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The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement

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THE PROCESS/PRODUCT DISTINCTION AND THE TUNA/DOLPHIN CONTROVERSY: GREENING THE GATT THROUGH INTERNATIONAL AGREEMENT

TABLE OF CONTENTS

I. INTRODUCTION .............................................. 81

II. THE PROCESS/PRODUCT DISTINCTION AND THE CLASH BETWEEN THE ENVIRONMENT AND INTERNATIONAL TRADE .............................................. 81

III. THE PROCESS/PRODUCT DISTINCTION AND THE TUNA/DOLPHIN DISPUTE SETTLEMENT PANEL REPORT
A. The Source of the Controversy/Dolphins in the Eastern Tropical Pacific and the Process Based Regime of the Marine Mammal Protection Act .............................................. 84
B. The GATT and the Process/Product Distinction
   1. What is the Product at Issue? ............................ 87
   2. Regulation of the Process ............................... 88
   3. Panel Resolution of the Process/Product Distinction ... 90
   4. The Irony Inherent in the Panel’s Process/Product Distinction .............................................. 96
C. The Effect of the Process/Product Distinction on the Rest of the Panel Report
   1. Extraterritoriality
      a. Extraterritorial Application of Article XX(b) .... 100
      b. Extraterritorial Application of Article XX(g) .... 103
   2. International Agreement ................................... 107

IV. PROPOSALS FOR CHANGE / GREENING THE GATT
A. The Problems With Interpretation and General Environmental Amendment
   1. Interpretation .................................................. 115
   2. General Environmental Amendment ...................... 118
B. Waiver and Trumping / The Possibilities for International Agreement
   1. Formulating an International Agreement .......................... 122
   2. The Waiver and Trumping Solution .......................... 125

V. CONCLUSION .................................................. 132
THE PROCESS/PRODUCT DISTINCTION AND THE TUNA/DOLPHIN CONTROVERSY: GREENING THE GATT THROUGH INTERNATIONAL AGREEMENT

Alan Isaac Zreczny

I. INTRODUCTION

What is a product? When you pick up an item off the shelf at the local grocery store, what are you selecting? Is the notion of a product limited to the physical characteristics and qualities of the item itself as it sits on the shelf, or does it extend to the method or process of its production? Assume that the concept of a product encompasses both of these attributes. Can the importation of these items be prohibited on the basis that the manner in which they are produced contravenes the importing country’s environmental standards although the item itself, as imported, does not?

On September 3, 1991, a General Agreement on Tariffs and Trade ("GATT") dispute settlement panel ("the Panel") addressed this issue in what may be considered one of the most controversial decisions in the history of the GATT: United States-Restrictions on Imports of Tuna ("Tuna/Dolphin Report"). The Panel’s message was clear: process based regulations are incompatible with the GATT as it exists today.

II. THE PROCESS/PRODUCT DISTINCTION AND THE CLASH BETWEEN THE ENVIRONMENT AND INTERNATIONAL TRADE

The most important issue facing the Panel was the GATT compatibility of trade measures that blur the conventional boundaries of product definition. Although the decision did not focus entirely on the quagmire that characterizes the process/product distinction, the panel’s findings on this issue had a clear and determinative effect on the rest of its report.

From the point of view of environmental sustainability, process regulation is considered as important as regulation of the product itself. Maintaining the environmental services of our planet is essential to its robustness and hence to sustainable development. Without the ability to ban products produced by


environmentally unsustainable practices, countries will be lacking an essential measure for achieving environmentally sustainable development, since the measure is precisely tailored to deterring the unwanted practice. This does not mean that all such bans should *a fortiori* be acceptable, but rather they are the starting point for judging such measures as necessary to achieve environmentally sustainable development.\(^3\)

Environmental economists echo this view when justifying the regulation of production, manufacturing, or fishing processes.

> [F]rom the point of view of the importing country, it should be irrelevant whether environmental losses arise during production or consumption; both impose some costs on importing countries. This may be most obvious when the loss incurred during production is suffered directly by the importer... But the importer may also suffer when an exporter chops down its rain forest or wipes out its rhinos.\(^4\)

Therefore, when defining the relevant product, a wide framework of reference must be adopted. This is especially true when only the process, and not the traditional notion of the product itself, has detrimental environmental implications. Without this broad definitional scope, entire categories of environmentally damaging activities will continue to take refuge behind the current letter of the international trading system.

Environmentalists view the Panel's decision as a threat to important environmental laws. They fear promotion of freer trade at the expense of the environment, and a situation where the rich and developed countries become more and more reluctant to impose high environmental standards.\(^5\) Trade lawyers, on the other hand, perceive the Panel's findings as the natural result when free trade, and the GATT system, collides with protectionist trade measures of any sort.\(^6\) Generally speaking, these "free-traders" find no inherent contradiction when considering environmental protection and the GATT. They remind environmentalists that the GATT serves to protect

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member states from market access restrictions imposed by an importing country through the unilateral imposition of its domestic standards. In fact, this position is said to embrace the concerns of environmentalists. The suggestion is that chaos and anarchy, not increased environmental protection, would result if the GATT permitted unilateral imposition of domestic environmental standards.\footnote{Thomas J. Schoenbaum, \textit{AGORA: TRADE AND ENVIRONMENT; Free International Trade and Protection of the Environment: Irreconcilable Conflicts?}, \textit{86 Am. J. Int'l. L.} 700, 703 (1992).}

Scrutiny of the Tuna/Dolphin Report reveals that the Panel was on a mission to oppose the inclusion of the environment, and more specifically the process/product distinction, into the current GATT framework. Although in this particular instance this approach worked to the detriment of the environment, it does not represent a frivolous case of discrimination. The Panel recognized that incorporation of a new perspective to the process/product distinction through the existing language of the GATT or through interpretation of that language could result in forays of truly questionable reasoning and therefore in great controversy. Rather than risk the consequences of either of these undesirable alternatives, the Panel chose to strictly apply the GATT and found process based regulations GATT illegal. In so doing, the Panel served to further the argument that process based regulations are necessary for environmental sustainability. By leaving no way in which the current GATT system can be used or manipulated to permit such regulations, the Panel urged and challenged the Contracting Parties to resolve these issues on a multilateral basis.

\section*{III. THE PROCESS / PRODUCT DISTINCTION AND THE TUNA / DOLPHIN DISPUTE SETTLEMENT PANEL REPORT}

At the outset, it should be noted that the Panel’s report has not yet been adopted by the Contracting Parties to the GATT.\footnote{Housman and Zaelke, \textit{supra} note 6, at 10277.} Although such a ruling does not represent a decision of the Contracting Parties, and thus has no binding effect, it can still be quite influential. This is true if the decision is well reasoned by panelists with outstanding reputations and where its implications have been accepted by most or all of the Contracting Parties. In this way, such a decision could become part of GATT jurisprudence and practice.\footnote{JOHN H. JACKSON, The Royal Institute of International Affairs, Council of Foreign Relations Press, \textit{RESTRUCTURING THE GATT SYSTEM} 68 (1989).} The international community’s unanimous support of the Panel’s
ruling\textsuperscript{10} appears to place the Tuna/Dolphin Report in this category of decisions. In addition, it seems logical that this sort of international consensus would persuade a country to refrain from engaging in activity that is perceived, though not officially recognized, as illegal under the GATT.

A. The Source of the Controversy: Dolphins in the Eastern Tropical Pacific and the Process Based Regime of the Marine Mammal Protection Act

The Tuna/Dolphin controversy can be traced directly to a unique and unexplained relationship that exists between dolphins and yellowfin tuna in the Eastern Tropical Pacific Ocean ("ETP").\textsuperscript{11} In the ETP, dolphin herds can be found swimming directly over schools of yellowfin tuna.\textsuperscript{12} The purse-seine fishing technique depends on this relationship for success. After herding dolphins together, tuna boats encircle the dolphins with nets that are then drawn together at the bottom. It is in this way that the yellowfin tuna is caught. The nets, however, do not discriminate and also capture dolphins. The dolphins often drown, are crushed in the hauling process, or are badly wounded.\textsuperscript{13}

In response, the United States ("U.S.") passed the Marine Mammal Protection Act ("MMPA").\textsuperscript{14} The MMPA is a pure process oriented regulation. The MMPA imposes a general moratorium on the taking and importation of marine mammals and marine mammal products.\textsuperscript{15} This ban, however, is subject to limited exceptions that require the issuance of

\footnotesize
\textsuperscript{10} Nancy Bryson and Susan Koehn, 	extit{Fishing in Treacherous Waters; GATT Dispute over U.S. Regulation of Tuna Harvesting Reveals Deeper Problems Between Environmental Protection and International Trade Rule}, RECORDER, §Commentary; International Environment, Jan. 23, 1992, at 8.

\textsuperscript{11} The ETP is defined as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America. 16 U.S.C. §1385(c)(2) (Supp. III 1991).


\textsuperscript{13} Kerry L. Holland, 	extit{Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean}, 17 SYRACUSE J. INT'L. L. & COMM. 267, 268-269 (1991)


\textsuperscript{15} Id. at §1371(a).
permits. One such exception allows for marine mammal takings incidental to commercial fishing operations. Despite this exception, the MMPA provides that:

[i]n any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

More significantly, the MMPA indicates that this goal is particularly critical with respect to yellowfin tuna harvested using purse-seine nets.

This goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.

Finally, the MMPA requires the Secretary of the Treasury to impose a ban on an importing country's commercial fish or fish products caught through the use of commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of U.S. standards. This embargo can be removed only when the Secretary of Commerce certifies that the incidental dolphin kill rate of the nation in question is comparable to that of the U.S.

Fearing the GATT incompatibility of the MMPA's process based trade sanctions, the U.S. had been reluctant to impose the ban on tuna imports required under its terms. In 1991, however, the Ninth Circuit affirmed a

16. Id. at §1374.
17. Id. at §1371(a)(2).
18. Id.
19. Id.
20. Id. at §1371(a)(2) and §1371(a)(2)(A)-(E) et seq.
21. Id. at §1371(a)(2)(B)(i)-(ii).
22. The Greening of Protectionism, supra note 5, at 25.
Federal District Court injunction prohibiting the importation of yellowfin tuna from Mexico,\(^2\) and therefore forced the U.S. to impose the embargo. As a result, Mexico requested consultations with the U.S. in November of 1990, and then requested that the Contracting Parties establish a dispute resolution panel in January of 1991.\(^3\)

B. The GATT and the Process/Product Distinction

The Panel analyzed the MMPA and the process/product distinction under the framework of Article II and Article XI of the GATT. With this in mind, and before analyzing the Panel report itself, it is important to examine the relevant portions of these Articles.

Article I establishes the concept of national treatment and reads, in part:

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

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less 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.\(^4\)

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23. Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991); See also Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990). The district court enjoined the importation of yellowfin tuna from Mexico stating that the Secretary of Commerce had not made a positive finding, as required by the MMPA and that Mexico had complied with the standards regarding incidental takings of dolphin.


The Note Ad Article III provides:

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 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 paragraph 1 and is accordingly subject to the provisions of Article III.\(^{26}\)

Article XI addresses the general elimination of quantitative restrictions. According to Article XI:1:

No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.\(^{27}\)

1. What is the Product at Issue?

Definition of the relevant product represents a critical step in the Panel's analysis. Mexico structured its argument to reflect a clear separation between process and product. The U.S., on the other hand, advanced an ambiguous or broad definition of the relevant product. The importance of product definition is not limited to issues of international trade. Definition of the relevant product represents part of the "loadstar" of U.S. antitrust analysis\(^{28}\) under the Sherman Act.\(^{29}\) There, product determination is often onerous,


expensive, outcome determinative, and the subject of great debate and controversy.\textsuperscript{30}

Mexico emphasized that the U.S. embargo on yellowfin tuna and yellowfin tuna products was based on a non-existent category of products – "a hybrid 'tuna/dolphin' category existing neither in the natural world nor in tariff nomenclature: tuna associating with dolphins."\textsuperscript{31} Several countries, in their submissions to the Panel, echoed this position of clear separation between process and product. Australia noted that "the method of production or processing of the tuna or tuna products did not alter the composition of the product nor its end use."\textsuperscript{32} Canada distanced the fishing process and the yellowfin tuna product even further. Canada indicated that the U.S. did not maintain production limits on yellowfin tuna itself, but instead set limits on dolphin mortality rates incidental to tuna catch.\textsuperscript{33} The arguments presented by Venezuela also shared this line of reasoning.\textsuperscript{34}

The U.S. advanced a more ambiguous and less stringent definition of product. According to the U.S., regulation of yellowfin tuna production necessarily affects the yellowfin tuna product that results. The U.S. added that there is not always a bright line distinction between regulations that affect the sale and purchase of a particular product and those affecting its production.\textsuperscript{35}

2. Regulation of the Process.

With its definition of the relevant product in place, Mexico argued that the MMPA, its corresponding regulations, and the U.S. prohibition on imports of yellowfin tuna and yellowfin tuna products from Mexico were contrary to Article XI. In addition, Mexico maintained that the exceptions found under Article XI:2 did not apply.\textsuperscript{36}

\textsuperscript{30} See United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945) (where the product distinction was made between the virgin and secondary (recycled) ingot market); United States v. E.I. du Pont DeNemours & Co. (Cellophane), 351 U.S. 377 (1956) (where the critical distinction was made between different types of flexible wrapping materials).

\textsuperscript{31} Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1602, ¶ 3.16.

\textsuperscript{32} Id. at 1610, ¶ 4.2.

\textsuperscript{33} Id. at 1611, ¶ 4.7.

\textsuperscript{34} See Id. at 1614, ¶ 4.27.

\textsuperscript{35} Id. at 1603, ¶ 3.18.

\textsuperscript{36} Id. at 1602, ¶ 3.10.
The U.S. maintained that Article XI was not implicated in this dispute. Rather, the U.S. asserted that the measures at issue were internal regulations enforced at the time or point of importation and were therefore subject to Article III through the Note Ad Article III. Furthermore, the U.S. claimed that the MMPA complied with the national treatment requirement of Article III as a law, regulation, and requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of yellowfin tuna harvested in the ETP with purse-seine nets.\(^\text{37}\)

By simply prohibiting the import of non-conforming tuna products, the U.S. argued that it could regulate production methods consistently with Article III as long as such measures: (1) were not applied in a way to afford protection to domestic production, and (2) satisfied the requirement of national treatment.\(^\text{38}\) The U.S. added that the Agreement on Technical Barriers to Trade, which further refined the obligations of the parties, did not distinguish between the regulation of products themselves and the regulation of the processing methods used in their production.\(^\text{39}\)

With respect to the U.S. argument under Article III, Mexico reiterated the justifications for keeping a well articulated process/product distinction in the GATT.\(^\text{40}\) Mexico indicated that a product regulating measure could not be characterized as consistent with Article III if it discriminated between domestic and imported products based solely on the method of production.\(^\text{41}\)

Finally, Mexico espoused an "even if" argument. Assuming that process regulation was lawful under the GATT, Mexico maintained that the MMPA violated Article III:4 due to the discrepancy that results when calculating the number of "permissible takings" for foreign fleets compared to that for the

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37. Id. at 1602, ¶ 3.11.

38. Id. at 1603, ¶ 3.19.

39. Id. at 1603, ¶ 3.21.


41. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1602, ¶ 3.16.
As was the case with the definition of the relevant product, international consensus prevailed on the process regulation issue as well.43


The Panel acknowledged the U.S. position that while Article XI:1 prohibits quantitative restrictions on importation, Article III:4 and the Note Ad Article III permit the imposition of internal regulations on products imported from other Contracting Parties. This is true provided that the internal regulation: (1) does not discriminate in violation of the most-favored-nation principle of Article I:1, (2) is not applied so as to protect domestic production in violation of the national treatment principle of Article III:1, and (3) accords to imported products treatment no less favorable than granted to like products of national origin as required by Article III:4.44

The Panel, however, avoided any attempt to analyze the U.S. definition of the relevant product. Clearly, the Panel was not interested in undertaking an analysis that would somehow blur the line between the traditional boundaries of process and product. Adhering to a strict textual reading of Article III, the Panel accepted the Mexican definition of product.

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

42. According to Mexico: Such inconsistencies included, inter alia, the following: the United States fleet had a general permit for incidental takings (an absolute quantity of 20,5000 dolphins per year as a minimum ceiling, since there could be additional permits), while foreign fleets had a specific limit with which to comply (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 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. Id. at 1603, ¶ 3.22.

43. See id. at 1610-1616, ¶¶ 4.0-4.30.

44. Id. at 1617, ¶ 5.9.
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.45

To justify its narrow product definition, the Panel compared the imposition of internal regulations under Article III:4 to the imposition of internal taxes under Article III:2.46 The Panel reasoned that prior Contracting Party interpretations of national treatment made with respect to Article III:2 could be applied to Article III:4.47 Although the Panel stated that it was deferring to the interpretation of the Contracting Parties with respect to aspects of national treatment, it is evident that this analogy was made for purposes of product definition.

The Panel looked to a Working Party report dealing with border tax adjustments.48 This report states that:

there was a convergence of views [among the Contracting Parties] 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 tax adjustment.

45. Id. at 1617, ¶ 5.11.

46. Article III:2 reads:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.


47. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1618, ¶ 5.13.

Examples of such taxes comprised social security charges whether on employers or employees and payroll taxes.\textsuperscript{49}

This tax analogy underscores the difference between what the Panel viewed as a process, and what it perceived as a product. The Working Party distinguished between taxes paid on the product itself and those paid on what can be described as "peripheral matters" such as social security charges and payroll taxes. In similar fashion, the Panel could justify a distinction between the yellowfin tuna products affected by the import ban and the peripheral or unrelated matter of techniques used in yellowfin tuna fishing. Therefore, the Panel's reasoning served to distance the relationship between the process through which the yellowfin tuna was harvested and the imported tuna product itself.

This analogy permitted the Panel to reaffirm its determination made with respect to Article III in general, and apply it to the Note Ad Article III.

\textsuperscript{[T]he 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 that 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.\textsuperscript{50}}

The Panel seemed to limit its definition of product regulation to more "traditional" regulatory concerns, such as product wholesomeness.\textsuperscript{51} This sort of characteristic, as opposed to the interplay between dolphin takings and tuna fishing, is more easily attributed to the traditional notion of a product. It seems, therefore, that the Panel required a more solid nexus between the regulations imposed by the MMPA and the prohibited tuna products

\textsuperscript{49. Id. at 100-101, ¶ 14.}

\textsuperscript{50. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1618, ¶ 5.14.}

\textsuperscript{51. Trachtman, GATT Dispute Settlement Panel: International trade - quantitative restrictions - national treatment - environmental protection - application of GATT to U.S. restrictions on import of tuna from Mexico and other countries, 86 AM. J. INT'L L. 142, 147 (1992).}
themselves before stating that the measures in question passed GATT scrutiny. As suggested by Mexico, "justification of the MMPA's link between measures on tuna and dolphins could be found nowhere in the [GATT]." This analysis reflects the Panel's reluctance to depart from traditional notions of process/product definitions.

Bright line separation between process and product is not without GATT precedence. In the case of Belgian Family Allowances, a Belgian law placed a levy on foreign goods purchased by public bodies when the goods originated in a country whose system of family allowances did not meet Belgian requirements. Noting that the Belgian legislation was irreconcilable with the spirit of the GATT, the dispute resolution panel concluded that the law "introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions." This, like the tax analogy used by the Panel, seems to represent the more controversial portion of the process/product spectrum. In these cases, the associated peripheral matters (social security and payroll taxes, and systems of family allowances) make it difficult to argue that the lines separating process and product are somehow blurry.

The concern in the process/product debate is clearly these more difficult cases where countries may "excuse import restrictions on account of unilateral parochial or cultural views about production [which may include] religious discriminations, laws regarding employment of women, rigid 'safety' standards or minimum wage and vacation rules." The reluctance to rule on process based trade measures is related to the fear of creating significant

52. Id.

53. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1594, ¶ 3.50.


55. Id. at 61, ¶ 8.

56. Id. at 60, ¶ 3.

loopholes in the GATT. The loopholes that would be opened for so-called "production externalities" are significant because:

GATT rules set no bounds on such exemptions once they are allowed. Where would discrimination stop? Would exemptions be allowed only when the importing country is directly affected by the environmental polices of the exporter? . . . Should they be allowed when the environmental harm occurs on no man's land: in the deep oceans or in the atmosphere?

The legal argument used to substantiate this fear was well articulated by Venezuela.

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.

Although the Panel had clarified its definition of product and its position on process regulation, it had not completed its analysis. As if to make its point perfectly clear, the Panel went on to note that even if this

58. Jackson, World Trade Rules and Environmental Polices: Congruence or Conflict?, supra note 57, at 1240.


60. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1614, ¶ 4.27.
particular case could be characterized as a regulation of the sale of tuna as a product, the national treatment requirement of Article III was not satisfied.\textsuperscript{61}

The Panel indicated that Article III:4 requires a comparison of the treatment received by imported tuna as a product with that of domestic tuna as a product.\textsuperscript{62}

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." 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. It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products.\textsuperscript{63}

Given its previously established definition of the relevant product, the Panel's analysis of national treatment is not surprising. The Panel once again emphasized that a regulation governing the taking of dolphin incidental to tuna harvesting could not affect tuna as a product. The Panel simply deferred to language of Article III:4 and required that Mexican tuna receive treatment no less favorable than that afforded to U.S. tuna. The Panel made clear that this was the rule whether or not the level of incidental dolphin takings by Mexican vessels corresponded to that of U.S. vessels.\textsuperscript{64} This finding alleviated the need for the panel to look into MMPA's method for calculating Mexican compliance with these standards,\textsuperscript{65} since the principle of national treatment was already found to have been contravened.\textsuperscript{66}

\textsuperscript{61} Id. at 1618, ¶ 5.14.

\textsuperscript{62} Id. at 1618, ¶ 5.15.

\textsuperscript{63} Id. at 1617-1618, ¶ 5.12.

\textsuperscript{64} Id. at 1618, ¶ 5.15.

\textsuperscript{65} See supra, note 42.

\textsuperscript{66} Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1618 ¶ 5.16.
The Panel's removal of Article III as a justification for process based regulations left the Mexican argument that the import prohibition on yellowfin tuna and yellowfin tuna products from Mexico was simply a form of quantitative restrictions in violation of Article XI. The U.S. presented no argument in support of a contrary conclusion with respect to Article XI. As a result, the Panel found 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 inconsistent with Article XI:1.67

The Panel's failure to recognize the legitimacy of process based trade measures has been characterized as:

a head-in-the-sand attitude that runs counter to the political reality that, worldwide, countries are moving to adopt process standards, with related trade measures, that affect both natural resources as well as manufactured goods. Environmentalists are increasingly concerned about the life cycle of a product, beginning with the extraction of natural resources in the production process, but also including a consideration of the environmental ramifications of transport, marketing, packaging, consumption and disposal.68

The Panel's resolution of the process/product distinction, however, is consistent with its underlying "mission" not to engage in analysis that may open the door for process regulation under the current GATT system. The Panel achieved this goal by refusing to acknowledge the U.S. definition of product on one hand and by adhering to a narrow interpretation of the GATT on the other. It seems that regardless of the justification for process regulation, environmental or otherwise, the Panel would have reached the same conclusion. This suggests that a more open or interpretively forgiving consideration of the process/product distinction is not an endeavor considered appropriate for a GATT dispute resolution panel.

4. The Irony Inherent in the Panel's Process/Product Distinction.

At this point it is interesting to examine the Panel's analysis of the labeling provisions of the Dolphin Protection Consumer Information Act

67. Id. at 1618, ¶ 5.18-5.19.
"DPCIA". The DPCIA provides labeling standards for tuna products exported from, or offered for sale in the U.S. This labeling regime focuses specifically on yellowfin tuna harvesting operations in the ETP. In part, the DPCIA makes punishable the use of the term "Dolphin Safe", or its equivalent, on tuna products linked to purse-seine harvesting vessels in the ETP that do not meet the requisite "dolphin safe" standards.

In this part of its analysis, the Panel seems to contradict its product definition and therefore the basis for its process/product distinction. Initially, the Panel dismissed Mexico's argument that the labeling provisions were governed by Article IX:1. The Panel then addressed Mexico's concern that the labeling provisions discriminated against Mexico as a country fishing in the ETP and were therefore inconsistent with the most-favored-nation obligations of Article I:1. The Panel found the labeling regime of the DPCIA consistent with Article I:1 since it applied to all tuna caught in the ETP regardless of the country of origin. In arriving at this conclusion the Panel noted that:

70. Id. at §1385(b)(1).
71. Id. at §1385(d)(1)(B) and §1385(d)(2).
72. Article IX:1 reads, in part: "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." GATT, supra note 1, art. IX, ¶ 1, 61 Stat. at A29, 55 U.N.T.S. at 220. The Panel indicated that Article IX is entitled "Marks of Origin" and that its text refers to marks of origin of imported products. In addition, the Panel observed that Article IX contained a most-favoured-nation requirement, but not one of national-treatment. This, the Panel reasoned, indicated that Article IX was intended to regulate marking of origin of imported products, but not marking of products generally. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1622 ¶ 5.41.
73. Id. at 1622, ¶ 5.42. Article I:1 reads:
With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
74. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1622 ¶¶ 5.43-5.44.
the labeling 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-conferring advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods.75

This statement serves to undermine the Panel's analysis undertaken with respect to categorization of the MMPA measures under Article II or Article XI, and therefore with respect to the definition of the relevant product. Here the panel noted that the consumer has a choice to purchase a can of tuna, what the Panel defined as the relevant product, that is labeled "Dolphin Safe". In so doing, the Panel compressed the process and the product into inseparable components. The Panel's statement indicates, much in line with the U.S. definition of product, that a can of tuna labeled "Dolphin Safe" corresponds to a product. Clearly, the only way to assure that this product is in fact "Dolphin Safe" is to examine its method of production or regulate its manufacturing process.

This same sort of contradictory reasoning is present in the GATT Secretariat's paper dealing with the issue of trade and the environment.76 The GATT Secretariat, although with no authority to interpret GATT law or determine GATT polices,77 strongly opposes process based trade regulations. "In principle, it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting country."78 However, when dealing with the issue of alternatives to unilateral and extrajurisdictional application of domestic environmental laws, the GATT Secretariat proposes "consumer-based actions,

75. Id. at 1622, ¶ 5.42.


78. GATT Secretariat, supra note 76, at 10.
including the promotion of environmental labelling so that consumers can easily concentrate their purchases on products produced in what they consider to be environmentally-safe ways." These inconsistencies may simply be the result of the Panel and the Secretariat trying to stave off the contemporary reality of environmental sustainability with the existing language of the GATT.

Despite these apparent incongruities, the Panel's position on the issue of process regulation has been vindicated. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations\(^9\) ("the Final Act"), does not indicate a tolerance for production or process based regulations. Under the new Agreement on Technical Barriers to Trade ("the Standards Code") it is no longer enough that regulations on imports be no more stringent than regulations on domestic products. The Final Act, which expands the Standards Code to cover processes and production methods, adds that even if import and domestic regulations are identical, the import regulation may be challenged for not being the least trade restrictive device to meet the underlying environmental objective.\(^8\) Therefore, it is easy to envision losing a dispute on the issue of whether process based regulations are more trade restrictive than alternative approaches, whatever those may be.

C. The Effect of the Process/Product Distinction on the Rest of the Panel Report.

With its resolution of the process/product distinction secured, the Panel turned to the U.S. argument under Article XX. Article XX reads, in part:

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

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79. Id. at 25.

80. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Office of the United States Trade Representative, Office of the President, December, 15, 1993 [hereinafter Final Act].

81. Id. at Part II, Annex 1-A Agreements on Trade in Goods, §6 Agreement on Technical Barriers to Trade, Technical Regulations and Standards, art. 2.2. See also, Charnovitz, Special Report: Trade Negotiations and the Environment, BNA INTERNATIONAL ENVIRONMENT DAILY (BNA) (March 27, 1992).
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.82

The U.S. proposed that even if otherwise inconsistent with the provisions of the GATT, the embargo imposed under the MMPA could be justified under Article XX as an exception to GATT obligations.83

It is not surprising to find that the Panel’s definition of the relevant product and subsequent stand on the process/product distinction set the framework for its finding with respect to the U.S. arguments advanced under Article XX. The Panel found that the U.S. direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico, imported directly from Mexico, and the provisions of the MMPA under which it is imposed, could not be justified under either Article XX(b) or Article XX(g).84

1. Extraterritoriality

GATT jurisprudence indicates that Article XX has not been interpreted to allow the imposition, by one government, of regulations to protect the life or health of humans, animals, or plants outside its own territory.85 Despite this historically rooted fact, the U.S. argued that Article XX(b) and XX(g) could be used in such a way as to extraterritorially enforce the process based regulations of the MMPA.

a. Extraterritorial Application of Article XX(b)

The U.S. argued under Article XX(b) that the MMPA embargo was necessary to protect the lives and health of dolphins. According to the U.S.,

82. GATT, supra note 1, art. XX ¶ (b) and (g), 61 Stat. at A60-61, 55 U.N.T.S. at 262.
83. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1604, ¶ 3.27.
84. Id. at 1620 ¶ 5.29, and at 1621, ¶ 5.34.
85. Jackson, World Trade Rules and Environmental Polices: Congruence or Conflict?, supra note 57, at 1240-1241.
the requisite threshold of necessity required for successful implementation of
Article XX(b) was achieved since no alternative measure to the ban, that could
reasonably be expected to attain its objective, was either available or
proposed. This argument follows logically from the U.S. definition of
product that incorporates the fishing technique used to capture yellowfin tuna
in the ETP.

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 percent more than the average mortality per
set for United States vessels during the same period, and the mortality of two stocks especially vulnerable to depletion
could not exceed specified percentages of overall mortality. These measures were directly and explicitly to prevent
dolphin deaths or severe injury. Accordingly, it was clear that the measures of the United States were necessary to
protect animal life or health.

The Mexican argument against this sort of de facto extraterritorial application of environmental laws seems to reflect the same concerns the Panel expressed with respect to process regulation.

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

86. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1605, ¶ 3.33.

87. Id.

88. Jackson, supra note 9.
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.\textsuperscript{89}

The Panel stated that whether Article XX(b) reached measures necessary to protect human, animal or plant life or health outside the jurisdiction of the Contracting Party invoking a particular measure was not clearly answered by the text of that provision itself. In order to solve this dilemma, the Panel undertook an analysis of the drafting history of Article XX(b), its purposes, and the consequences the interpretations suggested by both the U.S. and Mexico would have on the operation of the GATT system as a whole.\textsuperscript{90}

The Panel's interpretive examination indicates that Article XX(b) is derived from Article 32 of the Draft Charter of the International Trade Organization ("ITO"). That article read, in part: "Nothing in Chapter IV 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". Exception (b) was amended in the New York Draft of the ITO Charter to 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". The Panel reasoned that this addition was included to address concerns regarding the abuse of sanitary regulations by importing countries. This clause was then deemed unnecessary by Commission A of the Second Session of the Preparatory Committee. Removal of this explanatory language persuaded the Panel to believe that Article XX(b) only addresses the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.\textsuperscript{91}

The Panel used this rationale to affirm the policy warnings expressed

\textsuperscript{89} Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1605, \textsection 3.31.

\textsuperscript{90} Id. at 1619, \textsection 5.25.

\textsuperscript{91} Id. at 1620, \textsection 5.26.
by Mexico and to caution against an expansive and extraterritorial reading of Article XX(b).

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.\(^2\)

It follows that an extraterritorial reading of Article XX(b) would allow for process regulation within a foreign country, thereby implicating issues of national sovereignty. To avoid these complications, and to reaffirm its clear distinction between the method of fishing and the tuna products in question, the Panel had to outlaw extraterritorial application of the MMPA. This provided the Panel with yet another, though indirect, approach to conclude that process regulation is not consistent with a Contracting Party's obligations under the GATT.

This rationale, however, seems vulnerable to attack. It is equally plausible to suggest that it is the country engaging in the environmentally unsustainable act that impinges on the sovereignty of others. In this case, for example, the jurisdictionless dolphins belong to none and all of the world's countries at the same time. Therefore, U.S. sovereignty can be considered compromised regardless of where the dolphins are victimized.

b. Extraterritorial Application of Article XX(g)

The U.S. argued that Article XX(g) was applicable to the present dispute since the measures in question were made effective in conjunction with restrictions on the domestic production or consumption of tuna.\(^3\)

\(^2\) Id. at 1619, ¶ 5.27.

\(^3\) The U.S. stated that it 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
Furthermore, the U.S. contended that the geographic or territorial location of the dolphin being conserved was not a limiting factor under Article XX(g).94

Mexico reiterated its objection to the process based trade measures imposed by the MMPA. Mexico noted that the embargo covered a product that did not correspond to the product sought to be conserved.95 In other words, the definition of the relevant product was being played out once again, this time under the auspices of Article XX(g). Mexico claimed that the embargo was applied to imports of yellowfin tuna and yellowfin tuna products from Mexico whereas the U.S. Article XX(g) claim sought to justify the measures of the MMPA on the grounds of dolphin conservation.96

Consequently, the United States was not conserving one resource (dolphins) or two resources (dolphins and tuna) but rather a specific combination of products (tuna/dolphin) located in a specific geographical area (the ETP), which did not correspond to any known trade classification either within or outside GATT. If restrictions 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.97

Therefore, Mexico insisted that the U.S. was not applying the measures in conjunction with restrictions on domestic production or consumption.98

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94. Id. at 1607, ¶ 3.41.
95. Id. at 1608, ¶ 3.47
96. Id. at 1608, ¶ 3.50.
97. Id. at 1608-1609, para 3.50. This view was shared by many of the countries that submitted arguments to the Panel. The European Union [hereinafter EU] at 1613, ¶ 4.14; Japan at 1614, ¶ 4.19; and Norway at 1614, ¶ 4.21.
98. Id. at 1608, ¶ 3.51.
As for restrictions on tuna/dolphin, 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, Mexico simply emphasized that Article XX(g) did not grant extraterritorial jurisdiction over natural resources not located in the territory of the contracting party invoking that provision.  

The Panel was faced with several interesting questions with respect to the extraterritorial application of Article XX(g). The Canadian submission articulated these points well.

"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 also remained the question of when and to what extent measures taken relating to unilaterally-set conservation objectives [could] be extended to areas outside national jurisdictions."

The Panel’s reasoning, which by this time was no longer unexpected, prohibited the regulation of the production process outside the territory of a contracting party and required the product subject to trade restrictions to be the same as that being conserved. The Panel stressed that the control of the production or consumption of an exhaustible natural resource could be effective only to the extent that the production or consumption of that resource was under its own jurisdiction. In a restatement of its determination regarding Article XX(b), the Panel simply described the

99. Id.

100. Id. at 1608, ¶ 3.47.

101. Id. at 1612, ¶ 4.8.

102. Id. at 1620-1621, ¶ 5.31.
problems associated with an extrajurisdictional interpretation of Article XX(g). 103

Finally, the Panel indicated that in order to meet the requirements of Article XX(g) "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." 104 The Panel, however, did not consider whether the process based measures of the MMPA met this requirement assuming extraterritorial application of Article XX(g) was appropriate. The Panel's jurisdictional resolution implies that it did not find this standard to have been achieved by the U.S. 105

The Panel's analysis with respect to Articles III and XI, and the process/product boundaries established there, clearly affected its examination of extraterritoriality under Article XX. The rule derived, that Article III applies only to product regulation and not to production processes, gave the panel a framework with which to analyze the general exceptions to the GATT under Article XX. The distinction between process and product has been characterized as a conflict of laws rule designed with jurisdictional allocative purposes in mind. The implication is that production processes are within the exclusive jurisdiction of the domestic producer and exporter, whereas the importer has the exclusive jurisdiction over products physically brought into its territory. 106 Thus, the Panel seemed to focus on principles of territoriality. This principle, emanating from a State's sovereignty over its national territory, permits a State to regulate conduct that occurs within its own national borders. 107 According to the Panel, therefore, process

103. Id. at 1621, ¶ 5.32.

104. Id. (Citing Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, L/6268, adopted by the Contracting Parties on March 22, 1988, BISD 355/98, 114, ¶ 4.6 (1989)).

105. Despite its statement to the contrary, the Panel did comment on this matter. Leaving no stone unturned, the Panel indicated how it would have ruled had such an inquiry been undertaken. 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 fisherman 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 conservation of dolphins. Id. at 1621, ¶ 5.33.

106. Trachtman, supra note 51, at 150.

regulation is linked directly to territorial jurisdiction. The Panel’s clear separation of process and product prevents process regulation without a corresponding jurisdictional claim.

2. International Agreement

The Panel’s position on the process/product distinction also influenced its suggestion for resolution of the controversy. Interestingly, the GATT does seem to permit a ban on imports that can be traced to a particular type of production process. Article XX provides an exception for measures "relating to the products of prison labour." Unlike purse-seine fishing, however, there seems to be universal consensus against the use of prison labor. In fact, one may even suggest that this has risen to the level of customary international law. This sort of distinction appears to have influenced the Panel’s recommendation for international agreement as the form for ultimate resolution of the process/product controversy.

The Panel was quite careful to emphasize the point that the GATT is not per se hostile to the environment. The Panel noted that "Article XX(b) allows each contracting party to set its human, animal or plant life or health standards" and "that Article XX(g) allows each contracting party to adopt its own conservation policies." However, as the Panel emphasized in its concluding remarks, its analysis was strict constructionalist in nature and was therefore limited to the confines of the existing GATT system. 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. This sort of statement, not unique to this particular conciliation, reflects the Panel’s apparent uneasiness with forging

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

109. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1619, ¶ 5.27.

110. Id. at 1621, ¶ 5.52.

111. Id. at 1622, ¶ 6.1.

112. Only two years earlier, a dispute resolution panel, resolving a question of intellectual property protection, concluded in a similar manner. To avoid any misunderstanding as to the scope and implications of the above findings, the Panel stresses that neither Article II:4 nor Article XX(d) puts obligations on contracting parties specifying the level of protection that they should accord to patents or the effectiveness of procedures to enforce such protection. The only task entrusted to the Panel was to see whether the treatment accorded to imported products under Section 337 is compatible with the Rules of the General Agreement. United States Section 337 of the Tariff Act of 1930, L/6439, adopted by the Contracting Parties on
a new definitional analysis and therefore its reluctance to resolve the process/product controversy on its own. With respect to Article XX(b), Mexico questioned the "necessity" of the embargo instituted under the MMPA. Mexico indicated that its own dolphin protection measures were in conformity with the GATT "demonstrating that the General Agreement did not oblige its contracting parties to adopt measures contrary to the environment." In fact, Mexico indicated that the only way to achieve process oriented environmental protection, in this case dolphin conservation, was through international agreement.

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. 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.

Mexico's call for international agreement was echoed by many of the countries that submitted arguments to the Panel. In essence, there already


114. *Id.*

115. *Id.*

116. The EU stated that it "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." *Id.* at 1612, ¶ 4.10; 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." *Id.* at 1614, ¶ 4.20; Thailand noted that "[i]nstead 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 [MMPA] itself." *Id.* at 1614, ¶ 4.24; Venezuela emphasized "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 (under the intermediary embargo provisions of the MMPA). Venezuela urged the development of multilateral measures to protect dolphins, and urged that the MMPA embargo be lifted." "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." *Id.* at 1614, ¶ 4.26-4.27.
exists international consensus on the proper mechanism through which to resolve the process/product controversy, at least with respect to dolphin conservation. In what can only be described as an oversight or perhaps even a mistake in argument, the U.S. acknowledged that "the need to conserve dolphin was recognized internationally, as for example in the work of the Inter-American Tropical Tuna Commission ("IATTC") and the United Nations Convention on the law of the Sea."\footnote{117}

The Panel agreed with the call for resolution through international agreement. In so doing, it relied on a prior panel's narrowly construed definition of "necessary."

\[T\]he import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.\footnote{118}

This indicates that only the least trade restrictive measures will justify use of Article XX(b) and therefore imposition of environmentally based trade sanctions. With this in mind, the Panel indicated that even assuming that extrajurisdictional protection of life and health were an acceptable interpretation of Article XX(b), the requirement of necessity was not achieved.

The Panel found that the U.S. had not exhausted all reasonably available GATT consistent options through which to pursue its objectives. The Panel specifically noted the possibility of negotiation of international cooperative arrangements which it felt were "desirable in view of the fact that dolphins roam the waters of many states and the high seas."\footnote{119} In fact, the Panel's constant reference to the unilateral measures of the U.S. indicates that process based trade measures taken pursuant to an international agreement

\footnote{117. \textit{Id.} at 1607, \textsection 3.40. The IATTC was formed in 1950 as the result of negotiations with respect to fishing zones between the U.S. and Costa Rica in 1950. The IATTC was designed to regulate fishing and protect marine resources. In the mid 1970's, the IATTC turned its attention to the tuna/dolphin problem, and emphasized a need to reduce dolphin mortality. This program was envisaged to have international scope and purpose. \textit{Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean, supra} note 13, at 275-276.}

\footnote{118. \textit{Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R,} adopted by the Contracting Parties on November 7, 1990, \textsc{BISD} 37/200, 222-223, \textsection 75 (1990).}

\footnote{119. \textit{Tuna/Dolphin Report, supra} note 2, 30 I.L.M. at 1620 \textsection 5.28.}
with broad multilateral support would somehow be considered more acceptable and therefore deemed consistent with the GATT or permissible under its general exceptions. Finally, the Panel pointed out that even assuming that the trade measures of the MMPA represented the only means of achieving U.S. objectives, the unpredictability of the permissible incidental taking rate and the resulting inability of the Mexican authorities to know, at any given time, if they were in conformity with U.S. regulations, removed any possibility of meeting the requisite standard of necessity.

Ironically, this line of reasoning suggests that a change in the method of calculating of permissible incidental takings combined with the failure of negotiations with Mexico would permit U.S. application of the process based regulations of the MMPA in an extraterritorial fashion. Furthermore, the Panel's interpretation of "necessary", poses a problem: how diligently does one country have to attempt negotiation of an agreement before making unilateral trade measures "necessary"? And therefore, when is the attempt to fulfill this "necessity" requirement deemed exhausted?

Similar to the call to prohibit process based regulations, the Panel's suggestion for international agreement as the way to resolve the process/product controversy was also vindicated. According to the GATT Secretariat:

[i]f the goal is to influence environmental policies and practices in other counties, the option which is most consistent with orderly international relations is inter-governmental cooperation leading to a multilateral agreement. By offering each country the opportunity to explain and defend its view of the problem, the negotiating process increases the chances of uncovering solutions acceptable to all the affected parties. Cooperative efforts also offer the best chance of ensuring that the policy changes deal directly with the problem at hand and that they provide minimum scope for protectionist abuses.

120. OTA Report, supra note 77, at 49.

121. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1620 ¶ 5.28.


123. OTA Report, supra note 77, at 52.

124. GATT Secretariat, supra note 76, at 10.
The GATT Secretariat has underscored the importance of keeping a bright line distinction between process and product. In what appears to be a direct commentary on the Tuna/Dolphin controversy, the Secretariat indicates that "[n]egative incentives - in particular, the use of discriminatory trade restrictions on products unrelated to the environmental issue at hand - are not an effective way to promote multilateral cooperation." 125

In addition, the Final Act's standards relating to human, animal and plant health oblige a country to base its own standards on international rules where they exist. In the alternative, such standards are to be set so as not to needlessly discriminate against other countries where similar conditions prevail. 126 Finally, in its effort to design principles to guide the conduct of people and nations towards one another and towards the environment, 127 the United Nations Conference on Environment and Development has directly addressed the process/product controversy. Principle 12 of the Rio Declaration on Environment and Development ("Rio Declaration") reads, in part:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus. 128

The Rio Declaration seems to have expressly adopted the Panel's ruling as well.

The justifications used to support multilateral agreements that secure international environmental objectives parallel those advanced for the trade measures such agreements would impose. It has been suggested that such trade measures only be used: (1) where the conduct at issue has global environmental effects, (2) when trade measures are matched by domestic regulations, (3) if they are truly multilateral with broad support, (4) where there are positive efforts and incentives to encourage adherence by reluctant

125. Id. at 4.

126. Final Act, supra note 80, Annex 1-A, Agreements on Trade in Goods, §6 Agreement on Technical Barriers to Trade, Regulations and Standards, arts. 2.4 and 2.5. See also The Greening of Protectionism, supra note 5, at 26.


countries, (5) if they are related to the conduct at issue, and (6) if they are crucial to achieving the environmental goal in question.129

The culmination of the Panel’s Article XX analysis indicates that in the absence of a violation of international standards, this Article will provide little protection for environmental regulations that apply to a foreign producer’s manufacturing processes.130 The Panel’s process/product distinction appears to remove any possibility for process regulation under the present GATT system. As a result, one must ask if a broad product definition or a process based regulation in the name of the environment represents a legitimate cause. And if so, how can the GATT system be altered to accommodate this purpose?

IV. PROPOSALS FOR CHANGE/GREEN THE GATT

The Panel’s ruling crystallized the fact that there presently exists a democratic deficiency where international trade and the environment are concerned. This legislative failure has permitted the process/product controversy to flourish.

In essence the panel here has stated that the fundamental impediment to an overlay of environmental concerns and standards on trade policy is the lack of a comprehensive set of GATT-approved, internationally accepted, environmental norms. While GATT as a set of internationally negotiated, accepted, and periodically amended rules governs trade activities, no similar body of comprehensive international agreements exist with respect to environmental concerns and standards.131

As it stands today, the GATT contemplates no mechanism for simultaneous and equivalent consideration of substantive environmental matters and issues concerning international trade.132

It is no longer possible to ignore the inseparable relationship between international trade and the environment. The controversies that arise as the result of this interaction may be addressed in several ways. Some argue that the GATT should not represent the forum in which international environmental guidelines are negotiated. The argument, as demonstrated in

129. OTA Report, supra note 77, at 44-45.


132. Id. at 423.
Australia's Tuna/Dolphin submission, is that neither a dispute resolution panel nor the GATT in general has the "competence to rule on the actual danger to health, morals or the environment represented by specific goods or their method of production."\textsuperscript{1} In fact, during a debate on trade and environmental issues in May of 1991, just prior to the Panel's decision, the GATT Council agreed that the GATT's proper role was to promote liberal trade. The Council felt that the issues of setting or harmonizing environmental policies and standards were best left to international environmental agreements.\textsuperscript{2}

Others view the basic GATT structure as effective and the basis on which environmental concerns should be addressed. The European Parliament recently questioned the GATT's competence on environmental matters, calling for a two year moratorium on panel judgments dealing with the environment. According to the European Parliament, this ban should continue until GATT practice and the GATT Articles themselves are strengthened with respect to environmental policy.\textsuperscript{3}

With these philosophical positions in mind, the question becomes should the GATT be altered? Or, should another international regime, separate from the GATT, emerge to address the process/product controversy and environmental matters in general? The GATT's proven infrastructure indicates that it is the natural and most logical basis on which to build an international environmental regime. Ultimately, the goal should be to create a General Agreement on Tariffs, Trade, and the Environment ("the GATTE"), or its equivalent under the proposed World Trade Organization ("WTO").\textsuperscript{4}

The Panel's decision appears to move towards this ultimate, though unstated, goal. Throughout its ruling, the Panel was reluctant to distort the traditional framework of the GATT. This allowed the Panel to dismiss the U.S. definition of product with an "our hands are tied" argument. The Panel's justification for a strict interpretation of current GATT provisions is fully revealed in its Concluding Remarks.

\begin{enumerate}
\item [133.] Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1610, ¶ 4.1.
\item [135.] EC Parliament Proposes Two-Year Moratorium on GATT Panel Environmental Decisions, Int'l Trade Rep. (BNA) §General Developments: GATT (Jan. 27, 1993). This proposal seems quite ironic considering the EU complaint under the GATT with respect to the intermediary ban of the MMPA. See infra note 163.
\end{enumerate}
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.137

This statement reveals the Panel’s wish to remove itself as far as possible from undertaking a final resolution of this particular dispute, and of the process/product controversy in general. Rather than reaching a definitive answer, beyond the confines of the current GATT system, the Panel left such a determination up to the GATT’s Contracting Parties.

Some view this "hands-off" approach as an abdication of duty. [T]he Tuna/Dolphin Panel Report failed to consider the environmental interests served by the MMPA. For this reason, the Panel’s analysis obscures, rather than illuminates, the relative weight of the conflicting values at stake in the tuna/dolphin dispute. Analysis of future conflicts between the interests in liberalized trade and in protecting the global commons will need to take account of all relevant international interests.138

The merits of such claims notwithstanding, the Panel’s conduct appears consistent with the general practice of GATT dispute resolution

137. Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1622, ¶ 6.3.

panels. These panels are generally reluctant to extend GATT law, through interpretation, to new circumstances such as the MMPA's imposition of process based trade measures. This sort of action is traditionally left to the GATT's legislative process. A conservative institutional framework of this nature necessarily removes the possibility for any dispute resolution panel to find process based trade measures compatible with the current GATT regime.

Before analyzing the Panel's proposals for change, one should beware of haphazard alterations to the GATT system in an attempt to make it more "green."

If the greening of the GATT means that the Contracting Parties should respect environmental objectives in administering Article XX, then greening is a good idea. But if greening means that the Contracting Parties should subordinate economic goals to ecological imperatives then greening is a bad idea -- for the environment and for the GATT. It is a bad idea for the environment because the GATT does not have the scientific expertise to judge what ecological measures are appropriate. It is a bad idea for the GATT because environmental policy would be too divisive for GATT's current decision-making structure.

A. The Problems With Interpretation and General Environmental Amendment.

In its concluding remarks, the Panel recommended against interpretation, and suggested amendment or waiver of GATT obligations as possible solutions for the process/product controversy. It is only a strategy involving the waiver of GATT obligations that will satisfactorily resolve the growing tensions between international trade and the environment.

1. Interpretation

The Panel recommended against interpretation of Article XX as the method to address environmental concerns within the GATT framework. This is true of interpretation intended to divine the intent of the drafters as well as that undertaken to fit the environment into the language of the GATT

139. OTA Report, supra note 77, at 51.

140. Id.

as it exists today. For the most part, the Panel backed up this position with a consistent and narrow analysis of the GATT provisions themselves.

Despite its own warnings, however, the Panel did undertake an interpretive tact in order to solve the question surrounding the extraterritorial application of Article XX(b).\(^\text{142}\) Ironically, this inconsistency serves to strengthen the Panel's overall recommendation against interpretive solutions to the conflict between trade and the environment.

It has been stated that:

> [t]he drafting history cited by the Panel hardly compels—or even favors— the Panel's conclusion. To the contrary, although the drafting history indicates that the parties were concerned, \textit{inter alia}, with sanitary provisions protecting their own citizens, no evidence exists in the negotiations the Panel relies upon that even hints that nations are limited to protecting animal or plant life within its borders . . . This drafting history simply does not support the conclusion that the drafters of Article XX(b) intended to disable nations from protecting global commons resources through the use of green trade barriers.\(^\text{143}\)

The Panel's interpretation of Article XX(b), prohibiting extraterritorial application, has been characterized as understandable if one looks narrowly at the drafting of Article XX(b) between 1946 and 1948.\(^\text{144}\) The suggestion is that such an analysis ignores the historical background that served to formulate Article XX(b). This history comes in the form of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927. Although the goal of the convention was to abolish all import and export restrictions, eight types of restrictions were permitted to remain in use. These "exceptions" were considered to have risen to the level of customary international law and to be based on fundamental notions of international trade. One such exception allowed "for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites". In fact, an addendum was added to clarify that "the protection of animals and plants against disease also refers to measures taken to preserve them from degeneration or extinction."\(^\text{145}\) Therefore, under this

\(^{142}\) See \textit{infra} "Extraterritorial Application of Article XX(b)", at 19.

\(^{143}\) Dunoff, \textit{supra} note 138, at 1416-1417.

\(^{144}\) Charnovitz, \textit{supra} note 141, at 44.

\(^{145}\) \textit{Id.} at 41-42 (Citing League Doc. C.E.1.22 at 21, 97 L.N.T.S. 405, and 97 L.N.T.S. 427).
interpretation, the U.S., who had authored the language adopted, believed that Article XX(b) would support existing U.S. trade and environmental laws.\footnote{Id. at 44-45.}

This historical analysis and interpretation is consistent with the jurisprudence of the International Court of Justice and of U.S. courts.\footnote{Restatement (Third) of the Foreign Relations Law of the United States §325, comment (e) and (g), reporter’s note 4 (1986).} Others, however, find such an interpretive analysis of Article XX, and the GATT in general, as problematic. They contend that this approach ignores the fact that under the Vienna Convention on the Law of Treaties\footnote{Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf.39/27 art. 31 and 32.} legislative history or "travaux paratoires" is considered a secondary method for treaty interpretation.\footnote{Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, supra note 57, at 1241-1242.}

Uneasiness also exists with respect to stretching the GATT text to somehow address or encompass environmental issues. In fact, the Panel’s ruling serves to remove this sort of interpretation as a viable candidate for greening the GATT.\footnote{Manard, supra note 131, at 424.}

\[\text{[A]ttempting to interpret the GATT Articles in such a way as to create . . . rules by some further development of GATT jurisprudence merely seeks to match up two important topic areas where one has an established set of rules and the other has few.}\footnote{Id. at 418.}

Although many interpretive solutions may be proposed, none could satisfactorily resolve the process/product controversy or any other environmental and trade conflict. After the Panel’s decision, and with respect to Article XX(b), the word "necessary" permits environmentally based trade sanctions only in very limited circumstances. As previously discussed,\footnote{See infra "International Agreement", at 25.} in order to meet the Panel’s threshold of "necessity", environmentally based trade measures must represent the least trade restrictive means through which the overriding environmental goal can be achieved. Interpretation of Article

\begin{itemize}
    \item[146.] Id. at 44-45.
    \item[147.] Restatement (Third) of the Foreign Relations Law of the United States §325, comment (e) and (g), reporter’s note 4 (1986).
    \item[149.] Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, supra note 57, at 1241-1242.
    \item[150.] Manard, supra note 131, at 424.
    \item[151.] Id. at 418.
    \item[152.] See infra "International Agreement", at 25.
\end{itemize}
XX(b) could be altered so that "protect" corresponds to the goals of the contested legislation, and "necessary" to the method of regulation. For example, protection of endangered species would justify the most trade restrictive measures. On the other hand, trade measures designed to protect species to which no immediate threat is perceived would be justified only with the least trade restrictive measures available. Therefore, under this interpretive technique, categorization of the goal would determine the degree to which trade sanctions could restrict trade.  

The difficulties inherent in such a system abound. With respect to the Tuna/Dolphin controversy, where would dolphin be categorized? In addition, at what level of danger would process based regulations be deemed permissible? This or any similar interpretive solution would simply generate debate and controversy in these procedural areas while the environmental object of the regulation continued to be harmed.

2. General Environmental Amendment

It has been suggested that the public policy objectives inherent in Article XX(b) and XX(g) encompass objectives of environmental protection. According to this view, a general environmental amendment would be entirely consistent with the objectives of Article XX. This sort of amendment, however, will not satisfactorily resolve the process/product controversy or other environmental issues. The problem with a general environmental amendment is reflected in the Panel's concern over imposition of unilateral extrajurisdictional trade restrictions. Contracting Party approval of a general exception for the environment would only change the GATT cosmetically. One can readily foresee a situation where political pressure would persuade a Contracting Party to accept such an environmentally friendly provision. The problem, however, is that such a general environmental exception would permit each Contracting Party to retain its own interpretation of the exception's parameters. Therefore, it would be difficult, if not impossible, to enlarge the scope of Article XX

153. This interpretive model was formulated as part of a group drafting assignment concluded in conjunction with a Seminar on Environment and Trade at the Georgetown University Law Center (April, 1993). The author, a member of the group, has included this portion of the drafting assignment with the permission of the other group members.


155. Id. See also infra "Extraterritoriality", at 19.
without also facilitating the implementation of protectionist barriers justified on environmental grounds.\textsuperscript{156}

In addition, the call for a general environmental amendment to the GATT encounters technical or practical problems.\textsuperscript{157} An amendment to Article XX to incorporate the environment would require a two-thirds acceptance by all of the Contracting Parties. However, the amendment would only be binding on those Contracting Parties that have accepted the amendment. Related impracticalities of the amendment process include: (1) the time consuming process involved in gathering the requisite number of acceptances, and (2) the ability of developing countries to obtain negotiating power and therefore successfully challenge an amendment. It was precisely for these reasons that the Tokyo Round resulted in the adoption of so-called side codes which in and of themselves represent complex agreements.\textsuperscript{158} Unfortunately, the greatest number of acceptances of a Tokyo Round side code has been thirty-seven. This does not amount to even one-half of total GATT membership.\textsuperscript{159} Consequently, overcoming these obstacles and obtaining the requisite two-thirds vote for a general environmental amendment appear impossible. This systemic rigidity and corresponding inability to accommodate new aspects of international trade, such as the environment, has resulted in the gradual disuse of the amendment procedure.\textsuperscript{160}

### B. Waiver and Trumping/The Possibilities for International Agreement

It is in the context of the Panel's proposals for amendment that its suggestion for international agreement must be analyzed. To be truly effective, an international agreement permitting process based trade measures must undergo a two-stage evolution. Initially, the agreement itself must be

\begin{itemize}
\item \textsuperscript{156} OTA Report, \textit{supra} note 77, at 51.
\item \textsuperscript{157} Amendment to the GATT is governed by Article XXX which reads, in part: Except where provisions for modification are made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it. GATT, \textit{supra} note 1, art. XXX, ¶ 1, 61 Stat. at A74, 55 U.N.T.S. at 282.
\item \textsuperscript{158} Jackson, \textit{Restructuring the GATT System}, \textit{supra} note 9, at 24-25.
\item \textsuperscript{159} \textit{Id.} at 26.
\item \textsuperscript{160} \textit{Id.} at 45-46.
\end{itemize}
formulated. At this point, the agreement simply represents a convention, and is therefore technically without binding force. It is precisely for this reason that the GATT system must be retained. The second evolutionary phase involves bringing the international agreement within the general framework of the GATT. This phase assures that binding rules governing process based standards can be implemented and enforced.

The call for an international agreement to resolve the controversy surrounding attempts at process regulation is by no means a novel concept. Historically, process based trade regulations have been imposed through international agreement. A 1906 convention was adopted to stop production and importation of matches produced with white phosphorus. The import ban was imposed not because the matches themselves were harmful, but because the process by which they were made constituted a health danger to domestic and foreign workers. In 1911, a treaty was signed between the U.S., Great Britain, Russia, and Japan outlawing water hunting of seals and sea otters. This hunting technique left many seals injured and disproportionately endangered females. The treaty, much like the provisions of the MMPA, also outlawed the importation of seal skins taken in violation of the convention. Finally, a 1921 regional agreement between Italy and the Kingdom of the Serbs, Croats, and Slovenes prohibited trade in fish caught by procedures that had deleterious effects on the spawning and preservation of fisheries.

From these historical examples, it is clear that an international agreement solves, without controversy, the definitional and extrajurisdictional problems associated with the process/product distinction.

Interestingly, the U.S. seems to have accepted the Panel's call for international agreement as evidenced by the initiation of negotiations with Mexico to resolve the Tuna/Dolphin problem. In fact, Mexico has even requested that the GATT Council postpone consideration of the Panel's report in lieu of these negotiations. Perhaps this new position was inspired by

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162. Id.

163. Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo, Int'l Trade Rep. (BNA) §News Highlights: GATT, at 1351 (Sept. 18, 1991). However, in January of 1992 and under court order, the U.S. was forced to impose the MMPA's secondary embargo provisions banning the import of yellowfin tuna and yellowfin tuna products from intermediary nations. See Earth Island Institute v. Mosbacher, 785 F. Supp. 826 (N.D. Cal. 1992). This has resulted in political pressure being placed on the GATT Council to adopt the Tuna/Dolphin Report and therefore its finding that the MMPA's intermediary ban is GATT illegal. See, Tuna/Dolphin Report, supra note 2, 30 I.L.M. at 1621-1622, ¶¶5.35-5.40. Any intermediary nation can complain to the GATT as a result of having been affected by the intermediary ban. To this end, both France and Italy filed a formal complaint to invoke GATT dispute resolution procedures by requesting consultations with the U.S. OTA Report, supra note 77, at 15. See also GATT Council Refuses
the text of the North American Free Trade Agreement ("NAFTA").\(^{164}\) Article 906, entitled *Compatibility and Equivalence*, reads:

1. Recognizing the crucial role of standards-related measure in achieving legitimate objectives, the Parties shall, in accordance with this Chapter, work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers.

2. Without reducing the level of safety or of protection of human, animal or plant life or health, the environment of consumers, without prejudice to the rights of any Party under this Chapter, and taking into account international standardization activities, the parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties.\(^{165}\)

Furthermore, the U.S. House of Representatives and Senate recently passed a bill entitled the International Dolphin Conservation Act of 1992.\(^{166}\) This bill represents a regional agreement whereby the embargo on yellowfin tuna and yellowfin tuna products from Mexico (and Venezuela) would be removed if those countries agreed to take steps to decrease the incidence of dolphin takings. Specifically, the bill would amend the MMPA to allow the U.S. Secretary of State to enter into agreements establishing a five year moratorium on the use of purse-seine nets on dolphins. Any such agreements

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were to take effect on March 1, 1994.167 Although these talks are being conducted on a regional level, this bill seems to represent the sort of action the Panel was striving for. It is through these regional activities that GATT compatible process/product standards may be achieved. These standards can then be applied to multilateral agreements and eventually incorporated into the GATT system itself.

1. Formulating an International Agreement.

Proposed guidelines regarding the form such an international environmental agreement should take have come from the European Union ("EU"). The influence of the Panel’s ruling is clear.

A Specific exemption under Article XX is only justified when the environmental agreement is genuinely multilateral in nature. In order to arrive at such a definition, certain criteria could be examined:

(i) The agreement should have been negotiated under the aegis of the United Nations or a specialized agency such as UNEP or the procedures for negotiation should have been open for participation of all GATT members

(ii) The agreement should be open for accession by any GATT members on terms which are equitable in relation to those which apply to original members.

(iii) Certain environmental problems are regional in nature and therefore may need to be addressed at the regional level. In such cases, the criteria suggested above should apply to all countries within the region. . . . Quite clearly, such regional agreement cannot provide any justification for applying extrajurisdictional trade measures vis-a-vis countries outside the region.168

The implication is that international standards or customary international law addressing process/product issues would make it easier to


168. European Community Proposal on Trade and Environment, supra note 154, at S-5.
resolve trade and environmental disputes and consequently decrease the likelihood of conflict. Achieving international consensus, however, requires more than simple GATT involvement in the process. This level of negotiation will require that all countries, developed and developing, all governmental and non-governmental trade and environmental agencies, and the United Nations be involved.\textsuperscript{169}

It is much easier to state that an international agreement addressing the process/product controversy should be created and agree on its general form than it is to actually arrive at one. Several problems are associated with this sort of negotiation. Reaching an agreement is often a slow and arduous process requiring flexibility and a willingness to compromise.\textsuperscript{170} The cause of these extended negotiations can be linked to the number of parties that must be involved as well as to economic and diplomatic concerns.\textsuperscript{171} Unfortunately, this time factor may allow irreversible environmental harm, such as loss of species, to occur before the agreements are concluded.\textsuperscript{172}

In addition, even if successful negotiation is accomplished, a country may be reluctant to join such an agreement for various reasons. It may: (1) disbelieve scientific evidence and simply declare that a particular environmental problem does not exist, (2) acknowledge the existence of such a problem, but assign it low priority for resolution, (3) disagree with the proposed agreement's allocation of responsibility for resolving the problem, or (4) simply try to "free-ride" and benefit from the efforts of others.\textsuperscript{173} Finally, there is also the requirement of enforcement, and therefore verification. A sound system of verification is needed to instill confidence in the agreement, encouraging uncommitted countries to join.\textsuperscript{174} It is precisely for the foregoing reasons that the IATTC has struggled to achieve the goals of its dolphin conservation program. In fact, it was only in 1986 that all ETP purse-seine fishing nations took part in this program.\textsuperscript{175}

\textsuperscript{169} OTA Report, supra note 77, at 73.


\textsuperscript{171} Christensen, supra note 12, at 594.

\textsuperscript{172} Housman and Zaelke, supra note 6, at 10277.

\textsuperscript{173} GATT Secretariat, supra note 76, at 29.

\textsuperscript{174} Cairncross, Whose World is it, Anyway?, THE ECONOMIST, \S Survey; The Environment, at 6 (May 30, 1992).

\textsuperscript{175} Christensen, supra note 12, at 594-595.
Prioritizing environmental issues to be addressed by these agreements is not the answer. Essentially, prioritizing simply corresponds to an international agreement to agree on the order in which these matters will be negotiated and eventually resolved. Creating a list of priorities will encounter the same obstacles as negotiation of the agreements themselves. The best approach is simply to allow any country to initiate an agreement on any particular subject. The merits of the cause, and therefore the degree of international consensus, will determine the success of the negotiation.

Finally, it is difficult to imagine that countries with strong environmental policies, such as the U.S. with the MMPA, will be persuaded to be flexible and conciliatory if it means they will have to reduce their environmental standards. The potential for hostile reactions seems inevitable. In fact, a concurrent resolution in the U.S. Congress reflects this antagonism. The resolution reads, in part:

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

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

Now, therefore, be it resolved by the House of Representatives (The Senate Concurring)

Section 1. President.
The Congress calls upon the President to initiate and complete negotiations, as part of the current Uruguay Round GATT talk, to make the GATT compatible with the Marine Mammal Protection Act and other United States health, safety, labor, and environmental laws, including those laws that are designed to protect the environment outside the geographic borders of the United States.

Section 2. Legislation.
The Congress will not approve legislation to implement any trade agreement (including the Uruguay Round of the GATT and the United States-Mexico Free Trade Agreement) if such
agreement jeopardizes United States health, safety, labor, or environmental laws.\textsuperscript{176}

The benefits provided by international environmental agreements, however, outweigh their associated difficulties. The process of multilateral negotiation allows all countries to express their desires and concerns through negotiation. The net result of such a process is an agreement that incorporates these factors in its standards. This necessarily enhances adherence to and the enforceability of the agreement.\textsuperscript{177}

2. The Waiver and Trumping Solution.

Creating an international agreement that provides for process based trade measures is only the first stage in addressing the process/product debate or any other environmental issue. Assuming that the difficulties associated with the negotiation of such an agreement can be resolved, and this constitutes a very large presumption, the question becomes how it will be implemented and what will its relationship be to the GATT? Waiver of GATT obligations and the subsequent creation of a trumping system represents the best way to implement such an agreement while keeping it within the auspices of the international trading system. In fact, GATT incorporation of international environmental agreements that have trade sanctions as part of their enforcement mechanisms has been characterized as an ultimate necessity.\textsuperscript{178}

The combination of the Panel's findings and international consensus indicates that this is the only way that those trade measures will be deemed GATT consistent.

The waiver and trumping solution constitutes a two stage process. Initially, GATT obligations would be waived with respect to a particular international environmental agreement. This will serve to bring the agreement within the GATT system in a relatively short period of time. During the period for which the waiver is viable, the agreement itself would be added to a list of similar multilateral conventions contained in a general trumping provision amended to the GATT. It is in this way that process based trade measures could be incorporated into the GATT system.


\textsuperscript{178} General Agreement on Tariffs and Trade Will Include Environment, EPA's Reilly Says, INT'L TRADE REP. (BNA) §General Developments: GATT, at 1829 (Oct. 21, 1992).
Compared with formal amendment, waiver of GATT obligations entails less stringent procedural requirements.\textsuperscript{179} In addition, such a waiver:

would ensure that the proposed trade policy actions would be focused on the environmental problems in question, and that they would be transparent, multilaterally negotiated, have broad support among the GATT membership, and be subject to conditions designed to avoid abuse.\textsuperscript{180}

Waiver of GATT obligations will allow international agreements dealing with the process/product distinction to prevail over GATT rules. Thus, trade measures taken pursuant to those regimes would not be deemed inconsistent with the GATT.\textsuperscript{181} As a result, individual Contracting Parties could impose import restrictions on exports from countries with what those agreements define to be inadequate environmental regulations.\textsuperscript{182}

Waivers of GATT obligations, however, are granted for only limited periods of time, in exceptional circumstances, and are not considered a substitute for rule revision.\textsuperscript{183} To address these issues, a trumping mechanism must be amended to the GATT. A system of this nature has been adopted in the text of the NAFTA. Article 104, entitled \textit{Relation to Environmental and Conservation Agreements}, reads:

I. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

\begin{verbatim}
179. Article XXV addresses the issue of waiving GATT obligations. This article reads, in part:
In exceptional circumstances not elsewhere provided for in this Agreement,
the Contracting Parties may waive an obligation imposed upon a contracting
party by this Agreement; \textit{Provided} that any such decision shall be approved
by a two-thirds majority of the votes cast and that such majority shall
comprise more than half of the contracting parties.

180. GATT Secretariat, \textit{supra} note 76, at 12.

181. Jackson, \textit{World Trade Rules and Environmental Policies: Congruence or Conflict?}, \textit{supra} note 57 at 1244-1245.

182. GATT Secretariat, \textit{supra} note 76, at 12.

183. \textit{Id.}
\end{verbatim}

(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990;

(c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel March 22, 1989, on its entry into force for Canada, Mexico and the United States; or

(d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement. 

Such a system serves simultaneously to permit and constrain the use of trade measures adopted in the name of the environment. Unlike a general environmental amendment, a trumping system would provide the Contracting Parties with a precise indication of permissible environmentally based trade sanctions.

Inclusion of such a provision, however, would involve the amendment process and its associated difficulties. Ironically, the drafting history of the GATT indicates that a similar trumping clause was present in Article 45 of the Havana Charter, the document designed to create the structure of the ill-fated

184. NAFTA, supra note 164, Part One, General Part, Chapter One, Relation to Environmental and Conservation Agreements, art. 104.

185. Dunoff, supra note 138, at 1441.

186. See infra "General Environmental Amendment", at p. 37.
ITO. This precursor to GATT Article XX contained an additional exception that covered measures "taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals."\(^{187}\)

When there has been formulation of criteria through which new agreements could be added to the general trumping provision, the waiver portion of the "waiver and trumping solution" can be abandoned. At that time an automatic trumping mechanism could be installed. Under such a system, an international environmental agreement intended to be added to the general trumping provision, and signed by the requisite number of Contracting Parties, would automatically prevail over inconsistent GATT obligations.

Once an agreement with international environmental standards is in place, trade measures can be implemented to address process based concerns. In this context, measures are deemed effective because:

- they can help convince a country to join an international environmental agreement or to behave according to certain environmental norms;
- deny a country economic gain from failing to follow such norms;
- prevent a country's actions from undermining the environmental effectiveness of other countries' efforts; and
- remove the economic incentive for certain environmentally undesirable economic activity.\(^{188}\)

Interestingly, the same reasons have been advanced to justify strictly unilateral action as envisioned by the U.S. under the MMPA. The argument is that much like trade sanctions taken pursuant to international agreement, unilateral action can serve as a catalyst to bring about either the international agreement in the first place, or compliance with and accession to its terms.\(^{189}\)

As suggested by the GATT Council, trade measures taken under the umbrella of an international agreement "will not, in general, pose practical difficulties under the GATT as long as they reflect the necessary degree of multilateral consensus."\(^{190}\) Furthermore, international agreement and subsequent GATT waiver and trumping solves the Panel's concern over unilateral extrajurisdictional protection since that concept is rendered moot.

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187. The Contracting Parties to the General Agreement on Tariffs and Trade, Analytical Index, GATT/LEG/2, Article XX-1 (Geneva, 1989); See also GATTery v Greenery; The Perils of Eco-Sanctions, supra note 4, at 15.

188. OTA Report, supra note 77, at 42.

189. Housman and Zaelke, supra note 6, at 10276.

190. Id. at 23.
where the international community has agreed to act on an environmental problem. According to the EU, this system of waiver and trumping solves GATT's inherent problem of a per se lack of environmental competence.191

The waiver and trumping solution serves to define the role of the international trade system with respect to the process/product distinction as well as to the environment in general. "[T]he GATT should limit itself to clarifying the scope for using trade measures within the framework of an [international agreement] rather than defining the type of environmental problem which may require the use of trade measures."192 Formation of these international agreements outside the confines of the GATT system assures that environmental experts are responsible for their negotiation. Their subsequent incorporation into the GATT through waiver or a trumping provision permits the traditional GATT system to operate as it does best; by analyzing the merits of environmentally motivated non-tariff barriers to trade. Adoption of such a deferential approach has been described as "the best thing the GATT can do for the cause of a more sustainable environment."193

As with any proposal, there are problems associated with such a waiver and trumping solution. For example, situations will arise where trade measures are taken pursuant to one of the waived or trumped agreements but with respect to a non-signatory, or to a signatory that has taken a reservation to a portion of that agreement. The Panel's ruling has been criticized for not elaborating on the interplay between the international agreement and the GATT and for its failure to suggest on the number of signatories required for an agreement to trump the GATT for all of the Contracting Parties.194 It is precisely these issues that have been undertaken by the recently activated GATT Group on Environmental Measures and International Trade.195

One suggestion for resolving this dilemma is to only allow trade measures against non-signatories if taken pursuant to multilateral agreement adopted by a designated quorum of countries. In addition, this system would provide a right of appeal for those countries discriminated against.196 The EU has suggested that a "collective interpretation" of Article XX represents the best way to clarify the extent to which such measures can derogate from


192. Id. at S-3.

193. Charnovitz, supra note 141, at 55.

194. Housman and Zaelke, supra note 6, at 10277.

195. GATT Secretariat, supra note 76, at 10.

196. The Greening of Protectionism, supra note 5, at 28.
the obligations contained in the rest of the GATT.\textsuperscript{197} This indicates that application of these agreements to non-signatories is more acceptable than unilateral extraterritorial application of one nation's laws as in the case of the MMPA and Mexico. In this way, the same reasoning put forward for the imposition of trade measures pursuant to an international agreement dealing with the process/product distinction could be used to formulate a jurisdictional rule of reason to justify the application of trade sanctions taken pursuant to an international agreement against a non-member.

An environmentally oriented multilateral round of trade negotiations represents the evolutionary culmination in the process of greening the GATT. In fact, there already exist aspirations and proposals for the next GATT round to be the "Green Round."\textsuperscript{198} Such a "Green Round" may lead to the creation of an environmental equivalent to the Final Act's General Agreement on Trade in Services ("GATS")\textsuperscript{199} and Agreement on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods ("TRIPS").\textsuperscript{200} This would also resolve the fear that waiver or trumping simply reflect an underlying sentiment that environmental rules are somehow subservient to those of international trade.\textsuperscript{201} This level of negotiation could set out in a systematic fashion the obligations of all GATT signatories, while keeping the substantive environmental issues separate from the traditional GATT system and consistent with the multilateral agreements created up to this point.\textsuperscript{202} Furthermore, if the idea of a WTO is approved, this will

\textsuperscript{197} European Community Proposal on Trade and Environment, supra note 154, at S-4.

\textsuperscript{198} Baucus Urges New GATT "Green" Round to consider Proposed Environmental Code, INT'L TRADE REP. (BNA) §General Developments: GATT, at 1829 (Nov. 6, 1991).

\textsuperscript{199} Final Act, supra note 80, Part II, Annex 1-B, General Agreement on Trade in Services [hereinafter GATS].

\textsuperscript{200} \textit{Id.}, Part II, Annex 1-C, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [hereinafter TRIPS].


\textsuperscript{202} The notion of being part of the GATT framework while at the same time being a relatively autonomous body seems to be addressed in the text of the GATS. Article XXIV entitled Council for Trade in Services reads, in part:

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of Members.
create a common institutional framework for the GATT as modified by the Uruguay round as well as all of the arrangements concluded under its auspices. In order to join the WTO, a country would be required to accept all of these agreements as well as the traditional GATT obligations. Therefore, a successful Green round would pave the way for an Environmental Council within the WTO (along with a Goods Council, Services Council and Intellectual Property Council). This Environmental Council would be autonomous enough to objectively balance environmental and trade objectives.

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Final Act, supra note 80, Part II, Annex 1-B, General Agreement on Trade in Services, Part V, Institutional Provisions, Council for Trade in Services, art. XXIV. A similar provision is contained in the text of the TRIPS. The article entitled Council on Trade-Related Aspects of Intellectual Property Rights, reads, in part:

The Council on Trade-Related Aspects of Intellectual Property Rights shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations thereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council may consult with and seek information from any source it deems appropriate.

Final Act, supra note 80, Part II, Annex 1-C, Agreement on Trade Related Aspects of Intellectual Property Rights, Including Counterfeit Goods, Part VII, Institutional Arrangements; Final Provision, art. 68.

203. Agreement Establishing the World Trade Organization, supra note 136, at 636.

204. The groundwork for an Environmental Council is laid out in the so-called "Decision on Trade and the Environment". This will establish a standing trade and environment committee that will function within the WTO. The committee's objective will be to study the link between trade and environmental protection. Initially, the committee is to address the following issues:

1. the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
2. the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
3. the relationship between the provisions of the multilateral trading system and taxes for environmental purposes and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling, and recycling;
4. the provisions of the multilateral trading system with respect to transparency of trade measures used for environmental purposes, and environmental measures and requirements that have significant trade effects;
5. the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
Unlike suggestions for a case-by-case balancing analysis, the waiver and trumping solution reinforces a rule based GATT system and leaves both environmentalists and "free traders" sure of the playing field. In this way, a GATT type of arrangement within the WTO can become reality. Although this is clearly an arduous task, it appears to be the only satisfactory long term solution to peacefully reconcile the process/product controversy and the overall clash between international trade and the environment.

IV. CONCLUSION

As evidenced by the Panel's resolution of the Tuna/Dolphin dispute, the current GATT system will not tolerate unilaterally imposed process based trade measures that have extraterritorial implications. This controversy reflects only one of the problems faced by those wishing to reconcile the clash between the regimes of international trade on one side, and the environment on the other. The process/product impasse serves as an excellent model on which all of the problems associated with this clash of cultures can be resolved. It is evident that the GATT system works and that it is here to stay. It is also clear that the current GATT system is not suited to address substantive issues relating to environmental protection. To redress this deficiency, the GATT should be changed in such a way as to accommodate process regulation and other environmental concerns. The best way to initiate this process is through the Panel's suggestion for the waiver of GATT obligations with respect to international environmental agreements. In this way, the efficient and successful GATT trading framework is left intact while international agreements are incorporated to address environmentally related issues. The ultimate hope is that this process will lead to the creation of a single, comprehensive, and substantive framework for both international trade and the environment. If these changes are ultimately achieved, the

6. the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions; and
7. the issue of exports of domestically prohibited goods.

It is certainly no coincidence that the committee's proposed agenda mirrors many of the issues raised in the Tuna/Dolphin Report. The overriding apprehension for complete integration of the environment and the international trading system remains the use of trade-related measures and unilateral sanctions designed to promote environmental change in another country. Accord Set Among GATT Nations on Linking Trade, Environment, Int'l Trade Rep. (BNA) §General Developments: GATT, at 565 (April 13, 1994). The basis for concern seems to come from developing countries who view the environment (as well as labor issues) as a way to disguise protectionism. Sutherland Says He is Not Candidate for Head of World Trade Organization, INT'L TRADE REP. (BNA) §General Developments: GATT, at 649 (April 27, 1994).

205. See, Dunoff, supra note 138.
Tuna/Dolphin Report may go down in history as an environmentally friendly decision after all.