary nation had *itself prohibited* the import of any tuna that was

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<sup>74</sup>Sec. 101 (a)(2)(B)

<sup>75</sup>Sec. 305 (a)

<sup>76</sup>Sec. 305 (b)(1)

<sup>77</sup>Sec. 305 (b)(1)(A), (B)

<sup>78</sup>Sec. 305 (b)(2)(A), (B)

<sup>79</sup>Sec. 101 (a)(2)(C); Sec. 3(5), 3(17)

barred from direct importation into the United States. Subsequent to the entry into force of the new provision France, the Netherlands Antilles and the United Kingdom were withdrawn from the list of intermediary nations. Costa Rica, Italy, Japan and Spain remained on the list.

## **B. Articles III and XI**

5.6 The Panel noted the arguments of the EEC and the Netherlands that the primary nation trade embargoes, while not currently applied to exports of tuna from their territories, could nonetheless be examined under the General Agreement as mandatory measures. The United States disagreed, arguing that measures could not be challenged under the General Agreement unless the trade of the challenging contracting party was affected, and that this was not the case for trade in tuna from the EEC and the Netherlands. The Panel observed that the CONTRACTING PARTIES had accepted that commitments which contracting parties exchanged in tariff negotiations were commitments on conditions of competition for trade, not on volume of trade. It further observed that the CONTRACTING PARTIES had also decided in previous cases that legislation requiring the executive to act contrary to obligations under the General Agreement was inconsistent with the General Agreement, whether or not the legislation had actually been applied in a particular case.<sup>80</sup> The Panel noted that the legislation providing for the primary nation embargo left no discretion to the United States executive as to whether, in the cases in which the legislative requirements were not met, a trade embargo would in fact be applied. The Panel therefore found that the primary nation embargo was mandatory legislation, and that the EEC and the Netherlands could thus challenge its consistency with the General Agreement.

5.7 The Panel then noted the argument of the EEC and the Netherlands that measures taken under the primary and intermediary nation embargoes were not justifiable as measures relating to the enforcement at the time or point of importation of an internal law, regulation or requirement that applied equally to the imported product and the like domestic product, under the terms of the Note ad Article III. The measures constituted a quantitative restriction which was not permitted under the terms of Article XI:1. The United States did not refute these claims, other than to state that the EEC and the Netherlands, as the complainants, bore the burden of proof.

5.8 The Panel proceeded first to examine whether the United States measures, although applied at the border, should nonetheless be examined under the national treatment provisions of Article III. The Panel observed that a Note to Article III extends the scope of Article III to domestic measures enforced at the time or point of importation as follows:

"any law, regulation or requirement ... which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law, regulation or requirement ... subject to the provisions of Article III".

The Panel observed however that this provision can only be invoked in respect of a measure which "applies to an imported product and to the like domestic product". The Panel also noted that the national treatment standard, as it relates to laws, regulations and requirements, is specified in Article III:4:, which states:

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<sup>80</sup>Reports of the panels on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, 160, 163-4, paras. 5.2.2, 5.2.9-10; *EEC - Regulation on Imports of Parts and Components* adopted 16 May 1990, BISD 37S/132, paras. 5.25-26

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

The Panel noted that Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the policies or practices of the country of origin with those of the country of importation. The Panel found therefore that the Note ad Article III could only permit the enforcement, at the time or point of importation, of those laws, regulations and requirements that affected or were applied to the imported and domestic products considered *as products*. The Note therefore could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country.

5.9 The Panel then examined in this light the measures taken by the United States. It noted that the import embargoes distinguished between tuna products according to harvesting practices and tuna import policies of the exporting countries; that the measures imposed by the United States in respect of domestic tuna similarly distinguished between tuna and tuna products according to tuna harvesting methods; and that none of these practices, policies and methods could have any impact on the inherent character of tuna as a product. The Panel therefore concluded that the Note ad Article III was not applicable.

5.10 The Panel then examined whether the United States measures were consistent with Article XI:1, which reads in part:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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".

The Panel noted that the embargoes imposed by the United States were "prohibitions or restrictions" in the terms of Article XI, since they banned the import of tuna or tuna products from any country not meeting certain policy conditions. They were not "duties, taxes or other charges". The Panel therefore concluded that the measures were inconsistent with Article XI:1.

### **C. Article XX(g)**

5.11 The Panel noted the United States argument that both the primary and intermediary nation embargoes, even if inconsistent with Articles III or XI, were justified by Article XX (g) as measures relating to the conservation of dolphins, an exhaustible natural resource. The United States argued that there was no requirement in Article XX (g) for the resources to be within the territorial jurisdiction of the country taking the measure. The United States further argued that the measures were taken in conjunction with restrictions on domestic production and consumption. Finally, it argued that the measures met the requirement of the preamble to Article XX. The EEC and the Netherlands disagreed, stating that the resource to be conserved had to be within the territorial jurisdiction of the country taking the measure. The EEC and the Netherlands were further of the view that the United States measures were not related to the conservation of an exhaustible natural resource under Article XX (g), and were not taken in conjunction with domestic restrictions on production or consumption.

5.12 The Panel proceeded first to examine the text of Article XX(g), which, together with its preamble, states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

The Panel observed that the text of Article XX(g) suggested a three-step analysis:

- First, it had to be determined whether the *policy* in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources.
- Second, it had to be determined whether the *measure* for which the exception was being invoked - that is the particular trade measure inconsistent with the obligations under the General Agreement - was "related to" the conservation of exhaustible natural resources, and whether it was made effective "in conjunction" with restrictions on domestic production or consumption.
- Third, it had to be determined whether the measure was applied in conformity with the requirement set out in the preamble to Article XX, namely that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.

### *1. Conservation of an exhaustible natural resource*

5.13 Concerning the first of the above three questions, the Panel noted that the United States maintained that dolphins were an exhaustible natural resource. The EEC disagreed. The Panel, noting that dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.

5.14 The Panel noted that the EEC and the Netherlands argued that the exhaustible natural resource to be conserved under Article XX (g) could not be located outside the territorial jurisdiction of the country taking the measure. It based this view on an examination of the Article XX (g) in its context, and in light of the object and purpose of the General Agreement. The United States disagreed, pointing out that there was no textual or other basis for reading such a requirement into Article XX (g).

5.15 The Panel observed, first, that the text of Article XX (g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved. It noted that the conditions set out in the text of Article XX (g) and the preamble qualify only the trade measure requiring justification ("related to") or the manner in which the trade measure is applied ("in conjunction with", "arbitrary or unjustifiable discrimination", "disguised restriction on international trade").

The nature and precise scope of the *policy area* named in the Article, the conservation of exhaustible natural resources, is not spelled out or specifically conditioned by the text of the Article, in particular with respect to the location of the exhaustible natural resource to be conserved. The Panel noted that two previous panels have considered Article XX (g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision.<sup>81</sup>

5.16 The Panel then observed that measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX (e) relating to products of prison labour. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.

5.17 The Panel further observed that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory. Nor are states barred, in principle, from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory. A state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fishermen on these vessels, with respect to fish located in the high seas.

5.18 The Panel noted that the parties based many of their arguments on the location of the exhaustible natural resource in Article XX (g) on environmental and trade treaties other than the General Agreement. However, it was first of all necessary to determine the extent to which these treaties were relevant to the interpretation of the text of the General Agreement. The Panel recalled that it is generally accepted that the Vienna Convention on the Law of Treaties expresses the basic rules of treaty interpretation (see Annex B attached), and that the parties to the dispute shared this view. It therefore proceeded to examine the treaties in this light.

5.19 The Panel recalled that the Vienna Convention provides for a general rule of interpretation (Article 31) and a supplementary means of interpretation (Article 32). The Panel first examined whether, under the *general* rule of interpretation of the Vienna Convention, the treaties referred to might be taken into account for the purposes of interpreting the General Agreement. The general rule provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" is one of the elements relevant to the interpretation of a treaty. However the Panel observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and that they did not apply to the interpretation of the General Agreement or the application of its provisions. Indeed, many of the treaties referred to could not have done so, since they were concluded prior to the negotiation of the General Agreement. The Panel also observed that under the general rule of interpretation in the Vienna Convention account should be taken of "any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation." However, the Panel noted that practice under the bilateral and plurilateral treaties cited could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it. The Panel therefore found that under the

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<sup>81</sup>Reports of the Panels in *Canada - Measures affecting the exports of unprocessed herring and salmon*, adopted 22 March 1988, 35S/98; *United States - Prohibition of imports of tuna and tuna products from Canada*, adopted 22 February 1982, 29S/91

general rule contained in Article 31 of the Vienna Convention, these treaties were not relevant as a primary means of interpretation of the text of the General Agreement.<sup>82</sup>

5.20 The Panel then examined whether the treaties referred to might be relevant as a *supplementary* means of interpretation of the General Agreement under the Vienna Convention. The Panel noted that the supplementary means permitted by Article 32 of the Vienna Convention include "the preparatory work of the treaty and the circumstances of its conclusion". However, the terms of this provision make clear that its applicability is limited. Preparatory work and other supplementary means of interpretation may only be used "to confirm" an interpretation reached under the general rule of interpretation, or when application of the general rule "leaves the meaning ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable." Even if interpretation according to the general rule had led to this result, the Panel considered that those cited treaties that were concluded prior to the conclusion of the General Agreement were of little assistance in interpreting the text of Article XX (g), since it appeared to the Panel on the basis of the material presented to it that no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments. The Panel also found that the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement cited by the parties did not provide clear support for any particular contention of the parties on the question of the location of the exhaustible natural resource in Article XX(g). In view of the above, the Panel could see no valid reason supporting the conclusion that the provisions of Article XX (g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (g).

**2. *"Related to" the conservation of an exhaustible natural resource; made effective "in conjunction" with restrictions on domestic production or consumption***

5.21 The Panel then examined the second of the above three questions, namely whether the primary and intermediary nation embargoes imposed by the United States on yellowfin tuna could be considered to be "related to" the conservation of an exhaustible natural resource within the meaning of Article XX (g), and whether they were made effective "in conjunction with" restrictions on domestic production or consumption. The United States argued that its measures met both requirements. The EEC disagreed, stating the measures had to be "primarily aimed" at the conservation of the exhaustible natural resource, and at rendering effective the restrictions on domestic production or consumption.

5.22 The Panel proceeded first to examine the relationship established by Article XX (g) between the trade measure and the policy of conserving an exhaustible natural resource, and between the trade measure and the restrictions on domestic production or consumption. It noted that a previous panel had stated that the scope of the terms "relating to" and "in conjunction with" had to be interpreted in a way that ensured that the scope of provisions under Article XX (g) corresponded to the purposes for which it was included in the General Agreement. That panel had stated that

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<sup>82</sup>Article 31 of the Vienna Convention on the Law of Treaties



"... the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources".<sup>83</sup>

The previous panel had concluded that the term "relating to" should be taken to mean "primarily aimed" at the conservation of natural resources, and that the term "in conjunction with" should be taken to mean "primarily aimed" at rendering effective the restrictions on domestic production or consumption. The Panel agreed with the reasoning of the previous panel, on the understanding that the words "primarily aimed at" referred not only to the purpose of the measure, but also to its effect on the conservation of the natural resource.

5.23 The Panel then proceeded to examine whether the embargoes imposed by the United States could be considered to be primarily aimed at the conservation of an exhaustible natural resource, and primarily aimed at rendering effective restrictions on domestic production or consumption. In particular, the Panel examined the relationship of the United States measures with the expressed goal of dolphin conservation. The Panel noted that measures taken under the *intermediary* nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and policies that harmed or could harm dolphins, as long as it was from a country that imported tuna from countries maintaining tuna harvesting practices and policies not comparable to those of the United States. The Panel then observed that the prohibition on imports of tuna into the United States taken under the intermediary nation embargo could not, by itself, further the United States conservation objectives. The intermediary nation embargo could achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna to the United States, but in third countries from which the exporting country imported tuna.

5.24 The Panel noted also that measures taken under the *primary* nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country's tuna harvesting practices and policies were not comparable to those of the United States. The Panel observed that, as in the case of the intermediary nation embargo, the prohibition on imports of tuna into the United States taken under the primary nation embargo could not possibly, by itself, further the United States conservation objectives. The primary nation embargo could achieve its desired effect only if it were followed by changes in policies and practices in the exporting countries. In view of the foregoing, the Panel observed that both the primary and intermediary nation embargoes on tuna implemented by the United States were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins.

5.25 The Panel then examined whether, under Article XX (g), measures primarily aimed at the conservation of exhaustible natural resources, or primarily aimed at rendering effective domestic restrictions on their production or consumption, could include measures taken so as to force other countries to change their policies with respect to persons or things within their own jurisdictions, and requiring such changes in order to be effective. The Panel noted that the text of Article XX does not provide a clear answer to this question. It therefore proceeded to examine the text of Article XX (g) in the light of the object and purpose of the General Agreement.

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<sup>83</sup>Report of the Panel in *Canada - Measures affecting the exports of unprocessed herring and salmon*, adopted 22 March 1988, 35S/98, 114, para. 4.6

5.26 The Panel observed that Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement.<sup>84</sup> If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.

5.27 The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g). Since an essential condition of Article XX (g) had not been met, the Panel did not consider it necessary to examine whether the United States measures had also met the other requirements of Article XX. The Panel accordingly found that the import prohibitions on tuna and tuna products maintained by the United States inconsistently with Article XI:1 were not justified by Article XX (g).

#### **D. Article XX (b)**

5.28 The Panel noted the United States argument that both the primary and intermediary nation embargoes, even if inconsistent with Articles III or XI, were justified by Article XX (b) as measures necessary to protect the life and health of dolphins. The United States argued that there was no requirement in Article XX (b) that the animals whose life or health was to be protected had to be within the jurisdiction of the country taking the measure. The United States further argued that the measures were necessary to fulfil the policy goal of protecting the life and health of dolphins. Finally, it argued that the measures met the requirement of the preamble to Article XX. The EEC and the Netherlands disagreed, stating that the animals whose life or health was to be protected had to be within the jurisdiction of the country taking the measure. The EEC and the Netherlands were further of the view that the United States measures were not necessary within the meaning of Article XX (b).

5.29 The Panel proceeded first to examine the text of Article XX(b), which, together with its preamble, states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect the human, animal, or plant life or health"

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<sup>84</sup>Reports of the Panels in *Canada - Administration of the Foreign Investment Review Act*, adopted 7 February 1984, 30S/140, 64, para.5.20; *United States - Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, 36S/345, 393, para. 5.27

The Panel observed that the text of Article XX(b) suggested a three-step analysis:

- First, it had to be determined whether the *policy* in respect of which these provisions were invoked fell within the range of policies referred to in these provisions, that is policies to protect human, animal or plant life or health;
- Second, it had to be determined whether the *measure* for which the exception was being invoked - that is the particular trade measure inconsistent with the obligations under the General Agreement - was "necessary" to protect human, animal or plant life or health;
- Third, it had to be determined whether the measure was applied in a manner consistent with the requirement set out in the preamble to Article XX, namely that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.

***1. To protect human, animal or plant life and health***

5.30 Turning to the first of the above three questions, the Panel noted that the parties did not disagree that the protection of dolphin life or health was a policy that could come within Article XX (b). The EEC argued, however, that Article XX (b) could not justify measures taken to protect living things located outside the territorial jurisdiction of the party taking the measure. The United States disagreed. The arguments on this issue advanced by the parties were similar to those made under Article XX (g).

5.31 The Panel recalled its reasoning under Article XX (g). It observed that the text of Article XX (b) does not spell out any limitation on the location of the living things to be protected. It noted that the conditions set out in the text of Article XX (b) and the preamble qualify only the trade measure requiring justification ("necessary to") or the manner in which the trade measure is applied ("arbitrary or unjustifiable discrimination", "disguised restriction on international trade"). The nature and precise scope of the *policy area* named in the Article, the protection of living things, is not specified in the text of the Article, in particular with respect to the location of the living things to be protected.

5.32 The Panel further recalled its observation that elsewhere in the General Agreement measures according different treatment to products of different origins could in principle be taken with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. It could not therefore be said that the General Agreement proscribed in an absolute manner such measures. The Panel further recalled its observation that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory (see paragraph 5.17 above).

5.33 The Panel noted that the United States and the EEC, as under Article XX (g), based many of their arguments regarding the location of the living things to be protected under Article XX (b) on environmental and trade treaties other than the General Agreement. However, for the reasons advanced under its discussion of Article XX (g), the Panel did not consider that the treaties were relevant for the interpretation of the text of the General Agreement (see paragraphs 5.19-5.20). The Panel also noted that the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement did not clearly support any particular contention of the parties with respect to the location of the living thing to be protected under Article XX (b).

The Panel did not see the need to settle the issue argued by the parties as to whether the intent of the drafters was to restrict measures justifiable under Article XX to sanitary measures. The Panel therefore found that the policy to protect the life and health of dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (b).

## 2. "Necessary"

5.34 The Panel then examined the second of the above three questions, namely whether the primary and intermediary nation embargoes imposed by the United States on yellowfin tuna could be considered to be "necessary" for the protection of the living things within the meaning of Article XX (b). The United States argued that its measures met this requirement, since "necessary" in this sense simply meant "needed". The EEC disagreed, stating that the normal meaning of the term "necessary" was "indispensable" or "unavoidable". The EEC further argued that adopted panel reports had stated that a measure otherwise inconsistent with the General Agreement could only be justified as necessary under Article XX (b) if no other consistent measure, or more consistent measure, were reasonably available to fulfil the policy objective.

5.35 The Panel proceeded first to examine the relationship established by Article XX (b) between the trade measure and the policy of protecting living things. It noted that, in the ordinary meaning of the term, "necessary" meant that no alternative existed. A previous panel, in discussing the use of the same term in Article XX (d), stated that

"a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."<sup>85</sup>

This interpretation had also been accepted by another panel specifically examining Article XX (b).<sup>86</sup> The Panel agreed with the reasoning of these previous panels. The Panel then proceeded to examine whether the trade embargoes imposed by the United States could be considered to be "necessary" in this sense to protect the life or health of dolphins.

5.36 The Panel noted that measures taken under the *intermediary* nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and policies that harmed or could harm dolphin, as long as it was from a country that imported tuna from countries maintaining tuna harvesting practices and policies not comparable to those of the United States. The Panel observed that the prohibition on imports of tuna into the United States taken under the intermediary nation embargo could not, by itself, further the United States conservation objectives. The intermediary nation embargo would achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna to the United States, but in third countries from which the exporting country imported tuna.

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<sup>85</sup>Report of the Panel on *United States - Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, L/6439, 36S/345, 392, par. 5.26

<sup>86</sup>Report of the Panel on *Thailand - Restrictions on importation of and internal taxes on cigarettes*, DS10/R, adopted 7 November 1990, 37S/200, 223

5.37 The Panel also recalled that measures taken under the *primary* nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country's tuna harvesting practices and policies were not comparable to those of the United States. The Panel observed that, as in the case of the intermediary nation embargo, the prohibition on imports of tuna into the United States taken under the primary nation embargo could not possibly, by itself, further the United States objective of protecting the life and health of dolphins. The primary nation embargo could achieve its desired effect only if it were followed by changes in policies and practices in the exporting countries. In view of the foregoing, the Panel observed that both the primary and intermediary nation embargoes on tuna were taken by the United States so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins.

5.38 The Panel then examined whether, under Article XX (b), measures necessary to protect the life or health of animals could include measures taken so as to force other countries to change their policies within their own jurisdictions, and requiring such changes in order to be effective. The Panel noted that the text of Article XX is not explicit on this question. The Panel then recalled its reasoning under its examination of Article XX (g) that Article XX, as a provision for exceptions, should be interpreted narrowly and in a way that preserves the basic objectives and principles of the General Agreement. If Article XX (b) were interpreted to permit contracting parties to deviate from the basic obligations of the General Agreement by taking trade measures to implement policies within their own jurisdiction, including policies to protect living things, the objectives of the General Agreement would be maintained. If however Article XX (b) were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which required such changes to be effective, the objectives of the General Agreement would be seriously impaired.

5.39 The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b). Since an essential condition of Article XX (b) had not been met, the Panel did not consider it necessary to examine the further issue of whether the United States measures had also met the other requirements of Article XX. The Panel accordingly found that the import prohibitions on tuna and tuna products maintained by the United States inconsistently with Article XI:1 were not justified by Article XX (b).

#### **E. Article XX (d)**

5.40 The Panel noted the United States argument that the import prohibitions taken under the intermediary nation embargo were justified by Article XX (d), since they were necessary to secure compliance with import prohibitions under the primary nation embargo provisions. The EEC and the Netherlands disagreed. They stated that, since the measures taken under the primary nation embargo were inconsistent with the General Agreement, they could not serve as the basis for an invocation of Article XX (d).

5.41 The Panel examined the text of Article XX(d) which, together with its preamble, stated:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international

trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ... "

The Panel, recalling its finding that the measures taken under the primary nation embargo were inconsistent with Article XI:1 of the General Agreement, concluded that the primary nation embargo could not, by the explicit terms of Article XX (d), serve as a basis for the justification of the intermediary nation embargo.

#### **F. Concluding observations**

5.42 The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel therefore had to resolve whether the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes. The Panel had examined this issue in the light of the recognized methods of interpretation and had found that none of them lent any support to the view that such an agreement was reflected in Article XX.

5.43 The Panel further observed that the dispute settlement procedures cannot add to or diminish rights of contracting parties under the General Agreement. It noted that other procedures existed under the General Agreement that permit the obligations of a contracting party to be waived. The Panel noted that the relationship between environmental and trade measures would be considered in the context of preparations for the World Trade Organization.

### **VI. CONCLUSIONS**

6.1 In the light of its findings above, the Panel concluded that the United States import prohibitions on tuna and tuna products under Section 101 (a)(2) and Section 305 (a)(1) and (2) of the Marine Mammal Protection Act (the "primary nation embargo") and under Section 101 (a)(2)(C) of the Marine Mammal Protection Act (the "intermediary nation embargo") did not meet the requirements of the Note ad Article III, were contrary to Article XI:1, and were not covered by the exceptions in Article XX (b), (g) or (d) of the General Agreement.

6.2 The Panel *recommends* that the CONTRACTING PARTIES request the United States to bring the above measures into conformity with its obligations under the General Agreement.

## **Annex A**

### **Excerpts from the Marine Mammal Protection Act of 1972**

#### **Definitions**

**Sec. 3** For the purposes of this Act -

(...)

(5) The term 'intermediary nation' means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 101(a)(2)(B).

#### **Moratorium and Exceptions**

**Section 101. (a)** Imposition: exceptions - There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) [scientific research etc.]

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 104 of this title subject to regulations prescribed by the Secretary in accordance with section 103 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States;

(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting,

except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless

(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

(II) the average rate of the incidental taking by vessels of the harvesting nation is not more than 2.0 times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

(III) the total number of eastern spinner dolphin (*Stenella longirostris*) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (*Stenella attenuata*) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

(V) the harvesting nation complied with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h) of this title;

(C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six



months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B);

(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fisherman's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect.

### **International Commitments**

**Sec. 305** (a) Limitation on Application of Ban on Imports. -- Except as provided in subsection (b), the Secretary of the Treasury shall not, under section 101(a)(2) (A) and (B), ban the importation of yellowfin tuna or yellowfin tuna products from a country that transmits to the Secretary of State a formal communication in which the country commits to --

(1) implement a moratorium of at least 5 years duration beginning March 1, 1994, on the practice of harvesting tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals unless the moratorium is terminated in accordance with section 302(c);

(2) require an observer on each vessel of the country larger than 400 short tons carrying capacity which engages in purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, and ensure that at least 50 percent of all such observers are responsible to, and supervised by, a competent regional organization

(3) reduce the dolphin mortality resulting from purse seine net operations conducted by vessels of the country in 1992 to a level that is lower than such mortality in 1991 by a statistically significant margin; and

(4) reduce the dolphin mortality resulting from purse seine net operations conducted by vessels of the country in the period beginning January 1, 1993, and ending February 28, 1995, to a level that is lower than such mortality in 1992 by a statistically significant margin.

(b) SUBSEQUENT BANS ON FISH AND FISH PRODUCT IMPORTS FOR FAILURE TO COMPLY WITH COMMITMENTS. -

(1) BAN ON IMPORTS OF YELLOWFIN TUNA AND YELLOWFIN TUNA PRODUCTS.- The Secretary, in consultation with the Secretary of State, shall periodically determine whether each country which has transmitted a formal communication expressing the commitments described in subsection (a) is fully implementing those commitments. If the Secretary determines that any such country is not implementing those commitments-

(A) the Secretary shall notify the President and the Congress of that determination; and

(B) 15 days after such notification, the Secretary of the Treasury shall ban the importation from that country of all yellowfin tuna and yellowfin tuna products.

(2) BAN ON IMPORTS OF OTHER FISH AND FISH PRODUCTS.-

(A) IN GENERAL. -If-

(i) a country does not, within 60 days after the establishment with respect to that country of a ban on importation under paragraph (1)(B), certify and provide reasonable proof to the Secretary that the country has fully implemented the commitment described in subsection (a)(1) or has taken the necessary actions to remedy its failure to comply with the commitments described in subsection (a) (2), (3), and (4); and

(ii) the Secretary does not, before the end of that 60-day period, certify to the President that the country has provided such certification and proof;

the President shall direct the Secretary of the Treasury to ban the importation from the country of all articles (other than those subject to an importation ban under paragraph (1)(B) that are classified under one or more of those fish product categories that the President, subject to subparagraph (B), considers appropriate to carry out this paragraph.

(B) BAN CRITERIA.- The one or more fish and fish product categories to which the President imposes an import ban under subparagraph (A) with respect to a country must be a fish and fish product category or categories with respect to which the articles classified thereunder and imported from that country in the base year had an aggregate customs valuation equal to 40 per cent of the aggregate customs valuation of all articles classified under all fish and fish product categories that were imported from the country during the base year.

(C) DEFINITION OF BASE YEAR.- For purposes of subparagraph (B), the term 'base year' means the calendar year immediately occurring before the calendar year in which the import ban under subparagraph (A) commences with respect to the country

(3) DURATION OF IMPORT BANS. - Bans on importation imposed under paragraphs (1) and (2) with respect to a country shall continue in effect until the Secretary determines that the country is implementing the commitments described in subsection (a).

(4) IMPLEMENTATION OF IMPORT BANS.- The Secretary of the Treasury shall take such action as may be necessary or appropriate to implement importation bans imposed under paragraphs (1) and (2).

"(c) REVIEWS AND REPORTS.- The Secretary, in consultation with the Secretary of State, shall-

(1) periodically review the activities of countries which have transmitted to the Secretary of State formal communications expressing the commitments described in subsection (a), to determine whether those countries are complying with those commitments; and

(2) include the results of those reviews in annual reports submitted to the Congress pursuant to section 304(a).

## **Annex B**

### **Excerpts from the Vienna Convention on the Law of Treaties**

#### **ARTICLE 31**

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### **ARTICLE 32**

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.