GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel

1. INTRODUCTION

1.1. On 5 November 1990, Mexico requested consultations with the United States concerning restrictions on imports of tuna[1]. These consultations were held on 19 December 1990. On 25 January 1991 Mexico requested the CONTRACTING PARTIES to establish a panel under Article XXIII:2 to examine the matter[2] as the sixty-day period for consultations had expired without a mutually satisfactory adjustment having been reached.[3] On 6 February 1991 the Council agreed to establish the Panel and authorized its Chairman to designate the chairman and members of the Panel in consultation with the parties concerned. At that meeting of the Council, Australia, Canada, Chile, Colombia, Costa Rica, the European Communities, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, Singapore, Tanzania, Thailand, Tunisia and Venezuela reserved their rights to be heard by the panel and to make written submissions to the Panel.[4]

1.2. On 12 March 1991, the Council was informed that the Panel would have the following composition:

Chairman: Mr. András Szepesi
Members: Mr. Rudolf Ramsauer
Mr. Elbio Rosselli

As the parties had not agreed otherwise within twenty days from the establisment of the Panel, standard terms of reference apply[5], as follows:

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[1] C/M/246/27

[2] DS21/1

[3] Decision on "Improvements to the GATT Dispute Settlement Rules and Procedures", adopted 12 April 1989, BISD 36S/61, 62, para. C(2).

[4] C/M/247/16

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

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Mexico in document DS21/1 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.".

1.3. The Panel held meetings with the parties to the dispute on 14 and 15 May and 17 June 1991. Australia, the European Communities, Indonesia, Japan, Korea, the Philippines, Senegal, Thailand and Venezuela made oral presentations to the Panel on 15 May, and Canada and Norway submitted their separate views in writing. The Panel submitted its conclusions to the parties on 16 August 1991.

2. FACTUAL ASPECTS

Purse-seine fishing of tuna

2.1. The last three decades have seen the deployment of tuna fishing technology based on the "purse-seine" net in many areas of the world. A fishing vessel using this technique locates a school of fish and sends out a motorboat (a "seine skiff") to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.

2.2. Studies monitoring direct and indirect catch levels have shown that fish and dolphins are found together in a number of areas around the world and that this may lead to incidental taking of dolphins during fishing operations.[6] In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean surface and intentionally encircling them with nets to catch the tuna underneath. This type of association has not been observed in other areas of the world; consequently, intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the Eastern Tropical Pacific Ocean. When dolphins and tuna together have been surrounded by purse-seine nets, it is possible to reduce or eliminate the catch of dolphins through using certain procedures.

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[6]See, for instance, Simon P. Northridge, "World Review of Interactions between Marine Mammals and Fisheries", consultant report published as FAO Fisheries Technical paper Nº 251 Supplement 1, FIRM/T251 (Suppl.1), Food and Agriculture Organization of the United Nations (Rome, 1991).

Marine Mammal Protection Act of the United States (Measures on imports from Mexico)

2.3. The Marine Mammal Protection Act of 1972, as revised (MMPA)[7], requires a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except where an exception is explicitly authorized. Its stated goal is that the incidental kill or serious injury of marine mammals in the course of commercial fishing be reduced to insignificant levels approaching zero. The MMPA contains special provisions applicable to tuna caught in the ETP, defined as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coasts of North, Central and South America.[8] These provisions govern the taking of marine mammals incidental to harvesting of yellowfin tuna in the ETP, as well as importation of yellowfin tuna and tuna products harvested in the ETP. The MMPA is enforced by the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, except for its provisions regarding importation which are enforced by the United States Customs Service under the Department of the Treasury.

2.4. Section 101(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by United States fishermen in the course of commercial fishing pursuant to a permit issued by NMFS, in conformity with and governed by certain statutory criteria in sections 103 and 104 and implementing regulations.[9] Only one such permit has been issued, to the American Tuna-boat Association, covering all domestic tuna fishing operations in the ETP. Under the general permit issued to this Association, no more than 20,500 dolphins may be incidentally killed or injured each year by the United States fleet fishing in the ETP. Among this number, no more than 250 may be coastal spotted dolphin (Stenella attenuata) and no more than 2,750 may be Eastern spinner dolphin (Stenella longirostris). The MMPA and its implementing regulations include extensive provisions regarding commercial tuna fishing in the ETP, particularly the use of purse-seine nets to encircle dolphin in order to catch tuna beneath (referred to as "setting on" dolphin). These provisions apply to all persons subject to United States jurisdiction and vessels subject to United States jurisdiction, on the high seas and in United States territory, including the territorial sea of the United States and the United States Exclusive Economic Zone. Although MMPA enforcement provisions provide for forfeiture of cargo as a penalty for violation of its regulations on harvesting of tuna, neither the MMPA provisions nor their implementing regulations otherwise prohibit or regulate the sale, offer for sale, purchase, transportation, distribution or use of yellowfin tuna caught by the United States fleet.

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[7]P.L. 92-522, 86 Stat. 1027 (1972), as amended, notably by P.L. 100-711, 102 Stat. 4755 (1988) and most recently by P.L. 101-627 at 104 Stat. 4467 (1990); codified in part at 16 U.S.C. 1361ff.

[8]Title 50, Code of Federal Regulations (CFR) §216.3 (1990).

[9]The implementing regulations were codified at Part 216 of Title 50 CFR (1990); regulations on commercial fishing appeared at 50 CFR §216.24 (1990).

2.5. Section 101(a)(2) of the MMPA also states that "The Secretary of 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". This prohibition is mandatory. Special ETP provisions in section 101(a)(2)(B) provide that importation of yellowfin tuna harvested with purse-seine nets in the ETP and products therefrom is prohibited unless the Secretary of Commerce finds that (i) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by United States vessels. The Secretary need not act unless a harvesting country requests a finding. If it does, the burden is on that country to prove through documentary evidence that its regulatory regime and taking rates are comparable. If the data show that they are, the Secretary must make a positive finding.

2.6. The provisions for ETP yellowfin tuna in section 101(a)(2)(B) of the MMPA provide special prerequisites for a positive finding on comparability of a harvesting country's regulatory regime and incidental taking rates. The regulatory regime must include the same prohibitions as are applicable under United States rules to United States vessels. The average incidental taking rate (in terms of dolphins killed each time the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of United States vessels in the same period. Also, the share of Eastern spinner dolphin and coastal spotted dolphin relative to total incidental takings of dolphin during each entire (one-year) fishing season must not exceed 15 per cent and 2 per cent respectively. NMFS regulations have specified a method of comparing incidental taking rates by calculating the kill per set of the United States tuna fleet as an unweighted average, then weighting this figure for each harvesting country based on differences in mortality by type of dolphin and location of sets; these regulations have also otherwise implemented the MMPA provisions on importation.[10]

2.7. On 28 August 1990, the United States Government imposed an embargo, pursuant to a court order, on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets in the ETP until the Secretary of Commerce made positive findings based on documentary evidence of compliance with the MMPA standards. This action affected Mexico, Venezuela, Vanuatu, Panama and Ecuador. On 7 September this measure was removed for Mexico, Venezuela and Vanuatu, pursuant to positive Commerce Department findings; also, Panama and Ecuador later prohibited their fleets from setting on dolphin and were exempted from the embargo. On 10 October 1990, the United States Government, pursuant to court order,

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[10]NOAA (NMFS), "Regulations Governing the Importation of Tuna Taken in Association with Marine Mammals" (interim final rule), 54 Federal Register 9438 (7 March 1989); "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations" (final rule) 55 Federal Register 11921 (30 March 1990).

imposed an embargo on imports of such tuna from Mexico until the Secretary made a positive finding based on documentary evidence that the percentage of Eastern spinner dolphins killed by the Mexican fleet over the course of an entire fishing season did not exceed 15 per cent of dolphins killed by it in that period. An appeals court ordered on 14 November 1990 that the embargo be stayed, but when it lifted the stay on 22 February 1991, the embargo on imports of such tuna from Mexico went into effect.[11]

2.8. On 3 April 1991, the United States Customs Service issued guidance implementing a further embargo, pursuant to another court order of 26 March, on imports of yellowfin tuna and tuna products harvested in the ETP with purse-seine nets by vessels of Mexico, Venezuela and Vanuatu. Under this embargo, effective 26 March 1991, the importation of yellowfin tuna, and "light meat" tuna products which can contain yellowfin tuna, under specified Harmonized System tariff headings[12] is prohibited unless the importer provides a declaration that, based on appropriate inquiry and the written evidence in his possession, no yellowfin tuna or tuna products in the shipment were harvested with purse-seines in the ETP by vessels from Mexico, Venezuela or Vanuatu. The importer of such tuna or tuna products is also required to submit the NOAA Form 370-1 "Yellowfin Tuna Certificate of Origin". Form 370-1 requires the importer to declare the country under whose laws the harvesting vessel operated, which is then deemed to be the country of origin of the tuna. Over-the-side sales of fish are subject to the same information requirements. For unprocessed tuna there is no difference between the country of origin for customs purposes and for purposes of the MMPA. The country of origin is the country under whose laws the vessel harvesting the tuna is registered.

2.9. The MMPA also provides that six months after the effective date of an embargo on yellowfin tuna or tuna products, the Secretary of Commerce shall certify this fact to the President. This certification triggers the operation of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)), also known as the "Pelly Amendment". This provision provides discretionary authority for the President to order a prohibition of imports of fish products "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

Marine Mammal Protection Act (Measures on intermediary country imports)

2.10. Section 101(a)(2)(C) of the MMPA states that for purposes of applying the direct import prohibition on yellowfin tuna and tuna products described

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[11]National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals", 56 Federal Register 12367 (25 May 1991).

[12]The Customs guidance of 3 April specified that the merchandise concerned was provided for under the headings 0302.32.00.00, 0303.42.00.20, 0303.42.00.40, 0303.42.00.60, 1604.14.10.00, 1604.14.20.40, 1604.14.30.40, 1604.14.40.00, and 1604.14.50.00.

in paragraph 2.5 above, the Secretary of Commerce "shall require the Government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such importation to the United States". Unless the intermediary nation's ban is effective within sixty days of the effective date of the United States ban, and the Secretary receives this proof within ninety days of the effective date of the United States ban, then imports of yellowfin tuna and tuna products from the intermediary nation are prohibited effective on the ninety-first day. Six months after the intermediary nation prohibition goes into effect, the Secretary of Commerce must so certify to the President, triggering the Pelly Amendment as above.

2.11. On 15 March 1991 NMFS announced that the intermediary nations embargo would go into effect on 24 May 1991.[13] On 12 June 1991, NMFS published notice that it would request the United States Customs Service to obtain with respect to each shipment of yellowfin tuna or tuna products from a country identified as an intermediary nation both the Yellowfin Tuna Certificate of Origin, and a declaration by the importer that based on appropriate inquiry and the written evidence in his possession, no yellowfin tuna or tuna product in the shipment were harvested with purse-seines in the ETP by vessels from Mexico.[14] The identified countries are Costa Rica, France, Italy, Japan and Panama.[15] This requirement has applied to all imports of yellowfin tuna and tuna products from the identified countries since the effective date of 24 May 1991. Importations from these countries without the declaration will be refused entry into the United States.[16]

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[13]National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals", 56 Federal Register 12367 (25 May 1991).

[14]National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations", 56 Federal Register 26995 (12 June 1991).

[15]Letter from United States National Marine Fisheries Service to United States Customs Service dated May 24, 1991.

[16]National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations", 56 Federal Register 26995 (12 June 1991).

Dolphin Protection Consumer Information Act

2.12. The Dolphin Protection Consumer Information Act (DPCIA)[17] specifies a labelling standard for any tuna product exported from or offered for sale in the United States. "Tuna products" covered include any tuna-containing food product processed for retail sale, except perishable items with a shelf life of less than three days. Under this statute, it is a violation of section 5 of the Federal Trade Commission Act (FTCA) for any producer, importer, exporter, distributor or seller of such tuna products to include on the label of that product the term "Dolphin Safe" or any other term falsely suggesting that the tuna contained therein was fished in a manner not harmful to dolphins, if it contains tuna harvested in either of two situations. The two situations are (1) harvesting in the Eastern Tropical Pacific Ocean by a vessel using purse-seine nets which does not meet certain specified conditions for being considered dolphin safe, and (2) harvesting on the high seas by a vessel engaged in driftnet fishing. Violations of Section 5 of the FTCA are subject to civil penalties. The DPCIA provided that its labelling standard and civil penalty provisions for tuna products would take effect on 28 May 1991. Regulations to implement the DPCIA had not yet been issued at the time of the Panel's consideration.

3. MAIN ARGUMENTS

Findings and Recommendations Requested by the Parties

3.1. Mexico requested the Panel to find, with respect to the MMPA import prohibition imposed on yellowfin tuna and tuna products from Mexico, that inter alia:

(a) the embargo provisions in MMPA section 101(a)(2) as well as relevant provisions of the corresponding regulations were inconsistent with the general prohibition of quantitative restrictions under Article XI; the provisions of MMPA section 101(a)(2)(B) and relevant implementing regulations established discriminatory specific conditions for a specific geographical area, in violation of Article XIII;

(b) once the question of whether or not the United States measures were compatible with Articles XI and XIII has been clarified (i.e. after products could be imported), the conditions of comparison between yellowfin tuna regulation in the United States and in another country provided in the MMPA violated Article III (the conditions referred to being those in MMPA sections 101(a)(2)(B)(I), (II) and (III), and 104(h)(2)(A) and (B), as well as relevant implementing regulations); and

(c) the possible extension of the import prohibition to "all fishery products" from Mexico under the provisions of MMPA section 101(a)(2)(D), the Pelly Amendment and relevant implementing regulations were in violation of Article XI.

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[17] Section 901, Public Law 101-627, 104 Stat. 4465-67, enacted 28 November 1990, codified in part at 16 U.S.C. 1685.

3.2. With respect to the "intermediary nations embargo" imposed on importation into the United States of such tuna products from other contracting parties, Mexico requested the Panel to find that MMPA section 101(a)(2)(C) and the relevant implementing regulations were in violation of Article XI and that the possible extension of the import prohibition to "all fishery products" from an "intermediary nation" under the provisions of MMPA section 101(a)(2)(D), the Pelly Amendment and relevant implementing regulations was in violation of Article XI.

3.3. With respect to the Dolphin Protection Consumer Information Act, Mexico requested that the Panel find this legislation was inconsistent with Articles IX and I by virtue of its establishment of discriminatory and unfavourable specific conditions for a specific geographical area.

3.4. Mexico also requested that the Panel find that none of the measures mentioned in paragraphs 3.1 to 3.3 above were justified under the General Agreement.

3.5. Mexico suggested that the Panel recommend that the CONTRACTING PARTIES request the United States to bring its measures into conformity with its obligations under the General Agreement.

3.6. The United States requested the Panel to find that:

(a) The measures imposed under the MMPA with respect to certain domestic yellowfin tuna from Mexico were internal regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of tuna and tuna products consistent with Article III:4; and

(b) even if these measures are not consistent with Article III, they were covered by the exceptions in Article XX(b) and XX(g).

3.7. The United States further requested that the Panel find, with respect to the MMPA measures prohibiting imports of yellowfin tuna and tuna products from "intermediary nations", that:

(a) the "intermediary nations" measures were also regulations consistent with Article III, and

(b) even if they are not consistent with Article III, these measures were within the scope of Article XX(b), XX(d) and XX(g).

3.8. The United States further requested that the Panel find, with respect to the Dolphin Protection Consumer Information Act, (a) that these measures were subject not to Article IX but to Articles I and III, and (b) that because the Act discriminated on the basis of the waters in which the tuna is caught, not the origin of the tuna, it was consistent with the requirements of Articles I and III.

3.9. The United States asked the Panel to reject Mexico's complaint.

Marine Mammal Protection Act (Measures on imports from Mexico)

Article XI

3.10. Mexico stated that section 101(a)(2) of the MMPA, the relevant provisions of the corresponding regulations and the United States prohibition on imports of yellowfin tuna and yellowfin tuna products from Mexico were contrary to Article XI of the General Agreement, and that the provisions of Article XI:2 did not apply. According to GATT practice an infringement of obligations assumed under the General Agreement was considered prima facie to constitute a case of nullification or impairment within the meaning of Article XXIII[18]. Mexico therefore requested that the Panel find that these measures were inconsistent with Article XI and nullified or impaired benefits accruing to Mexico under the General Agreement, and recommend that the United States bring the MMPA and its measures thereunder into conformity with the General Agreement.

3.11. The United States said that these measures were not covered by Article XI but were laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of yellowfin tuna harvested in the ETP with purse-seine nets, and fully consistent with Article III; these measures were in turn enforced at the time or point of importation and were "subject to Article III" under the Note Ad Article III. The United States recalled the report of a previous panel[19] and stated that measures subject to the provisions of Article III were not to be considered in the context of Article XI or XIII.

3.12. Mexico responded that the precedent cited by the United States referred to the interpretation of Article XI and not to the interpretation of Article III as such; the same precedent clearly stated that "the General Agreement distinguishes between measures affecting the importation of products, which are regulated in Article XI:1, and those affecting imported products, which are dealt with in Article III"; another panel report had stated that: "the Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it has already found that they were inconsistent with Article XI"[20]; the expression "subject to" in the Note Ad Article III did not exclude the other GATT Articles but simply meant that Article III also applied. Mexico also referred to a statement in the preparatory work of the General Agreement that "We need also to make sure that internal regulations

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[18]Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance adopted 28 November 1979, BISD 26S/210, 216.

[19]Panel report on "Canada - Administration of the Foreign Investment Review Act", BISD 30S/140, 162 para. 5.14.

[20]Panel report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies", adopted 22 March 1988, BISD 35S/37, 90, para. 4.26.

cannot be so manipulated as to circumvent the intentions of the provisions which we are about to suggest in the matter of quotas and quantitative regulation."[21]

3.13. Mexico also stated that the possible extension of the embargo to all fishery products, under MMPA section 101(a)(2)(D) and the Pelly Amendment, would be contrary to Article XI. The United States responded that the Pelly Amendment was a discretionary provision, which authorized but did not require the President to take action against fish or wildlife products of the country certified. The United States further noted that the Pelly Amendment specifically required that the President may take such action only to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade. Mexico replied that as long as a legal provision to extend the embargo to all fishery products existed, even on a discretionary basis, its exports of those products were threatened by the United States legislation. If the United States justification were the discretionary character of this provision, then the United States should commit itself not to use it against Mexico or, in the absence of such commitment, the Panel should determine if that prohibition would be sanctioned by the General Agreement.

Article XIII

3.14. Mexico also argued that section 101(a)(2)(B) of the MMPA, relevant provisions of the corresponding regulations and the ban on imports of yellowfin tuna and yellowfin tuna products from Mexico were based on the establishment of discriminatory specific conditions for a specific geographical area, contrary to Article XIII of the General Agreement. The statutory provisions giving rise to the embargo against Mexico applied solely to yellowfin tuna fishing in the ETP as defined by the MMPA, not the other tuna or geographical areas. It therefore could not be said that "the importation of the like product of all third countries ... is similarly prohibited" as required by Article XIII. The discrimination applied against countries which fish in the ETP (which under the MMPA included the Mexican coasts and Exclusive Economic Zone) and benefitted the other parts of the world where tuna is also fished and to which the United States fleet had largely moved in recent years. Only after the United States fleet moved to other waters were more restrictive requirements imposed in 1988 for the protection of dolphin in the ETP - but not for the new fishing grounds of the United States fleet. Mexico noted that the precedent cited by the United States in paragraph 3.11 above only referred to Article XI in relation to Article III. Furthermore, Article XIII required that any prohibition, justified or not under Article XI, had to be applied on a non-discriminatory basis.

3.15. The United States stated that these measures were not covered by Article XI but by Article III, and that measures subject to the provisions of Article III were not to be considered in the context of Article XI or XIII.

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[21] EPCT/C.II/PV/10

The United States also noted that in fact the 1988 requirements were imposed before most of the United States fleet left the ETP.

Article III

3.16. Mexico stated that once the question of whether or not the United States measures were compatible with Articles XI and XIII had been clarified, the examination of this case would show that the MMPA was also contrary to Article III of the General Agreement. Mexico recalled that Article III referred to "taxes and other charges" and to "all laws, regulations or requirements" affecting products, not producers. Similarly, the Note Ad Article III referred to "any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product". Thus, internal regulations on producers could not be imposed at the border on imported products, just as taxes on producers could not be adjusted for in border tax adjustments on products. However, this did not mean that regulations on production could not be imposed at the border when such regulations were compatible with the General Agreement as a whole. Domestic tuna and tuna products were "like products" with respect to imported tuna and tuna products. However, while the United States embargo applied to tuna, what the United States applied for foreign fleets was a hybrid "tuna/dolphin" category existing neither in the natural world nor in tariff nomenclature: tuna associating with dolphins. Thus, the MMPA was inconsistent with the "like product" requirement in all articles of the GATT including Article III. Furthermore, Mexico stated, a measure regulating a product could not legally discriminate between domestic and imported products based solely on the production process; to do so would violate Article III.

3.17. Mexico also stated that the MMPA could not be considered as a production or processing method (PPM) for the following reasons. Firstly, from the legislation and the United States submissions to the Panel, it was clear that the purpose of this legislation was to protect dolphins, not to regulate production of tuna as such. Moreover, the MMPA established a prohibition on imports of tuna in terms of the results achieved by the United States fleet regarding dolphins, so this was a comparison criterion and not a PPM. The MMPA was aimed at governments in terms of programmes and results, and not at producers as should be the case for a production or processing method. Also, a PPM would apply to production with no distinction between domestic and foreign producers, but the MMPA contained two totally different sets of requirements, one for nationals (the general permit granted to the American Tunaboat Association) and another for foreigners (the formula provided by regulation for calculating the average rate of incidental taking of marine mammals, or ARITMM). A PPM would apply to production with no distinction between geographical areas, but the specific provisions of the MMPA referred only to a very special type of yellowfin tuna, caught with purse-seines in the ETP. In addition to that, the provisions of the MMPA did not affect or depend in any way on the physical characteristics of the embargoed product (yellowfin tuna).

3.18. The United States stated that it considered the regulations of the MMPA to be regulations affecting a product of national origin within the meaning of Article III:4 since yellowfin tuna could not be lawfully

harvested in the ETP except in accordance with the regulations. For example, the MMPA provided for a general permit, subject to conditions, to "authorize and govern the taking of marine mammals incidental to commercial purse-seine fishing for yellowfin tuna" (MMPA section 104(h)(2)(A)). The permit and associated regulations regulated the production of yellowfin tuna. Accordingly, the regulations affected the product, yellowfin tuna. It was not clear that there was in every case a meaningful distinction between regulations affecting the sale and purchase of a product and those affecting the production of the product. The production method for a product could be unlawful, therefore rendering the sale of a product produced by that method unlawful. The United States also noted that the regulations of the MMPA are clearly a PPM. They are intended to protect dolphin by regulating the production of tuna. The comparison made under the MMPA is whether the PPMs of another harvesting nation are comparable to the PPMs under the MMPA.

3.19. The United States further stated that these regulations were enforced at the time or point of importation and were "subject to Article III" under the Note Ad Article III. Where the United States had requirements in place regarding the production method for a particular product, such as in the current proceeding on tuna, the United States could then exclude imports of that product that did not meet the United States requirements, provided that such regulations were not applied so as to afford protection to domestic production (as provided in Article III:1), and as long as the treatment accorded the imported product was no less favourable than the treatment accorded the like domestic product (as provided in Article III:4). The fact that enforcement of the United States requirements in the case of imported products could take place at the border was explicitly recognized by the Note Ad Article III.

3.20. According to the United States, the requirements regarding production of imported tuna and tuna products were no less favourable than the requirements regarding tuna and tuna products produced by United States vessels, and in fact were more favourable, since there was an additional 25 per cent margin for other countries' vessels than for United States vessels, and other countries' vessels were not constrained by an absolute maximum number of dolphins that could be killed. Therefore, the MMPA regime was fully consistent with Article III. Yellowfin tuna harvested by vessels of other countries in the Eastern Tropical Pacific Ocean using purse-seine nets was "like" yellowfin tuna harvested by vessels of the United States in the Eastern Tropical Pacific Ocean using purse-seine nets. Article III:4 did not differentiate between those laws, regulations and requirements that have an impact on the physical characteristics of a product and those that otherwise affect the internal sale, offering for sale, purchase, transportation, distribution or use. Article III:4 instead required that imported goods be treated no less favourably than like products of national origin in respect of those laws, regulations and requirements. The United States measures at issue therefore were in accord with Article III:4.

3.21. The United States further argued that the Agreement on Technical Barriers to Trade, which they stated further refined parties' obligations with respect to standards, also did not draw a distinction between those laws, regulations and requirements that have an impact on the physical characteristics of a product and those that otherwise affect the internal

sale, offering for sale, purchase, transportation, distribution or use. Nor did that Agreement, in the United States' view, limit the application of requirements regarding production or processing methods. Moreover, marking requirements such as those considered by an earlier Working Party[22] did not have an impact on the physical characteristics of a product, but were within the scope of Article III. Similarly, requirements as to who could sell a product or the conditions of sale for a product did not have any impact on the physical characteristics of a product, but were clearly "requirements affecting the sale of a product".

3.22. Mexico stated that the MMPA provisions for foreign fleets were less favourable than the provisions for the United States fleet and therefore inconsistent with Article III:4. Such inconsistencies included, inter alia, the following: the United States fleet had a general permit for incidental takings (an absolute quantity of 20,500 dolphins per year as a minimum ceiling, since there could be additional permits), while foreign fleets had a specific limit to comply with (average rate of incidental takings of marine mammals per set, or ARITMM). The general permit of the United States fleet was arbitrarily fitted to that fleet's needs, fixed and known in advance, while the criteria used for foreign fleets (ARITMM) varied from year to year, depended on the performance of the United States fleet and were not known in advance but until after the season had closed. The number of United States vessels still fishing in the ETP was so small (only four because they had shifted to other areas before the new provisions of the MMPA were introduced) that this fact alone had artificially lowered the figure for ARITMM; if United States vessels no longer fished in the ETP, the United States ARITMM would be zero. Two different formulas, one for the United States fleet and another for foreign fleets, were used to compare the United States ARITMM against a particular foreign fleet's ARITMM. Finally, the formulas themselves were numerically biased in favour of the United States fleet to the detriment of Mexico.

3.23. Taking the figures provided by the United States as a basis, Mexico further stated that analysis of the computation and comparison of the ARITMM showed that the alleged 25 per cent advantage for foreign fleets did not actually exist. The United States ARITMM as adjusted varied depending on the country ARITMM to which it was being compared. It could be as high as 45.38 dolphins per set (when compared to Ecuador) and as low as 2.31 (when compared to Panama) during the same period (1987). The adjusted United States ARITMM for 1989 with regard to Mexico was 2.9 plus 25 per cent, or 3.62 dolphins per set; yet even though this was the threshold level for an embargo on Mexican tuna, the threshold ARITMM for triggering disciplinary sanctions for the United States fleet was higher, at 3.89 dolphins per set. Moreover, as for the subquota for spinner dolphins, the United States fleet was entitled to a take of 2,750 spinner dolphins under the MMPA, equivalent to 21.75 per cent of the United States total dolphin catch in 1989 (12,643). This figure was much higher (by 45 per cent) than the 15 per cent limit

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[22]Report of the Working Party on "Certificates of Origin, Marks of Origin, Consular Formalities", adopted 17 November 1956, BISD 5S/102, 103-108.

applied to foreign fleets relative to their total dolphin catch, which in addition was a fixed criterion which if not met mandatorily detonated an embargo.

3.24. The United States responded that this argument was based on an inaccurate factual premise. The United States requirements established requirements for the overall regulatory program under which yellowfin tuna is produced in the ETP using purse-seine nets. In the case of vessels of other countries, the United States did not apply these standards to each cargo or vessel, but to the overall regulatory program. For example, under the MMPA, if an individual vessel had a mortality rate in excess of 1.25 times the United States rate, that would not preclude the importation of that vessel's cargo. The test was whether the average rate for all vessels of that country was equal to or less than 1.25 times the rate for United States vessels. In the case of United States vessels, tuna and tuna products produced by United States vessels by definition were produced under a regulatory program that met United States requirements, so tuna and tuna products produced by United States vessels were allowed to be sold in the United States. However, individual vessels in violation of United States regulations would have their catch seized or other enforcement action taken against them. In this respect, imported tuna might receive more favourable treatment than tuna produced by United States vessels since the imported tuna could in some cases be sold in the United States when tuna produced by a United States vessel would be seized instead of being sold in the United States. This was consistent with Article III:4, in the view of the United States. The United States also noted that it had not yet determined how the law would be applied if there were no United States vessels setting on dolphin in the ETP.

3.25. The United States also responded that it was inaccurate to refer to the 20,500 limit as a minimum ceiling. First, no additional permits had ever been issued under the MMPA with respect to commercial tuna fishing in the ETP. However, if any additional permit were to be issued, it would be within the 20,500 limitation. Furthermore, the United States noted that the calculation of the weighted average kill per set for other countries was specifically designed to yield a fair, unbiased comparison of the average kill per set of the United States fleet against the average kill per set of the fleets of other countries. Mexico had never demonstrated that the formula did not yield a fair comparison. It had only claimed that it did not like that fair comparison because an unweighted comparison would have worked to its advantage in the two most recent years (although the weighted, fair comparison had worked to its advantage in the two years previous to that). A comparison of the unweighted average would work to the detriment of other countries, including Mexico, since it would not take account of the differences in mortality due to the type of dolphin involved or the location of the sets. In the past four years (1986 through 1989), the weighted average had increased the kill per set standard for fleets of other countries 16 times out of 20. Furthermore, in the example cited by Mexico of a kill per set of 3.62 compared to a kill per set of 3.89, Mexico was making a distorted comparison, comparing a weighted average for an entire fleet against an unweighted average applicable to a single vessel. If vessels of Mexico had set on the same types of dolphins and in the same locations as the vessels of the United States, the kill per set standard for

Mexico would not have been 3.62 (the United States average) but 4.525 (3.62 times 1.25).

3.26. Mexico responded that the disciplinary measures for the United States fleet were substantially weaker than an embargo because, while the measures for the United States fleet were discretionary (not mandatory) and the cargo seized was an amount of tuna equal to that determined to have been caught in the illegal sets (not the total catch), the embargo for foreign fleets covered the total catch of a given country.

Article XX

3.27. The United States stated that in its view, even if the MMPA measures were otherwise inconsistent with the provisions of the General Agreement, they were authorized under Article XX. Not all measures described by Article XX were inconsistent with the other provisions of the General Agreement; indeed, the Panel need not decide whether the measures of the United States were measures of the type described in Article XX if the Panel accepted the United States position that the United States measures were consistent with the other provisions of the General Agreement, in particular Article III. However, if there were any doubt as to whether the United States measures were consistent with the General Agreement, Article XX would ensure that these measures were not inconsistent with the United States obligations under the General Agreement. Since these measures were of the type described in Article XX, then, as stated in Article XX, nothing in the General Agreement could be construed to prevent the adoption or enforcement of these measures.

3.28. Concerning Article XX in general, Mexico noted that unlike other Articles, Article XX authorized application of measures which would otherwise be contrary to the General Agreement; it had therefore to be used on an extraordinary basis and under the close supervision of the CONTRACTING PARTIES as the watchdog of the multilateral trading system. Mexico also noted generally that exceptions had to be interpreted and applied restrictively so as to ensure that parties did not thereby evade their contractual obligations, and secondly that in accordance with GATT precedent a contracting party which invoked one of the exceptions in Article XX, in this case the United States, had the burden of proving that its measures were justified thereunder.

3.29. Mexico also asserted that a contracting party that invoked Article XX thereby acknowledged ipso facto that its measures were inconsistent with the General Agreement unless shown to be justified under Article XX; that is, a contracting party could not simultaneously argue that its measures were consistent with its other obligations under the General Agreement and argue that they fall under the exceptions in Article XX. Mexico therefore requested that before the Panel proceeded to examine these measures under Article XX, the Panel first establish which measures the United States considered to be compatible with the general rules of GATT and thus not to be examined under Article XX, and which measures the United States considered not to be compatible with these general rules and to be justified by Article XX.

3.30. Mexico further stated that the General Agreement was a contractual instrument which regulated trade relations among contracting parties in accordance with rights and obligations on which they had previously agreed. Since a proposal during the preparatory work of the Havana Charter to include the "conservation of fisheries resources, migratory birds or wild animals"[23] was deliberately not incorporated in the General Agreement, it was clear that such matters were not part of the general exceptions of Article XX of GATT. Therefore, accepting the United States invocation of Article XX on the ground of fisheries conservation would mean creating new obligations through the dispute settlement procedure, whereas the sole authority empowered to do so was the CONTRACTING PARTIES. The United States noted that, unlike in other instances, there was no evidence that the failure to include an explicit reference to fisheries resources in Article XX indicated an intent that they be excluded. To the contrary, previous panels had found that fishery resources were an exhaustible natural resource for purposes of Article XX. The United States also noted that Mexico, in paragraph 3.43, discussed only one of those panel reports. The United States further noted that the measures concerning intermediary nations did not provide for an embargo of intermediary nations, but simply required that goods that could not enter the United States directly could not avoid this restriction by being trans-shipped through, or processed in, another country. Tuna and tuna products, other than yellowfin tuna or tuna products caught by Mexico in the ETP using purse-seines, was not prevented from being imported into the United States.

3.31. Mexico also asserted that nothing in Article XX entitled any contracting party to impose measures in the implementation of which the jurisdiction of one contracting party would be subordinated to the legislation of another contracting party. It could be deduced from the letter and spirit of Article XX that it was confined to measures contracting parties could adopt or apply within or from their own territory. To accept that one contracting party might impose trade restrictions to conserve the resources of another contracting party would have the consequence of introducing the concept of extraterritoriality into the GATT, which would be extremely dangerous for all contracting parties. In this context, Mexico recalled that, under the MMPA, the United States not only arrogated to itself this right of interference, but also the right of interference in trade between other contracting parties, by providing for an embargo of countries considered to be "intermediary nations" simply because they continued to buy products which the United States had unilaterally decided should not be imported by itself or by any other country.

3.32. The United States replied that the MMPA specified the requirements for tuna imported into the United States. It did not subordinate the jurisdiction of one contracting party to the legislation of another contracting party. The United States also noted that dolphin roamed the seas and were therefore common resources within the jurisdiction of no one

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[23]United Nations Conference on Trade and Employment, Reports of the Committees and Principal Subcommittees, ICITO/8 ("Havana Reports"), pp. 84-85, para. 18, 21.

contracting party. Finally, the United States stated that there was nothing in Article XX that distinguished between those measures applied as part of an international agreement and other measures. Nor could conclusions such as those suggested by Mexico be drawn from the failure of the CONTRACTING PARTIES to adopt such a rule.

Article XX(b)

3.33. The United States stated that the MMPA embargo was necessary to protect the life and health of dolphins. No alternative measure was available or had been proposed that could reasonably be expected to achieve the objective of protecting the lives or health of dolphins. Purse-seining for tuna in the ETP meant deliberate encirclement of schools of dolphin with nets. Without efforts to protect them, they would be killed when the tuna was harvested. In order to avoid these needless deaths, the United States had established requirements for tuna production: yellowfin tuna harvested in the ETP using purse-seine nets and imported into the United States must have been 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, the resultant mortality had to be no greater per set than 25 per cent 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 per centages of overall mortality. These measures were directly and explicitly to prevent dolphin deaths or severe injury. Accordingly, it was clear that the measures of the United States were necessary to protect animal life or health.

3.34. Mexico responded that the MMPA embargo was not "necessary" in the sense of Article XX, as the lives and health of dolphins could be protected consistently with the General Agreement. Mexico's own dolphin-protection measures had been taken in conformity with the General Agreement, demonstrating that the General Agreement did not oblige its contracting parties to adopt measures contrary to the environment. Indeed, dolphin protection should be carried out not just for purse-seining in the ETP but in all waters of the world, all fishing methods, all fisheries, and all dolphin species. Thus, Mexico had proposed in the Food and Agriculture Organisation of the United Nations that an international conference be held to examine the interaction of fisheries and incidental taking of marine mammals. The best way of protecting the lives and health of dolphins was international cooperation among all concerned, not by arbitrary, discriminatory and unilateral trade measures.

3.35. Mexico also stated that the text and prior interpretation of Article XX(b) indicated that it referred to protection of the life and health of humans and animals within the territory of the contracting party protecting them. Otherwise, one contracting party could arrogate to itself the right to protect the life or health of humans and animals in international areas or within the territory of other contracting parties. Such a case had never arisen in GATT, was not provided for in the General Agreement, and above all would be contrary to international law.

3.36. The United States responded that a government could prohibit imports of a product in order to protect the life or health of humans, plants or animals outside its jurisdiction. The United States assumed that Mexico shared this view, since Mexico too prohibited the importation of dolphins and dolphin products in order to protect dolphin outside its jurisdiction. In this case, the United States could prohibit imports of tuna produced in a manner resulting in the needless deaths of dolphin outside the jurisdiction of the United States and of any country, since dolphin roam the high seas. The United States noted that under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a CITES party was obligated, inter alia, to prohibit the importation of products in order to protect endangered species found only outside the jurisdiction of that party.

3.37. Further with regard to Article XX(b), Mexico argued that this provision referred solely to protection of the life or health of humans, animals or plants as a population (for instance in the case of epizootics), and not as separate individuals. If it could be invoked to avoid the death of individual animals as claimed by the United States, then countries could restrict imports of beef to prevent the killing of cows abroad, or prohibit imports of any product of a living organism claiming that the prohibition was aimed at protecting the life of that organism. Moreover, according to Mexico, it was not consistent for the United States to claim the protection of dolphins as separate individuals while at the same time, as in the present case, it was authorizing the incidental kill of up to 20,500 dolphins a year by its own fleet. There was no basis to transform this arbitrarily-determined figure into a benchmark for applying Article XX(b) internationally.

3.38. Mexico also stated that, if the purpose of the MMPA was to protect dolphins, as the United States claimed, then that legislation, in order to be compatible with the GATT and with its own objectives, should protect all dolphins regardless of the type of fishery, species of dolphin, fishing method used or geographical area, which was not the case under the special and selective provisions of the MMPA on which the embargo was based. The special provisions of the MMPA applied solely to a situation in which a very special combination existed: yellowfin tuna, associated with certain species of dolphins, fished with purse-seine nets, and caught in the ETP. In this context, Mexico noted that off the Alaskan coast more than 15,000 dolphins were killed each year with drift-nets in squid fishing, with no special provisions to protect them being in place remotely of the kind of those on which the embargo to Mexico was based. Those dolphins were not even counted against the United States general permit for its own fleet (20,500 dolphin per year in the ETP). Similar situations occurred in Georgia and Florida, not to mention other parts of the world. In contrast, Mexico protected all marine mammals with no discrimination by geographical areas, marine mammals species, fishing techniques or fisheries involved. Mexico's protection referred to dolphins as such, not to the way or the place they were incidentally taken.

3.39. The United States replied that the MMPA did in fact protect all dolphins regardless of the type of fishery, species of dolphin, fishing method used or geographical area. In this respect, the United States noted that the MMPA prohibited the taking of marine mammals generally.

Article XX(g)

3.40. The United States further recalled the exception in Article XX(g), for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". The United States, recalling a previous panel, stated that dolphins were an exhaustible natural resource.[24] Dolphin populations would be unable to sustain themselves if too high a mortality rate persisted. The United States noted that the need to conserve dolphin was recognized internationally, as for example in the work of the Inter-American Tropical Tuna Commission and the United Nations Convention on the Law of the Sea. The Government of Mexico had also agreed with the objective of conserving dolphin. The Marine Mammal Protection Act of 1972, under which the import prohibition was taken, was designed to conserve marine mammals, including dolphin, and the current measures were instituted in response to a complaint by conservation groups.

3.41. The United States also stated that the measures in question were made effective in conjunction with restrictions on domestic production or consumption. The United States had imposed comprehensive restrictions on domestic production practices expressly to conserve dolphin, which restrictions were more stringent than those applied to production by foreign vessels. The United States had since the beginning of its regulation of its tuna industry required certain gear and fishing procedures. Currently, it also prohibited sets on dolphin after sundown, prohibited the use of explosives to herd schools of dolphin, regulated the number of speedboats that could be used in purse-seining operations, required that each vessel carry an observer, and enforced performance standards under which no United States vessel operator could exceed a rate of dolphin mortality set in regulations. Violation of these regulations could result in vessel and cargo seizure. The import prohibition at issue in the current dispute was a natural outgrowth of the restrictions on the domestic production of yellowfin tuna in the ETP. The United States measures were primarily aimed at rendering effective these restrictions on the United States fleet, as restricting United States vessel practices would not ensure the conservation of dolphin if other countries' vessels continued to cause dolphin mortality.

3.42. Finally, the United States stated that Article XX(g) did not specify whether the exhaustible natural resources being conserved must be depleted or threatened, nor was it limited in terms of the location of those natural resources. Moreover, the coverage of Article XX(g) was not limited to certain types of conservation measures. The Contracting Parties had not yet had an opportunity to address these questions of interpretation of the General Agreement.

3.43. Mexico argued in reply first that it was clear from the General Agreement, the preparatory work therefor and the established precedents, that the term "exhaustible natural resources" in Article XX(g) did not

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[24] Panel report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/98/112,113 para. 4.4.

include fisheries and fishery products, nor in fact any living being. By definition, exhaustible natural resources were resources which once taken or utilized cannot be renewed: that is, products whose physical or chemical characteristics bring about their destruction or definitive transformation when they are used, such as petroleum, uranium or any other fuel. Living beings, which can reproduce themselves, could not fall within this definition of "exhaustible". Living beings might become extinct as a population, depending on man-made or natural circumstances beyond the control of man (i.e. pollution or urbanization of their habitat, lack of nurseries, variation in climate, epizootics, etc.) but in the case of non-living natural resources, exhaustion occurred simply as a result of exploitation or use of that kind of products. While the panel in 1982 on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" had noted that both parties in that dispute considered tuna an exhaustible natural resource, this merely recorded an agreement between those two parties which did not necessarily apply to all disputes.

3.44. Mexico further argued that even if "exhaustible natural resources" were deemed to include living beings, a resource could be considered exhaustible within the meaning of Article XX(g) if and only if the party invoking the provision showed by means of scientific and internationally-recognized data that the resource in question was actually in danger of extinction. In the present case, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) did not include in its Appendix I list of species in danger of extinction any of the species of dolphins which the United States was claiming to protect. According to CITES, the only dolphins in danger of extinction were dolphins of the genus platanista (species Gangetica and Minor), of the species Lipotes Vexillifer, of the genus Sousa (species Chimensis and Teuszii) and of the genus Sotalia (species Fluviatilis); while the only species of dolphin mentioned in the United States Act are Delphinus Delphis (common dolphin), Stenella Attenuata (spotted dolphin) and Stenella Longirostris (spinner dolphin). The taxonomical difference between the dolphins mentioned in the MMPA and those in danger of extinction according to CITES was so large that there was even not a coincidence at family level. While the three species of protected dolphins in the ETP also existed in all the world's oceans, the dolphins actually threatened with extinction were to be found only outside the ETP and were not protected by United States legislation even though purse-seining was carried out near them. Moreover, data of the Inter-American Tropical Tuna Commission (IATTC) and the United States Government showed that the populations of spotted, spinner and common dolphins in the ETP had remained stable and in some cases had tended to increase. United States authorities (NOAA) had publicly agreed that there was no substantial evidence indicating that dolphin populations in the ETP were threatened with extinction. Mexico further remarked that the United States regulations would lead fishermen not to fish for the large tuna which were associated with dolphin in the ETP; this would undermine conservation of tuna stocks, since the alternative was to fish the younger, immature tuna that had not yet reproduced. From the standpoint of both economics and nature, it was more rational to use a renewable resource after it had reproduced rather than before.

3.45. Nevertheless, Mexico requested that the Panel find in its favour not because the dolphins in question were not in danger of extinction but because the concept itself of "exhaustible natural resource" did not apply to living beings. The Panel should not broaden a general exception which should be interpreted restrictively. Moreover, extension of Article XX(g) to living beings would require future interpreters of it to become expert on fishery questions and the law of the sea, which would raise institutional and practical problems and overlap with the competence of other organizations.

3.46. The United States replied that the text of Article XX(g) referred to "exhaustible natural resources", not to "exhausted natural resources" or "almost exhausted" natural resources. Nowhere in Article XX(g) was there a requirement that the exhaustible resources being conserved be threatened with extinction. This would make no sense; as soon as a species was recovering, the measures to protect or conserve it would no longer be justified under Article XX and the species would then be doomed to a perpetual threat of extinction. It was also not clear to the United States why, if conservation efforts were needed only when a population was in danger of extinction, Mexico had stated it was undertaking strong conservation efforts with respect to dolphins in the ETP. Furthermore, the United States view was that at current mortality rates of over 2 per cent annually, the population was declining and dolphin stocks would never recover to their pre-fishery levels. If a party's measures were based on scientific information evaluated using recognized scientific approaches, a dispute settlement panel in the GATT should not substitute its own judgment for that of the contracting party whose measure is challenged.

3.47. Mexico also argued with respect to Article XX(g) that the United States legislation did not fulfil the condition that the measures in question be applied "in conjunction with restrictions on domestic production or consumption". Firstly, Article XX(g) did not grant rights over extraterritorial natural resources situated in the territory of other contracting parties; secondly, the embargoed product was not the same as the product sought to be conserved; and finally, even if so, the United States was not applying restrictions on domestic production or consumption.

3.48. Mexico stated that the average rates of incidental taking and other MMPA provisions for tuna caught in the ETP represented a unilateral imposition by the United States of extraterritorial restrictions on fishing by other contracting parties in their own economic zones, under the pretext of protecting natural resources located abroad. The interference implicit in such action was not provided for in GATT Article XX(g). It was clear from the letter and spirit of Article XX(g) that it referred to imposition of export restrictions by a contracting party to conserve exhaustible natural resources located in its own territory; hence the requirements that the measures be accompanied by restrictions on domestic production or consumption, as elements to restore equity and non-discrimination as between nationals and foreigners. Permitting one contracting party to impose trade restrictions to conserve the resources of others would introduce the concept of extraterritoriality into the GATT. This would threaten all contracting parties, especially when restrictions were established unilaterally and arbitrarily as in the case of the United States MMPA. The sensitive nature of extraterritoriality and unilaterality had been taken into account in

Article XX(h) which provided that even intergovernmental agreements had to conform "to criteria submitted to the CONTRACTING PARTIES and not disapproved by them".

3.49. The United States replied that there was nothing in Article XX to support assertions that the United States legislation was extraterritorial. These measures simply specified the products that could be marketed in the territory of the United States. Trade measures by nature had effects outside a contracting party's territory; for example, the Note Ad Article III reflected this point in referring to applying a contracting party's requirements at the time or point of importation (that is, before the goods enter that contracting party's customs territory). The conservation objective of these measures motivated and permeated the United States legislation. Without conservation measures, dolphins, a common natural resource, would be exhausted. Without these measures on imports, the restrictions on domestic production would be ineffective at conserving dolphins. Dolphins were highly migratory species that roamed the high seas. The interpretation urged by Mexico would mean that a country must allow access to its market to serve as an incentive to deplete the populations of species that are vital components of the ecosystem. There was a general recognition that countries should not be required to allow this situation. CITES, for example, required a CITES party to restrict imports of specimens of species found only in the territory of another country, in addition to restrictions on listed species found in the high seas or in several countries' territories.

3.50. Mexico went on to note that the United States measures applied to imports of yellowfin tuna and yellowfin tuna products from Mexico whereas the Article XX(g) claim by the United States sought to justify the measures on the ground of the conservation of dolphins. Mexico did not permit its fishermen to intentionally catch dolphins; the issue here was unintentional incidental catching of dolphins in the course of tuna fishing in the ETP. Consequently, the United States was not conserving one resource (dolphins) or two resources (dolphins and tuna) but rather a specific combination of products (tuna/dolphins) located in a specific geographical area (the ETP), which did not correspond to any known trade classification either within or outside GATT. This novel claim was not only contrary to the concept of "like product", but would also raise problems practically impossible to resolve. While the interpretation of "the like product" did vary depending on which provision of the General Agreement was in question, justification of the MMPA's link between measures on tuna and dolphins could be found nowhere in the General Agreement. It was clear from the concept of "like product" and the GATT background that the product to which the restriction applies must be the same product as that which it is sought to conserve. Mexico recalled a prior panel which had found that a country could not justify under Article XX(g) its prohibition on all tuna imports from another country because the first country's measures restricting domestic production or consumption did not include certain tuna (albacore).[25] If restrictions

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[25]Panel report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", adopted 22 February 1982, BISD 29S/91, 108-109, paras. 4.10-4.12.

of the tuna-dolphin type were deemed to be justified under Article XX(g), contracting parties could begin, for example, imposing prohibitions on the import of paper in order to protect the trees used to produce the paper, or on imports of pharmaceuticals to protect the animals used as laboratory test subjects for them.

3.51. Mexico also argued that because the MMPA requirements applied solely to fishing of yellowfin tuna in the ETP, its measures (particularly the quantitative requirements) could not be considered to be "in conjunction with restrictions on domestic production or consumption".

- United States law did not impose any restrictions on domestic production or consumption of tuna in general or yellowfin tuna in particular; the MMPA only limited incidental dolphin mortality for the United States fleet in the ETP, not tuna as such. If the product restricted under Article XX(g) had to be itself subject to domestic production or consumption restrictions, as Mexico had argued, then it was clear that the MMPA failed to meet this requirement.

- While the United States did limit incidental mortality of dolphins, there was no domestic production or consumption of dolphins either in the United States or in Mexico. The limit on incidental dolphin mortality (20,500 dolphins per year) had been the same before and since the MMPA was amended in 1988 to provide for import embargoes on yellowfin tuna and tuna products, and had no causal connection with the 1988 amendments. Moreover, since the embargo was not on dolphins but on tuna it could not be said to have been taken in conjunction with restrictions on domestic production or consumption.

- As for restrictions on tuna/dolphins, no such product existed either in nature or in any known tariff nomenclature, and therefore its application within the general exceptions to the General Agreement would exceed the principle that such exceptions must be interpreted restrictively in order to avoid abuses. Even if this hybrid could be considered under Article XX, it would then be necessary to clarify, for instance, who defines it, what its characteristics were, what its scientific basis was, or what the relationship was between the two.

Finally, argued Mexico, even for tuna/dolphins, the restrictions on the United States fleet applied solely to the ETP, not the entire United States fleet. Since the great majority of the United States tuna fleet did its fishing outside the ETP, this meant that the bulk of United States yellowfin tuna production was not actually or legally subject to such restrictions. The only way of ensuring that all domestic production would be subject to the restrictions was to apply them to all the regions of the world. Mexico referred to a 1991 report of the Food and Agriculture Organization on

tuna-dolphin interactions[26], and stated that this report showed such interactions occurred worldwide.

3.52. The United States responded that the United States measures were limited to the ETP because it was only there that the unique linkage between yellowfin tuna and dolphins occurred, so it was only there that the danger to dolphins from commercial tuna fishing existed. To extend the United States production requirements to tuna harvested beyond the ETP would be to impose unnecessary barriers to trade. This would be contrary to the fundamental principles of the General Agreement. The United States noted that Mexico did permit its fishermen to intentionally catch dolphins, which was inherent in setting on dolphins since the dolphins are deliberately encircled by the purse-seine net. The United States further noted that, unlike in numerous other provisions of the General Agreement, the term "like product" was nowhere used in Article XX(g).

Article XX Preamble: Means of arbitrary or unjustifiable discrimination

3.53. The United States, noting a decision of an earlier panel[27], stated that its measures were not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the MMPA applied evenly to all countries harvesting yellowfin tuna in the ETP with purse-seine nets. The United States further noted that it had taken action under these provisions against Mexico, Venezuela and Vanuatu, and stated that any other country similarly situated would be similarly affected; Ecuador and Panama had been exempted because they had acted to change the conditions applicable to their vessels.

3.54. The United States stated that while the MMPA did set a goal of zero dolphin mortality for all regions of the world, the measures at issue were limited to tuna produced in the ETP because no evidence existed of there being any similar threat to dolphins from tuna harvesting in other areas.

3.55. Mexico replied that its complaint was not based exclusively on the existence of discrimination within the ETP, although the United States formulas for the calculation of comparisons contained elements that discriminated against other countries; rather, Mexico was arguing that discrimination existed, contrary to GATT Article XIII, against the ETP in relation to the rest of the world. Moreover, none of the species of dolphin considered to be threatened with extinction according to CITES existed in the ETP, the three dolphin species explicitly mentioned in the United States

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[26]Simon P. Northridge, "World Review of Interactions between Marine Mammals and Fisheries", consultant report published as FAO Fisheries Technical paper Nº 251 Supplement 1, FIRM/T251 (Suppl.1)., Food and Agriculture Organization of the United Nations (Rome, 1991).

[27]Panel report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", adopted 22 February 1982, BISD 29S/91, 108, para. 4.8.

legislation had stable and increasing populations in recent years, and the species actually threatened with extinction were in other parts of the world where, neither the quantitative provisions of the United States legislation nor the obligation to have on-board observers applied. Also, interaction between commercial fisheries and marine mammals, including dolphins, existed in various parts of the world and not only in the ETP, purse-seine fishing techniques were used in various parts of the world and not only in the ETP, and it was above all up to the United States, as the contracting party invoking Article XX, to substantiate its assertions with facts.

3.56. The United States replied that these dolphin populations were in fact declining, based on the most recent information available. The formula for the calculation of comparisons did not contain elements that discriminated against other countries, but instead the formula was specifically designed to provide a fairer comparison with other countries than would occur without the formula. Also, the association between marine mammals and commercial fisheries outside the ETP was of a totally different nature than the link between yellowfin tuna and dolphins in the ETP and did not pose a threat to dolphins outside the ETP.

Disguised restriction on international trade

3.57. The United States stated that its measures clearly were not a disguised restriction on trade since the sole objective was to conserve and protect the lives or health of dolphins. Any trade effects were explicit on the face of the MMPA and in its application.[28] The measures did not afford protection to the United States tuna fleet, as United States vessels were subject to stricter requirements than those applied with respect to vessels of other countries. The import prohibition at issue was ineffective in any event at affording protection as only 20 per cent of all United States tuna imports were of ETP-harvested yellowfin tuna, and over 38 per cent of ETP-harvested yellowfin tuna imports in 1990 were from Panama and Ecuador which were unrestricted.

3.58. Mexico agreed that the United States legislation clearly indicated the trade effects of its application, and agreed with the panel finding cited by the United States. However, this did not mean that the publication of the trade effects was the sole criterion for determining whether there is a disguised restriction on international trade. It could also happen that the disguise would consist of cloaking a trade measure under considerations of another order. Mexico and other countries had been the object of earlier embargoes for not having agreed to allow the United States fleet access to their resources; embargoes stemming from problems concerning access to resources were clearly being replaced by embargoes imposed for ecological considerations; and during the consideration of the most recent amendments to the MMPA a United States Congressman had made an on-the-record statement that the ecological embargo against Mexico should not be lifted until Mexico

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[28]Panel report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", adopted 22 February 1982, BISD 29S/91, 108, para. 4.8.

allowed access to its waters. Furthermore, the MMPA provisions for the ETP were imposed after the bulk of the United States fleet shifted to other areas; the prescribed comparison method protected the United States fleet and not dolphins; the embargo eliminated other ETP harvesting countries (and intermediary nations) from the United States market; the United States fleet had repeatedly applied to its government for protection; and tuna had been excluded as a sensitive product from the United States zero for zero initiative for fisheries products in the Uruguay Round. Furthermore, regarding import shares and protection, 20 per cent of total imports of a product was not a negligible amount; for instance, even a 10 per cent import share was sufficient for a country to be a substantial supplier under Article XXVIII. Finally, it was clear that a law that imposed on other fleets mortality rates that increased if the mortality obtained by the United States fleet increased was a law to protect the United States fleet rather than dolphins.

3.59. The United States replied that the embargoes referred to by Mexico were applied years ago under separate authority for different reasons. It also noted that the statement by one Congressman referred to by Mexico occurred after the United States measures were applied against Mexico, was made in connection with legislation unrelated to the United States measures at issue here, and clearly did not represent the purpose behind the United States measures. The United States also noted that the United States requirements were imposed prior to the shift of part of the United States fleet referred to by Mexico. The United States also responded that the fact that United States vessels were held to an absolute maximum limit on dolphin mortality, while the vessels of other countries were not, demonstrated that the United States requirements provided more favourable treatment for imported tuna than for domestically-produced tuna, particularly since an absolute limit with respect to vessels of other countries would not take account of the seasonal variations in dolphin mortality due not to fishing practices but to natural conditions.

4. SUBMISSIONS BY INTERESTED THIRD PARTIES

Australia

4.1. Australia stated that the GATT was silent on measures directed toward the conservation of marine mammals outside the territories of individual contracting parties. A panel could not resolve conflicts between a contracting party's obligations under the General Agreement and its obligations under other instruments such as those in respect of the conservation of marine mammals. A panel also had no competence to rule on the actual danger to health, morals or the environment represented by specific goods or their method of production (although it could accept expert evidence on such dangers). Controls on trade flows necessary to give effect to international conventions, for instance on narcotics, should be considered as incidental to GATT obligations. However, where a contracting party takes a measure with extraterritorial application outside of any international framework of cooperation, it is appropriate for the GATT to scrutinize the measure against that party's obligations under the General Agreement. The Panel could not consider justification of the United States

measures on any grounds not within Article XX or other Articles of the General Agreement.

4.2. Australia maintained that the country-specific import prohibitions in the Marine Mammal Protection Act discriminated between like tuna and tuna products in violation of Article I:1; the method of production or processing of the tuna or tuna products did not alter the composition of the product nor its end use. Australia recalled the findings of the Panel on Belgian Family Allowances (BISD/1S/59). Australia also maintained that the conditions imposed on foreign vessels in relation to maximum permissible incidental catch of dolphins came within the scope of Article III:1 (as internal quantitative regulations requiring processing of products in specified amounts). The method of processing applicable to foreign vessels was less predictable and less favourable than that accorded United States vessels, because access for tuna caught by foreign vessels was conditional on actual performance by United States vessels, and thus this method was inconsistent with Articles III:1 and III:4. While Article III:4 did not require equivalent treatment, justification for the application of different measures would need to be given (BISD/25S/65). The measures prohibiting import of tuna and tuna products from intermediary countries also were in breach of Article III:4. Australia maintained that Article XI was also relevant. The prohibitions on imports of tuna and tuna products were inconsistent with Article XI:1 and could not be justified by Article XI:2(b) or (c). Moreover, the prohibitions discriminated between like products, inconsistent with Article XIII.

4.3. Regarding Article XX, Australia stated generally that any measure involving conditional MFN by way of country-specific import prohibitions should be examined strictly, especially in view of the history of disputes over tuna. The burden of proof would be on the party invoking Article XX. The intermediary country measures in the MMPA could be an arbitrary and unjustifiable discrimination between countries where the same conditions prevail, as they applied to all tuna from the intermediary country without regard to conditions there nor to whether the product imported was re-exported to the United States.

4.4. Article XX(a), stated Australia, could justify measures regarding inhumane treatment of animals, if such measures applied equally to domestic and foreign animal products; a panel could not judge the morals of the party taking the measure but it could judge the necessity of taking measures inconsistent with the General Agreement, and their consistency with the Preamble to Article XX. Similar arguments applied under Article XX(b): under a recent panel decision (DS10/R) the United States was required to demonstrate that country-specific import prohibitions on tuna were the only means reasonably available to it to ensure the protection of dolphins and other marine mammals, and that such measures were the least GATT-inconsistent measures available. However, the incidental kill levels in this case related to feasible ratios associated with particular fishing methods, not species preservation, nor protection of health of marine mammals. Moreover, major United States tuna processors claimed to no longer buy tuna associated with dolphin, tuna from intermediary countries might not involve fishing by methods endangering dolphins, and conditions attached to foreign vessels' dolphin catches were more restrictive than those pertaining

to United States vessels in the ETP. As for Article XX(d), measures necessary to ensure compliance with (GATT-consistent) conservation laws or regulations would come within GATT's competence; the burden would be on the United States to demonstrate that such measures were the least GATT-inconsistent measures available.

4.5. Regarding Article XX(g), Australia noted that the MMPA embargo did not control trade in marine mammals to conserve marine mammals, but controlled trade in tuna and tuna products from designated countries. Regarding the scope of the Article XX(g) exception, Australia argued first that its drafting history did not support its extraterritorial application, but rather indicated that the drafters' purpose was to permit exceptions to provisions otherwise prohibiting export restrictions on tradeable goods. Even if conservation objectives might only be achievable by measures operating beyond the jurisdiction of individual contracting parties, the Panel could only consider such measures in the light of the GATT as it is; the CONTRACTING PARTIES had the option of recourse to Article XXV if they wished, including a waiver under Article XXV:5. Australia then focused on the definition of "exhaustible natural resources", and noted that dolphins were not on the CITES list of endangered species and that there was no agreement which might indicate that dolphins were an exhaustible natural resource. Thirdly, Australia argued that the different catch rates applying to United States vessels and foreign vessels indicated that the import controls on tuna were not made effective in conjunction with restrictions on domestic production or consumption. Finally, Australia recalled a prior panel decision[29] and argued that the MMPA measures were not related to restrictions on domestic production of tuna or marine mammals; thus, the United States had to justify its import prohibitions on tuna in terms of restrictions on domestic consumption of the equivalent product. The United States had to demonstrate that the prohibitions were primarily aimed at rendering effective restrictions on domestic harvesting of marine mammals.

4.6. Regarding the Dolphin Protection Consumer Information Act (DPCIA), Australia expressed the view that the DPCIA operated to protect consumers from false or deceptive labelling; as this Act applied to domestic and foreign products and did not discriminate on the basis of country of origin, it was not inconsistent with Articles I, III or XI. The labelling measures were also not inconsistent with Article IX. If different conditions did indeed exist in the ETP with regard to tuna-dolphin interaction, such that requirements necessary there were not necessary for other fishing areas, there would be no inconsistency with the most-favoured-nation provisions of Article IX:1. As for the requirement in Article IX:4 that marking rules be such as to permit compliance without materially reducing the value of the products, purchasing decisions based on quality considerations had no bearing on "material value" for these purposes. Moreover, as Article IX:4 did not involve a "like product", the "material value" of imported products needed to be interpreted against the "material value" of comparable domestic products; and for the concerned consumer, tuna labelled as "Dolphin Safe"

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[29]Panel report on "Canada - Measures Restricting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD/35S/98.

was not comparable to tuna not so labelled. The GATT did not prohibit the right to the exercise of consumer choice. Consumer choice determined the value of the label in terms of a retail price differential; if the manufacturers thought it significant, they could change production methods for that market. Furthermore, the DPCIA could be justified under Article XX. It did not distinguish between foreign and domestic products, so it was not a disguised restriction on international trade; it did not restrict supplies from any one contracting party, so it was not a means of arbitrary or unjustifiable discrimination. Article XX(d) itself referred to prevention of deceptive practices. The United States could demonstrate that such labelling was necessary if previous labelling had created consumer confusion as to the safety of products for dolphins. It might not be feasible to provide that labels on canned tuna provide detailed information on fishing methods and incidental dolphin takings. In this respect, the DPCIA resembled the practice in many countries of labelling additives in processed food by code numbers.

Canada

4.7. While underlining the right of a contracting party to take GATT-consistent measures aimed at the conservation of exhaustible natural resources, Canada argued that the MMPA embargo was inconsistent with United States obligations under Article XI. The embargo was not an internal measure under Article III because it was a specific import prohibition of a targeted country's yellowfin tuna exports. Moreover, even under Article III, the method of calculating ceilings for incidental dolphin taking discriminated in favour of domestic yellowfin tuna. Furthermore, if United States tuna fishermen exceeded their mortality rate in a given year, there was no provision shutting down access of United States tuna to the United States market. However, once the MMPA embargo was imposed on a country its yellowfin tuna was prohibited access to the United States market until an entire season's data showed its compliance with United States standards.

4.8. With regard to whether the MMPA embargo might be covered by the exception in Article XX(g), Canada noted that the United States did not maintain production limitations on yellowfin tuna per se but rather set limits on dolphin mortality incidental to this catch. Could the term "restrictions" on domestic production extend to restrictions on the production process? To what extent did Article XX(g) require that the resource being conserved be the same as the product subject to trade restrictions? There remained also the question of when and to what extent measures taken relating to unilaterally-set conservation objectives can be extended to areas outside national jurisdictions. Canada argued that the United States must demonstrate that Mexico's incidental dolphin mortality in waters outside United States jurisdiction impinges on the United States conservation program to an extent that would allow justification of the embargo under Article XX(g). With regard to Article XX(b), Canada

considered that the Panel should be guided by the interpretation of the term "necessary" as defined in a recent panel report.[30]

4.9. Finally, Canada argued that the intermediary nations embargo under the MMPA was contrary to Article XI and not covered by exceptions under Articles XI:2 or XX. Under Article XX(b), the United States would have the burden of demonstrating that the secondary embargo met the test of being "necessary". As for Article XX(g), this embargo did not directly further United States dolphin conservation objectives; it could be applied even if an intermediary nation's fishermen complied with United States provisions in its ETP tuna fishing or did not fish in the ETP at all. The embargo could not be said to be "primarily relating to" domestic conservation measures under Article XX(g). If an intermediary nation were to accede to United States requirements and prohibit imports of yellowfin tuna and tuna products from a targeted country (Mexico), this embargo would breach the intermediary nation's Article XI obligations and could not be justified under Article XX(g) if the intermediary nation did not itself maintain a conservation programme. Canada also noted the potential invocation of an embargo on all fish under the Pelly Amendment.

European Economic Community (EEC)

4.10. The comments of the EEC focused exclusively on the intermediary nations embargo provisions of the MMPA, which were due to become effective with respect to certain EEC member states on 24 May 1991. It was the view of the EEC that the intermediary nations embargo was incompatible with the GATT independent of the legality of the direct embargo against Mexico; the EEC requested that the Panel rule accordingly with regard to the intermediary nations embargo, to ensure that changes in United States legislation incorporate the elimination of the concept of "intermediary nations" as a basis for the application of trade embargoes. The EEC too had adopted measures to ensure the protection of the dolphin population and was ready to offer its full support to current efforts to reinforce international cooperation on the problems raised by the incidental kill of migratory species. The EEC also urged that, independently of the basis found for solving the present dispute, the CONTRACTING PARTIES seek to offer guidance on circumstances under which trade measures may be used to achieve environmental goals.

4.11. The EEC noted the provisions of the MMPA on intermediary nations, indicating in particular the further possible consequences of an embargo on an "intermediary nation": application of a United States embargo on all fish from that country, under the Pelly Amendment, and perhaps tertiary embargoes vis-à-vis other nations trading in yellowfin tuna with the intermediary nation and the United States. The EEC was a relatively small supplier of tuna products to the United States, exporting 5,222 tonnes in 1989 and 3,816 tonnes in 1990; three EEC member states, France, Italy and Spain, were likely to be affected by the intermediary nations embargo. The

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[30]Panel report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, DS10/R.

EEC had never considered applying an embargo vis à vis the countries embargoed by the United States; firstly, the EEC did not consider application of unilateral trade restrictions to be an adequate means to limit incidental dolphin mortality, secondly, the EEC had doubts as to whether the direct embargo by the United States was GATT-compatible and so saw an EEC embargo as risking a breach of GATT obligations, and thirdly, the EEC would not introduce trade measures because of a third country's requirements nor on the basis of that country's unilaterally-defined standards.

4.12. The EEC argued that the MMPA intermediary nations embargo was an import prohibition contrary to Article XI, and not covered by any of the exceptions in Article XI:2 nor by Article III. Article III was intended to cover internal measures whose overall purpose and function was to regulate the conditions for marketing certain products in the internal market of a contracting party; their enforcement on imported products at the time or point of importation was simply a matter of administrative convenience. Yet the MMPA rules were not limited to regulating conditions for marketing imported tuna in the United States, but went beyond the United States market and beyond United States jurisdiction. The intermediary nations embargo provisions were clear evidence that the MMPA was not just an internal regulation. Thus, these provisions did not fall under Article III.

4.13. Regarding Article XX, the EEC considered that the embargo on intermediary nations could in no way be justified as a measure "necessary" in the context of Article XX(b) or XX(g). In this respect, the EEC recalled two previous panel reports on the interpretation of these provisions.[31] As the intermediary nations embargo applied to countries not engaging in activities entailing risk for dolphins, it was clearly not a measure necessary for the protection of dolphins. The EEC noted that in the hypothetical case that the Panel were to deem the direct embargo to be legitimate, the United States could apply GATT-consistent rules to determine whether imported yellowfin tuna and tuna products originate from the countries under direct embargo - as enforcement of any legitimate measure limited in geographical scope could require application of rules to determine origin. But the scope of the intermediary nations embargo was wider than the result which would be produced by neutral application of such rules. Moreover, and independently of the actual trade scope of the embargo, the very concept of "intermediary nation" and the link between the restrictions applied to such countries and measures to prevent imports from countries subject to the direct embargo needed to be rejected. Such measures would affect the right of each contracting party to determine autonomously its own trade policy, and would create an unwarranted association in the United States market between tuna products from intermediary nations and dolphin mortality.

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[31]Panel reports on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, DS10/R; and "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD/36S/345, 392, para. 5.26.

4.14. The EEC argued as well that Article XX(g) was not relevant to the current dispute, as the United States measures were related to reduction of incidental kill of dolphins, not to conservation of tuna products. While tuna had been deemed in past disputes to be an exhaustible natural resource, dolphins were not, as they were not the object of commercial exploitation. In any event, the embargo on intermediary nations was not justified under Article XX(g); recalling a past panel[32], the EEC suggested that this embargo would not be primarily aimed at rendering effective restrictions to reduce dolphin mortality because these measures apply to countries not involved in activities leading to dolphin mortality, and the United States could ensure effectiveness of such restrictions through other measures consistent with its GATT obligations.

Indonesia

4.15. Indonesia noted the importance of its trade in tuna products with the United States, and further noted that this was the twenty-third time that the United States had embargoed imports of tuna, starting with Spain in 1975. The MMPA had been used as a means to continue this practice and shield United States producers from import competition by exploiting public sympathy for dolphins, which were in any event not a species listed as endangered under CITES. The restrictions on the ETP would lead to purse-seiners moving elsewhere, inviting a spread of United States sanctions on fish and fish products.

Japan

4.16. Japan noted its serious concern with the United States import ban against Mexico as well as with the intermediary nations embargo provisions of the MMPA, stating that Japan had not prohibited imports of yellowfin tuna or tuna products from Mexico because Japan's trade relations with Mexico should not be subject to United States domestic law, and because of Japan's view that the provisions in question were unjustified and GATT-inconsistent. For the reasons below, the direct embargo of Mexico under the MMPA and the possible trade sanctions under the Pelly Amendment constituted a prima facie nullification or impairment of benefits accruing to Mexico under the General Agreement; any import ban with respect to intermediary nations under both laws would nullify or impair their benefits as well. Japan requested the Panel to find accordingly and to suggest that the Council recommend that the United States bring its measures into conformity with United States obligations under the General Agreement.

4.17. It was Japan's view that the MMPA embargo on yellowfin tuna and tuna products from Mexico was a selective quantitative restriction in contravention of Articles XI:1 and XIII:1, and that nullification or impairment should be presumed. The MMPA was not an internal measure under

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[32]Panel report on "Canada - Measures affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/255, 114-115, paras. 4.6-4.7.

Article III; internal measures under Article III:1 were measures taken by a contracting party on activities within its territory, but the United States measure was different, as it had as its objective preventing the use of certain tuna harvesting methods in an area including the high seas and other countries' fishing zones. Although it was possible to enforce an internal measure at the time or point of importation, it was inconceivable that the Note Ad Article III should allow a ban on importation itself for such objectives. This was a border measure subject to Article XI and other relevant provisions of the General Agreement.

4.18. Japan did not accept the United States view that the measure in question was justified under Article XX(b) and XX(g). Japan stated that Article XX should be strictly and carefully interpreted since it generally exempts contracting parties from obligations under other GATT Articles. The drafting history of Article XX(b) indicated that it was designed to enable contracting parties to take measures such as for prevention of disease; for this reason it should be interpreted to justify only limited types of measures such as quarantine or sanitation measures, not measures like these taken for conservation of resources. The MMPA ban on imports was also not "necessary" under Article XX(b): the MMPA standard for incidental dolphin takings was set unilaterally, and was not a scientific standard, at least not one to be imposed on other nations. Also, it was a total import ban on yellowfin tuna and tuna products from Mexico, regardless of their place of harvesting.

4.19. With regard to Article XX(g), Japan referred to the findings of a previous panel report[33], and noted that it was hardly conceivable that Article XX(g) provision was intended to apply to import prohibitions of one species (yellowfin tuna) for the sake of conservation of another species (dolphin). Thus, extra care was needed in examining its applicability to the measures in question. Firstly, it was unlikely that the MMPA embargo could be shown to be "primarily aimed at the conservation of" dolphins because an embargo on all yellowfin tuna and tuna products was not a dolphin conservation measure but a sanctions mechanism to force other countries to adopt policies established unilaterally by the United States. If this were to be justifiable under Article XX(g) then so would be more extreme measures such as sanctions against products having nothing to do with the resource conserved, which would undermine the credibility of the GATT. Secondly, the MMPA embargo was not "primarily aimed at rendering effective restrictions on domestic production or consumption", since the embargo applied to all importation of yellowfin tuna and tuna products from Mexico, not just tuna from the ETP that did not meet a standard. A sanction of this sort should not be easily deemed a measure "in conjunction with" production restrictions. Noting that if an intermediary nation were to impose an embargo against a country targeted by the United States, this embargo would itself breach the provisions of the General Agreement, Japan underlined its concern that the MMPA measures and possible measures under the Pelly Amendment as a whole were far out of proportion to the objective of the

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[33]Panel report on "Canada - Measures Affecting Export of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/255.

conservation measure in the light of the provisions of the General Agreement.

Korea

4.20. Korea noted that the United States had invoked Article XX(g) in justification of its import ban on yellowfin tuna and tuna products from Mexico. Korea asked whether there existed any generally-recognized target level of protection in international agreements or practices, on which basis individual countries were authorized to act; if not, then it could only be assumed that certain countries' trade actions based on environmental objectives could be GATT-inconsistent. Korea asked the Panel to examine the legal and environmental aspects of trade restrictions, taking into account that the findings and recommendations in this case might have a significant impact on the proper functioning of the GATT system in the future.

Norway

4.21. Noting its sympathy for the motives of the United States, Norway nevertheless believed these measures might entail arbitrary and unjustifiable restrictions on international trade. The requirements of Article XI:2(c) were not met in this case. The exceptions in Article XX should be interpreted narrowly. While Article XX(g) provided such an exception for measures relating to conservation of an exhaustible natural resource, the requisite restrictions on domestic production or consumption were not present in this case as the "incidental take" only applied to the ETP. Moreover, as long as the object of conservation and protection was dolphins and the import restrictions applied to tuna, the requirements of Article XX(g) were not met.

Philippines

4.22. The Philippines noted its interest in the outcome of the Panel, particularly the Panel's findings regarding the intermediary nations embargo, because the Philippines is a major exporter of tuna and the United States is one of its major export markets. The Philippines had been subject to United States countervailing duties on its canned tuna in the past; although this problem had been solved it had negatively affected the Philippines tuna industry.

Senegal

4.23. Senegal too noted the importance of tuna in its national economy. Noting that the United States embargo had caused Mexico to invade Senegal's traditional markets (provoking a fall in prices and in Senegal's export revenues), Senegal wished for a speedy resolution to the dispute which might enable its exports to return to normal levels.

Thailand

4.24. Thailand also noted its concern since Thailand is a major exporter of tuna. 45 per cent of Thai canned tuna exports were to the United States, and in 1989 71 per cent of United States imports of canned tuna (by quantity) were from Thailand. Thai tuna packers largely relied on imported

tuna, making Thailand vulnerable to United States trade policy actions on tuna products. Thailand had supported conservation of dolphins, and had prohibited fishing of dolphins, but was concerned that GATT rules not be interpreted to legitimize use of conservation measures as a disguised trade barrier.

4.25. It was Thailand's view that Article XX could not justify the embargo on tuna and tuna products from Mexico and intermediary nations. First, the inherent lack of predictability in the method for setting the incidental taking rate for Mexican fishermen would not help Mexican vessels at all in the conservation of dolphin. Second, the intermediary nation embargo had no basis under the General Agreement. Also, as packers in these nations had no way to know in advance which country might not comply with the United States regulations, these measures imposed unpredictable disruption on world commercial markets for tuna and tuna products. Third, the intermediary nations embargo could not be considered as "necessary" for dolphin protection under Article XX(b) because intermediary countries had no control over activities of fishing vessels. Instead of the embargo, which imposed United States domestic law extraterritorially, international consultations on conservation would be a better way of solving the problem without resorting to trade measures. Indeed, such consultations were mandated by the Marine Mammal Protection Act itself.

Venezuela

4.26. Venezuela noted that the United States had also imposed an embargo on imports of yellowfin tuna and yellowfin tuna products from Venezuela under the Marine Mammal Protection Act, and Venezuela was also affected by the labelling provisions of the Dolphin Protection Consumer Information Act. Venezuela also noted its efforts to reduce incidental dolphin mortality in tuna fishing, consistent with recommendations of the Inter-American Tropical Tuna Commission (IATTC). Venezuela further noted the January 1991 IATTC recommendation that tuna fishermen, to preserve tuna stocks, concentrate their fishing on adult tuna, which swim with dolphin; the IATTC had recommended that tuna harvesters not attempt to avoid catching dolphin completely but continue to fish adult tuna while using all possible measures to avoid the incidental catch of dolphins. The Venezuelan tuna industry had complied with this international regime and been embargoed by the United States. Venezuela urged the development of multilateral measures to protect dolphins, and urged that the MMPA embargo be lifted.

4.27. Venezuela observed that the United States import prohibition was inconsistent with Article XI:1 of the General Agreement and not covered by any of the exceptions in Article XI:2. The United States measures were not internal laws subject to Article III (through the Note Ad Article III) because Article III did not cover a law which bans the importation of a product not on the characteristics of the product but rather on the method by which the product is produced. To determine that a country could ban the sale of both domestic and imported goods because the production of these goods causes harm, on the theory that the ban is non-discriminatory, would create a vast loophole in the GATT. Potentially, any nation could thereby justify unilaterally imposing its own social, economic or employment standards as a criterion for accepting imports. Any influential contracting party could effectively regulate the internal environment of others simply

by erecting trade barriers based on unilateral environmental policies. This was contrary to the fundamental premises of the GATT. Venezuela would be more sympathetic to an exception to Article XI for agreed compliance measures taken under an international environmental treaty regime. Yet until such an exception exists, the contracting parties could not allow the United States to avoid its Article XI obligations by distorting the Article III notion of internal measures.

4.28. Even if Article III were applicable, Venezuela argued, the embargo was inconsistent with the national treatment principle in Article III:1 and Article III:4. While the MMPA provisions might appear more favourable to foreign fishing fleets, in application they substantially favoured the United States tuna industry. Since almost all of the United States fleet had moved to the southwest Pacific, the incidental dolphin catch of the United States fleet in the ETP had approached zero. Compliance with the IATTC recommendation to fish adult tuna would necessarily entail some incidental dolphin catch; non-United States harvesters were forced to choose between violating the IATTC recommendations or ceasing to fish in the ETP. For countries like Venezuela, for which the ETP was the only accessible year-round source of tuna and which were committed to the international standards of the IATTC, an MMPA embargo was virtually guaranteed. The MMPA therefore disadvantaged the tuna industries of countries like Venezuela, affording protection to the United States tuna industry in violation of Article III:1. The MMPA provisions also violated Articles III:1 and III:4 because of the difference in notice given regarding the level of permissible incidental catch (firm amounts set in advance for United States fishermen and variable amounts set retrospectively for foreign fleets).

4.29. Venezuela argued also that the embargo was not justified under Article XX. Article XX(b) did not apply because dolphin populations are not endangered; even if they were, nothing in Article XX(b) suggested that a country could restrict trade to protect the life or health of humans, plants or animals whose habitat is outside the importing nation's territory. Could a country restrict imports of agricultural products from another country because it did not have food distribution programs for its poor? Moreover, the MMPA embargo was hardly the least restrictive means to accomplish the protective goal involved. The United States could effectively accomplish its goals through multilateral arrangements such as those under the IATTC, which would be much less trade-distorting. Article XX(g) also did not apply, said Venezuela, because the United States did not maintain restrictions on domestic production or consumption of tuna. Since only four United States boats remained in the ETP, the vast majority of United States tuna boats were free from the ETP catch restrictions. Even if the United States fleet were still active in the ETP, no interpretation of Article XX(g) would permit a contracting party to unilaterally impose trade restrictions because of conservation practices outside its territory. Would a contracting party have the right to restrict imports of products from countries that do not require recycling? Furthermore, with respect to the Preamble of Article XX, Venezuela argued that the MMPA embargo constituted a means of arbitrary and unjustifiable discrimination, as its provisions applied only to those countries that fish for tuna in the ETP, even though the IATTC had reported that tuna fishing elsewhere may also threaten

dolphins and marine mammals. The embargo was also a disguised restriction on international trade, for the same reasons cited in paragraph 4.28 above.

4.30. Finally, Venezuela argued that the Dolphin Protection Consumer Information Act was inconsistent with Articles I and III. Article I required that any rule or formality treat products of any contracting party no less favourably than products of any other contracting party. The special rules in the DPCIA for ETP-harvested tuna denied most-favoured-nation treatment to several contracting parties including Venezuela which could reasonably fish for tuna on a regular basis only in the ETP. The DPCIA violated Article III because, while virtually all United States tuna products could automatically be labelled "Dolphin Safe" (because almost all United States boats had left the ETP), tuna products from countries like Venezuela could virtually never be so labelled in spite of their stringent controls on dolphin catch. Moreover, since the label was not available for any tuna caught in the ETP with a purse-seine net, ETP tuna with the Dolphin Safe label was almost certain to be very young tuna caught in violation of IATTC recommendations. Enacted in 1990, after the United States fleet had left the ETP, the DPCIA was a blatantly discriminatory measure protecting the United States tuna industry.

5. FINDINGS

A. Introduction

5.1. The Panel noted that the issues before it arose essentially from the following facts: the Marine Mammal Protection Act (MMPA) regulates, inter alia, the harvesting of tuna by United States fishermen and others who are operating within the jurisdiction of the United States. The MMPA requires that such fishermen use certain fishing techniques to reduce the taking of dolphin incidental to the harvesting of fish. The United States authorities have licensed fishing of yellowfin tuna by United States vessels in the ETP on the condition that the domestic fleet not exceed an incidental taking of 20,500 dolphins per year in the ETP.

5.2. The MMPA also requires that the United States Government ban the importation of commercial fish or products from fish caught with commercial fishing technology which results in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards. Under United States customs law, fish caught by a vessel registered in a country is deemed to originate in that country. As a condition of access to the United States market for the yellowfin tuna or yellowfin tuna products caught by its fleet, each country of registry of vessels fishing yellowfin tuna in the ETP must prove to the satisfaction of the United States authorities that its overall regulatory regime regarding the taking of marine mammals is comparable to that of the United States. To meet this requirement, the country in question must prove that the average rate of incidental taking of marine mammals by its tuna fleet operating in the ETP is not in excess of 1.25 times the average incidental taking rate of United States vessels operating in the ETP during the same period. The exact methods of calculating and comparing these average incidental taking rates have been specified by regulation.

5.3. The MMPA also provides that ninety days after imports of yellowfin tuna and yellowfin tuna products from a country have been prohibited as above, importation of such tuna and tuna products from any "intermediary nation" shall also be prohibited, unless the intermediary nation proves that it too has acted to ban imports of such tuna and tuna products from the country subject to the direct import embargo.

5.4. Six months after either the direct embargo or the "intermediary nations" embargo goes into effect, the United States authorities are required to take action which triggers Section 8 of the Fishermen's Protective Act (the Pelly Amendment). This provision enables the President in his discretion to prohibit imports of all fish or wildlife products from the country in question, "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

5.5. Under the MMPA, the United States currently prohibits importation into its customs territory of yellowfin tuna and yellowfin tuna products from Mexico which were caught with purse-seine nets in the ETP. A predecessor embargo was imposed on such tuna and tuna products on 28 August 1990; the embargo in its present form has been in place since 26 March 1991. Since 24 May 1991 the United States has also implemented the "intermediary nations" embargo provisions of the MMPA by prohibiting the importation of yellowfin tuna or yellowfin tuna products from any other country if the tuna was harvested with purse-seine nets in the ETP by vessels of Mexico. If either of these prohibitions is in effect six months after its inception, then as of that date the President will have the discretionary authority under the Pelly Amendment to prohibit imports of all fish products of Mexico or of any "intermediary nation" for such duration as he determines appropriate and to the extent that such action is "sanctioned by the General Agreement".

5.6. The Dolphin Protection Consumer Information Act (DPCIA) provides that when a tuna product exported from or offered for sale in the United States bears the optional label "Dolphin Safe" or any similar label indicating it was fished in a manner not harmful to dolphins, this tuna product may not contain tuna harvested on the high seas by a vessel engaged in driftnet fishing, or harvested in the ETP by a vessel using a purse-seine net unless it is accompanied by documentary evidence showing that the purse-seine net was not intentionally deployed to encircle dolphins. The use of the label "Dolphin Safe" is not a requirement but is voluntary. The labelling provisions of the DPCIA took effect on 28 May 1991.

5.7. The Panel decided to examine successively:

(a) the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico imposed by the United States and the provisions of the MMPA on which it is based;

(b) the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from "intermediary nations" imposed by the United States and the provisions of the MMPA on which it is based;

(c) the possible extension of each of these import prohibitions to all fish products from Mexico and the "intermediary nations", under the

MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment); and

(d) the application to tuna and tuna products from Mexico of the labelling provisions of the DPCIA, as well as these provisions as such.

In accordance with the established practice, the Panel further decided that it would examine each of the above issues first in the light of the provisions of the General Agreement which Mexico claims to have been violated by the United States and then, if it were to find an inconsistency with any of the provisions invoked by Mexico, in the light of the exceptions in the General Agreement raised by the United States.

B. Prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico

Categorization as internal regulations (Article III) or quantitative restrictions (Article XI)

5.8. The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

5.9. The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. The relevant text of Article III:4 provides:

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

The Note Ad Article III provides that:

> "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point

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

5.10. The Panel noted that the United States had claimed that the direct import embargo on certain yellowfin tuna and certain yellowfin tuna products of Mexico constituted an enforcement at the time or point of importation of the requirements of the MMPA that yellowfin tuna in the ETP be harvested with fishing techniques designed to reduce the incidental taking of dolphins. The MMPA did not regulate tuna products as such, and in particular did not regulate the sale of tuna or tuna products. Nor did it prescribe fishing techniques that could have an effect on tuna as a product. This raised in the Panel's view the question of whether the tuna harvesting regulations could be regarded as a measure that "applies to" imported and domestic tuna within the meaning of the Note Ad Article III and consequently as a measure which the United States could enforce consistently with that Note in the case of imported tuna at the time or point of importation. The Panel examined this question in detail and found the following.

5.11. The text of Article III:1 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale.... of products" and "internal quantitative regulations requiring the mixture, processing or use of products"; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure "which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation". This suggests that this Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products.

5.12. A previous panel had found that Article III:2, first sentence, "obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products".[34] Another panel had found that the words "treatment no less favourable" in Article III:4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and that this standard has to be understood as applicable to each individual case of imported products.[35] It was apparent to the Panel that

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[34]Panel report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

[35]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 386-7, paras. 5.11, 5.14.

the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products.

5.13. The Panel considered that, as Article III applied the national treatment principle to both regulations and internal taxes, the provisions of Article III:4 applicable to regulations should be interpreted taking into account interpretations by the CONTRACTING PARTIES of the provisions of Article III:2 applicable to taxes. The Panel noted in this context that the Working Party Report on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, had concluded that

> "... there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment ... Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes".[36]

Thus, under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes). Consequently, the Note Ad Article III covers only internal taxes that are borne by products. The Panel considered that it would be inconsistent to limit the application of this Note to taxes that are borne by products while permitting its application to regulations not applied to the product as such.

5.14. The Panel concluded from the above considerations that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.

5.15. The Panel further concluded that, even if the provisions of the MMPA enforcing the tuna harvesting regulations (in particular those providing for the seizure of cargo as a penalty for violation of the Act) were regarded as regulating the sale of tuna as a product, the United States import prohibition would not meet the requirements of Article III. As pointed out in paragraph 5.12 above, Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no

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[36] BISD 18S/97, 100-101, para. 14

less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

5.16. The Panel noted that Mexico had argued that the MMPA requirements with respect to production of yellowfin tuna in the ETP, and the method of calculating compliance with these requirements, provided treatment to tuna and tuna products from Mexico that was less favourable than the treatment accorded to like United States tuna and tuna products. It appeared to the Panel that certain aspects of the requirements could give rise to legitimate concern, in particular the MMPA provisions which set a prospective absolute yearly ceiling for the number of dolphins taken by domestic tuna producers in the ETP, but required that foreign tuna producers meet a retroactive and varying ceiling for each period based on actual dolphin taking by the domestic tuna fleet in the same time period. However, in view of its finding in the previous paragraph, the Panel considered that a finding on this point was not required.

Articles XI and XIII

5.17. The Panel noted that the United States had, as mandated by the MMPA, announced and implemented a prohibition on imports of yellowfin tuna and yellowfin tuna products caught by vessels of Mexico with purse-seine nets in the ETP. The Panel further noted that under United States customs law, fish caught by a vessel registered in a country was deemed to originate in that country, and that this prohibition therefore applied to imports of products of Mexico.

5.18. The Panel noted that under the General Agreement, quantitative restrictions on imports are forbidden by Article XI:1, the relevant part of which reads:

> "No prohibitions or restrictions .... 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 therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

5.19. The Panel noted that Mexico had also argued that the prohibition imposed on imports from Mexico was inconsistent with Article XIII. In view of the finding that this measure is inconsistent with Article XI:1 the Panel found that it was not necessary to make a finding on the question of whether it was also inconsistent with Article XIII.

Section 8 of the Fishermen's Protective Act (Pelly Amendment)

5.20. The Panel recalled that Mexico had also argued that the possible extension of import prohibitions to all fish products of Mexico under Section 101(a)(2)(D) of the MMPA and Section 8 of the Fishermen's Protective

Act (the Pelly Amendment) was inconsistent with Article XI. The Panel noted that the Pelly Amendment authorized such an embargo, but gave the United States authorities discretion to refrain from taking any trade measures at all. Such an embargo was not now in effect, and might not be imposed by the United States authorities. In the Panel's view, therefore, the question presented to it was whether a statutory provision that authorizes but does not require a measure inconsistent with the General Agreement constituted in itself a measure in conflict with the General Agreement.

5.21. The Panel recalled that it had been recognized by the CONTRACTING PARTIES in previous cases that legislation mandatorily requiring the executive authority of a contracting party to act inconsistently with the General Agreement may be found to be inconsistent with that contracting party's obligations under the General Agreement, whether or not an occasion for its actual application has yet arisen, but on the other hand, legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement.[37] Accordingly, the Panel found that, because the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.

Article XX

General

5.22. The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. The Panel recalled that previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.[38] Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,[39] and not to examine Article XX exceptions unless

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[37]Panel reports 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; and "EEC - Regulation on Imports of Parts and Components", BISD 37S/132, L/6657, adopted 16 May 1990, paras. 5.25-5.26.

[38]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 385, para. 5.9.

[39]Panel reports on "Canada - Administration of the Foreign Investment Review Act", adopted 7 February 1984, BISD 30S/140, 164, para. 5.20; and "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 393 para. 5.27.

invoked.[40] Nevertheless, the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting ipso facto an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible.

5.23. The Panel proceeded to examine whether Article XX(b) or Article XX(g) could justify the MMPA provisions on imports of certain yellowfin tuna and yellowfin tuna products, and the import ban imposed under these provisions. The Panel noted that Article XX provides that:

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

Article XX(b)

5.24. The Panel noted that the United States considered the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico, and the provisions of the MMPA on which this prohibition is based, to be justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health and were "necessary" within the meaning of that provision because, in respect of the protection of dolphin life and health outside its jurisdiction, there was no alternative measure reasonably available to the United States to achieve this objective. Mexico considered that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the contracting party taking it and that the import prohibition imposed by the United States was not necessary because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned.

5.25. The Panel noted that the basic question raised by these arguments, namely whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure, is not clearly answered by the text of that

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[40] See, e.g., the panel report on "EEC - Regulation of Parts and Components", adopted 16 May 1990, BISD 37S/132, L/6657, para. 5.11.

provision. It refers to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. The Panel therefore decided to analyze this issue in the light of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.

5.26. The Panel noted that the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, "Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures:...(b) necessary to protect human, animal or plant life or health". In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country". This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.[41] Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.

5.27. The Panel further noted that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards. The conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be "necessary" and not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade", refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the contracting party. The Panel recalled the finding of a previous panel that this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.[42] The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, 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. 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.

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[41] EPCT/A/PV/30/7-15

[42] Panel report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, 222-223, DS10/R, paras. 73-74.

5.28. The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

5.29. On the basis of the above considerations, the Panel found that the United States' direct import prohibition imposed on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed could not be justified under the exception in Article XX(b).

Article XX(g)

5.30. The Panel proceeded to examine whether the prohibition on imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico and the MMPA provisions under which it was imposed could be justified under the exception in Article XX(g). The Panel noted that the United States, in invoking Article XX(g) with respect to its direct import prohibition under the MMPA, had argued that the measures taken under the MMPA are measures primarily aimed at the conservation of dolphin, and that the import restrictions on certain tuna and tuna products under the MMPA are "primarily aimed at rendering effective restrictions on domestic production or consumption" of dolphin. The Panel also noted that Mexico had argued that the United States measures were not justified under the exception in Article XX(g) because, inter alia, this provision could not be applied extrajurisdictionally.

5.31. The Panel noted that Article XX(g) required that the measures relating to the conservation of exhaustible natural resources be taken "in conjunction with restrictions on domestic production or consumption". A previous panel had found that a measure could only be considered to have been taken "in conjunction with" production restrictions "if it was

primarily aimed at rendering effective these restrictions".[43] A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.

5.32. The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not "constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade" refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).

5.33. The Panel did not consider that the United States measures, even if Article XX(g) could be applied extrajurisdictionally, would meet the conditions set out in that provision. A previous panel found that a measure could be considered as "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g) only if it was primarily aimed at such conservation.[44] The Panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins.

5.34. On the basis of the above considerations, the Panel found that the United States direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico directly imported from Mexico, and the provisions of the MMPA under which it is imposed, could not be justified under Article XX(g).

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[43]Panel report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/98, 114, para. 4.6.

[44]Panel report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/98, 114, para. 4.6.

C. Secondary embargo on imports of certain yellowfin tuna and certain yellowfin tuna products from "intermediary nations" under the MMPA

Articles III and XI

5.35. The Panel noted that Mexico had claimed that the "intermediary nations" embargo was inconsistent with Articles XI and XIII. The United States considered that these measures fell instead under Article III and the Note Ad Article III as they provided for enforcement of requirements for yellowfin tuna harvested in the ETP using purse-seine nets. The Panel found that since the United States domestic regulations on tuna harvesting were not applied to tuna as a product, the "intermediary nations" embargo did not fall within the scope of the Note Ad Article III, and was therefore a quantitative restriction subject to Article XI.

5.36. The Panel further noted that the MMPA required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from "intermediary nations", and that the United States was refusing entry to yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the ETP by vessels of Mexico. The Panel therefore found that these measures and the provisions of the MMPA mandating such an embargo were import restrictions or prohibitions inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

5.37. The Panel recalled its finding on the Pelly Amendment in paragraph 5.21 above, namely that this provision as such was not inconsistent with the obligations of the United States under the General Agreement because the Pelly Amendment does not require trade measures to be taken. The Panel considered that this finding was equally valid in the case of the "intermediary nations" embargo.

Article XX(b) and XX(g)

5.38. The Panel noted that the United States had argued that the intermediary nations embargo was justified as a measure under Articles XX(b) and XX(g) to protect and conserve dolphin, and that the intermediary country measures were necessary to protect animal life or health and related to the conservation of exhaustible natural resources. The Panel recalled its findings with regard to the consistency of the direct embargo with Articles XX(b) and XX(g) in paragraphs 5.29 and 5.34 above, and found that the considerations that led the Panel to reject the United States invocation of these provisions in that instance applied to the "intermediary nations" embargo as well.

Article XX(d)

5.39. The Panel then proceeded to examine the consistency of the "intermediary nations" embargo with Article XX(d), which the United States had invoked. The relevant part of Article XX(d) reads as follows:

> "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 ...".

5.40. The Panel noted that Article XX(d) requires that the "laws or regulations" with which compliance is being secured be themselves "not inconsistent" with the General Agreement. The Panel noted that the United States had argued that the "intermediary nations" embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo's effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the General Agreement, the "intermediary nations" embargo and the provisions of the MMPA under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with "laws or regulations not inconsistent with the provisions of this Agreement".

D. Dolphin Protection Consumer Information Act (DPCIA)

5.41. The Panel noted that Mexico considered the labelling provisions of the DPCIA to be marking requirements falling under Article IX:1, which reads:

> "Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country".

The United States considered that the labelling provisions were subject not to Article IX but to the most-favoured-nation and national-treatment provisions of Articles I:1 and III:4. The Panel noted that the title of Article IX is "Marks of Origin" and its text refers to marking of origin of imported products. The Panel further noted that Article IX does not contain a national-treatment but only a most-favoured-nation requirement, which indicates that this provision was intended to regulate marking of origin of imported products but not marking of products generally. The Panel therefore found that the labelling provisions of the DPCIA did not fall under Article IX:1.

5.42. The Panel proceeded to examine the subsidiary argument by Mexico that the labelling provisions of the DPCIA were inconsistent with Article I:1 because they discriminated against Mexico as a country fishing in the ETP. The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the "Dolphin Safe" label. The labelling provisions therefore did

not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods. The only issue before the Panel was therefore whether the provisions of the DPCIA governing the right of access to the label met the requirements of Article I:1.

5.43. The Panel noted that the DPCIA is based inter alia on a finding that dolphins are frequently killed in the course of tuna-fishing operations in the ETP through the use of purse-seine nets intentionally deployed to encircle dolphins. The DPCIA therefore accords the right to use the label "Dolphin Safe" for tuna harvested in the ETP only if such tuna is accompanied by documentary evidence showing that it was not harvested with purse-seine nets intentionally deployed to encircle dolphins. The Panel examined whether this requirement applied to tuna from the ETP was consistent with Article I:1. According to the information presented to the Panel, the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular nature of the association between dolphins and tuna observed only in that area. By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.

5.44. The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.

6. CONCLUDING REMARKS

6.1. The Panel wished to underline that its task was limited to the examination of this matter "in the light of the relevant GATT provisions", and therefore did not call for a finding on the appropriateness of the United States' and Mexico's conservation policies as such.

6.2. The Panel wished to note the fact, made evident during its consideration of this case, that the provisions of the General Agreement impose few constraints on a contracting party's implementation of domestic environmental policies. The Panel recalled its findings in paragraphs 5.10 - 5.16 above that under these provisions, a contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers, and a contracting party is also free to tax or regulate domestic production for environmental purposes. As a corollary to these rights, a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own.

6.3. The Panel further recalled its finding that the import restrictions examined in this dispute, imposed to respond to differences in environmental regulation of producers, could not be justified under the exceptions in Articles XX(b) or XX(g). These exceptions did not specify criteria limiting the range of life or health protection policies, or resource conservation policies, for the sake of which they could be invoked. It seemed evident to the Panel that, if the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the CONTRACTING PARTIES were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the CONTRACTING PARTIES to impose such limits and develop such criteria.

6.4. These considerations led the Panel to the view that the adoption of its report would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies, nor the right of the CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement.

7. CONCLUSIONS

7.1. (a) The prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the Marine Mammal Protection Act under which it is imposed are contrary to Article XI:1 and are not justified by Article XX(b) or Article XX(g).

(b) The import prohibitions imposed by the United States with regard to certain yellowfin tuna and certain yellowfin tuna products of "intermediary nations" and the provisions of the Marine Mammal Protection Act under which they are imposed are contrary to Article XI:1 and are not justified by Article XX(b), XX(d) or XX(g).

(c) 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.

7.2. The provisions of Section 8 of the Fishermen's Protective Act (the Pelly Amendment) as such are not inconsistent with the obligations of the United States under the General Agreement.

7.3. The tuna products labelling provisions of the Dolphin Protection Consumer Information Act relating to tuna caught in the Eastern Tropical Pacific Ocean are not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.