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# The Gatt Obstacle: International Trade as a Barrier to Enforcement of Environmental Conservation on the High Seas

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# THE GATT OBSTACLE: INTERNATIONAL TRADE AS A BARRIER TO ENFORCEMENT OF ENVIRONMENTAL CONSERVATION ON THE HIGH SEAS

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## I. INTRODUCTION

Enforcement of international environmental policies on the high seas has run a frustrating and sometimes elusive course. While nations are now beginning to enforce environmental policies to protect the marine environment, these policies carry no legal weight outside the implementing

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nation's own territorial sea.[1] As a result, many nations — in particular the United States — have sought to effectuate international adherence to domestic policies through the use of unilateral trade embargoes, thereby infusing a "modern tendency to link trade with environmental issues."[2]

Modern international law favors environmental protection, however, domestic environmental policies enforced through trade or trade embargoes are curiously and ironically inconsistent with international law pursuant to the General Agreement on Tariffs and Trade (GATT).[3] With the modern preference to encourage free trade and a global economy, GATT has become the conservationist's worst enemy as it continuously trumps domestic attempts to initiate marine environmental protection. This article examines the implementation of unilateral trade embargoes and their subsequent nullification under GATT.

## II. BACKGROUND: THE HIGH SEAS AND THE UNILATERAL TRADE EMBARGO

Since time immemorial, the high seas have been regarded as the common property of all mankind.[4] As such, the high seas, with their vast and rich marine resources, have been continuously exploited due to the lack of international law restricting harvesting of their resources. Until the post-World War II era, nations were still clinging to seventeenth-century Grotian[5] notions that ocean resources were inexhaustible.[6] With increased technology and an increased world population, however, nations quickly came to realize the deficiency in their antiquated views; ocean resources were becoming scarce and conservation was "necessary to prevent their total depletion."[7]

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1. *See* Taunya L. McLarty, *WTO and NAFO Coalescence: A Pareto Improvement for Both Free Trade and Fish Conservation*, 15 VA. ENVTL. L.J. 469, 469-70 (1996).

2. *Id.* at 475.

3. *See* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, at 1, 55 U.N.T.S. 194 [hereinafter GATT 1947].

4. *See* JAMES B. MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 2 (1992).

5. *See* Derrick M. Kedziora, Comment, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks*, 17 NW. J. INT'L L. & BUS. 1132, 1134 & n.8 (1997) (citing MORELL, *supra* note 4, at 2). Grotian notions are attributed to the works of seventeenth-century philosopher Hugo Grotius, including his 1609 pamphlet entitled *Mare Liberum*. *See id.* (citing R.P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 77-89 (1982)).

6. *See* Kedziora, *supra* note 5, at 1134-35.

7. *Id.* at 1135 (citing JAMES C.F. WANG, HANDBOOK ON OCEAN POLITICS AND LAW 43-44 (1992)). *See generally* MORELL, *supra* note 4, at 27-74 (describing the evolution of the 12- and

Attempts to protect the ever-dwindling marine resources were equally frustrated by established international law. While nations are entitled to a degree of sovereignty over their territorial sea, extending 12 to 200 miles from their coast,[8] the high seas, that is, the area beyond the 200-mile limit, are "beyond the sovereignty of any state"[9] and subject to unrestricted exploitation. Therefore, even those nations who actually attempt to conserve the ocean environment are left with few options for enforcement outside their territorial jurisdiction.

Unilateral trade embargoes seem the most appropriate measure for gaining extraterritorial enforcement power, but international law denies their implementation and imposes only soft obligations to protect the environment. For example, Principles 2 and 12 of the Rio Declaration,[10] principle 21 of the Stockholm Declaration,[11] the preamble to the U.N. Convention on Biological Diversity,[12] and the Panama Declaration[13] specifically denounce the use of environmentally motivated trade measures that have an economic effect. The Fish Stocks Agreement[14] and the Law

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200-mile limits on offshore jurisdictional zones, which occurred from 1969-1979).

8. *See* United Nations Convention on the Law of the Sea, Third U.N. Conference on the Law of the Sea, Dec. 10, 1982, arts. 2-3, 56-58, U.N. Doc.A/Conf.62/121, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

9. Patrick Shavloske, Comment, *The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty*, 7 IND. INT'L & COMP. L. REV. 223, 225 (1996) (citing UNCLOS, *supra* note 8, arts. 87, 89).

10. *Report of the U.N. Conference on Environment and Development*, The Rio Declaration on Environment and Development, Agenda Item 9, U.N. Doc. A/Conf.151/5/Rev.1 (1992), 31 I.L.M. 874, 876 (principle 2), 878 (principle 12) [hereinafter Rio Declaration].

11. *Report of the U.N. Conference on the Human Environment*, Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14 & Corr. 1 (1972), 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration].

12. United Nations Conference on Environment and Development: Convention on Biological Diversity, *opened for signature*, Rio de Janeiro, June 5, 1992, 31 I.L.M. 818, 823 (1992) [hereinafter Biological Diversity Convention].

13. Panama Declaration, *signed* Oct. 4, 1995 at Panama City, *given effect by* International Dolphin Conservation Program Act, Pub. L. No. 105-42, 2(a)(1), 111 Stat. 1122, 1122 (1997) (codified as amended at scattered sections 16 U.S.C.); *see* Joshua R. Floum, *Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic*, 10 GEO. INT'L ENVTL. REV. 943, 954 & n. 44 (1998); Deidre McGrath, Note, *Writing Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act*, 7 MINN. J. GLOBAL TRADE 431, 442 & nn.72 & 73 (1998).

14. Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea, *supra* note 8, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 6th Sess., U.N. Doc. A/Conf.164/37, 34 I.L.M. 1542 (1995) [hereinafter Fish Stocks Agreement].

of the Seas Convention[15] impose only vague and qualified obligations upon nations to take active conservational steps.

While the use of trade measures effectively entices, encourages, or coerces other nations to adopt conservational policies, they clearly have an adverse effect on international trade. As a result, these measures are inconsistent with GATT, and unless an implementing nation can show that its embargo satisfies a GATT exception, these measures will be found in violation of international law.[16]

## III. THE ENVIRONMENT: ECONOMIC BYCATCH UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE

### *A. Article III: National Treatment Provision*

Nearly all unilateral trade embargoes imposed to protect the marine environment will be asserted by the implementing nation as being consistent with GATT Article III,[17] the National Treatment provision. Article III requires that GATT parties treat imported products like domestic products.[18] In the GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna,[19] the panel concluded that Article III is an inapplicable means by which to justify an environmental embargo for the simple fact that "Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the [harvesting] policies and practices of the country of origin."[20] In nearly all instances, environmental protection measures imposed through a trade embargo attempt to force other nations to adopt more conservative harvesting approaches. Since, in general, oceanic resources are harvested with the use of nets, a nation imposing environmental protection measures will almost always be imposing its embargo to alter (1) the type of nets being used by the target nation, or (2) the harvesting policies of that nation. Article III therefore, does not apply to unilateral trade embargoes because they explicitly attack the harvesting practices and policies of the importing nation in contravention to GATT.

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15. UNCLOS, *supra* note 8.

16. *See* McLarty, *supra* note 1, at 476.

17. *See* GATT 1947, *supra* note 3, art. III, T.I.A.S. No. 1700, at 14-15.

18. *See id.* art. III(2), T.I.A.S. No. 1700, at 14.

19. *GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 33 I.L.M. 839 (1994) [hereinafter *Tuna II*].

20. *Id.* para. 5.7, at 889.

### B. Article XI: Antitrade Embargo Provision

Article XI of GATT is the crux of the GATT exceptions. Embargoes that prohibit the importation of a good are always deemed in violation of Article XI because they enforce "quantitative restrictions, including import quotas,"[21] upon the importation of a particular product. Therefore, nearly every unilateral trade embargo will fall within the reach of Article XI's language because it would effectively restrict importation quantity, which is in violation of GATT.

### C. Article XX

Where a nation is in violation of Article XI, it has the opportunity to effectively "save" its embargo by asserting a general exception under Article XX.[22] Article XX provides an extensive list of exceptions to the otherwise GATT-violative or trade-restrictive acts of a nation. Only two apply in oceanic environmental cases: the Article XX(b) animal health exception and the Article XX(g) exhaustible natural resources exception.[23]

#### 1. Preamble

None of the Article XX exceptions can be imposed by the implementing nation unless it can satisfy the preamble, or "chapeau,"[24] requirements of Article XX. In order to pass muster under the preamble, the implementing nation must show that its embargo is not (1) an arbitrary or unjustifiable restriction, or (2) a disguised restriction on trade.[25]

##### a. Arbitrary or Unjustifiable Restriction

The problem that environmentally motivated trade embargoes impose is that if an implementing nation is to have any international or extraterritorial effect, it must focus the embargo on noncomplying nations rather than on the particular goods involved. GATT, however, clearly denounces the use of trade measures that focus on a "nation" as opposed

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21. GATT 1947, *supra* note 3, art. XI(1), T.I.A.S. No. 1700, at 28-29.

22. *Id.* art. XX, T.I.A.S. No. 1700, at 56-59. Once Article XX is invoked by an implementing nation, the burden shifts to that nation to show that the Article XX exceptions do apply. *See* Canada — Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) para. 5.20, at 140, 164.

23. *See* GATT 1947, *supra* note 3, art. XX(I)(b), (I)(g), T.I.A.S. No. 1700, at 57.

24. *Chapeau* is French for "hat," DENIS GERARD, CASSELL'S FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY 144 (1981), and refers to the top portion of the Article XX language.

25. *See* GATT 1947, *supra* note 3, art. XX, T.I.A.S. No. 1700, at 56-57.

to a "class of products."[26]

For example, in the Tuna-Dolphin decisions,[27] if the United States had constructed its embargo to deny importation of all tuna caught using purse-seine nets, this clearly would have satisfied the burden of the arbitrary and unjustifiable restriction prong of the Article XX preamble because the embargo would have targeted all fish not caught with "environmentally-conservative" nets. Instead, the United States, like many other nations seeking to impose environmental policies on the high seas, focused its embargo on the nations that did not conform to U.S. domestic standards for reducing dolphin bycatch in the harvesting of tuna.[28]

The reason for the nation-specific embargo rationale is simple. If a nation is to effectively eliminate the importation of marine products harvested in contravention to its conservationist policies, it must focus on all such products that enter its territory from an offending nation. Clearly, with products such as shrimp, tuna, and other readily available oceanic resources being imported from hundreds of nations, it is almost impossible for a nation to discriminate between those products that were caught conservatively and those products that were not.

In addition, embargoes must be nation-specific because many exporting nations will try to circumvent an embargo constructed to deny importation of products harvested using conservationally unsound methods by first exporting its goods to an intermediary and complying nation so as to disguise their true origin.[29] Consequently, nations enforcing environmental harvesting practices are forced to tailor their embargoes to focus on the national origin of the product, and clearly cannot avoid having such an intermediary effect.[30]

In holding with the narrow construction of the GATT articles, GATT panels will almost exclusively find in accordance with their past holdings and determine that such embargoes are arbitrary and unjustifiable, despite the embargo enforcing nation's good faith imposition of the embargo as a conservational measure.

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26. *See* United States — Imports of Certain Automotive Spring Assemblies, May 26, GATT B.I.S.D. (30th Supp.) paras. 54-55, at 107 (1983); *see also* United States — Prohibition of Imports of Tuna and Tuna Products from Canada, Feb. 22, GATT B.I.S.D. (29th Supp.), at 91 (1982).

27. *GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.), 30 I.L.M. 1594 (1991) [hereinafter *Tuna I*]; *Tuna II*, 33 I.L.M. at 889.

28. *See* The Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2) (1994) [hereinafter MMPA].

29. *See* McLarty, *supra* note 1, at 474-75.

30. *See id.*

### b. *Disguised Restriction on Trade*

Nations are thwarted in their attempts to protect the environment by the "disguised restriction on international trade" prong of the Article XX preamble.[31] In order to satisfy the requirement, the implementing nation must have adopted a trade restriction that offers no greater protection to its own domestic products than it does to imported products.[32]

In practice, compliance with this requirement is difficult for a nation to prove because GATT panels are composed of international trade theorists whose sole purpose of empanelment is to ensure free trade. GATT panels have imposed tremendous scrutiny on the potential protectionist effects of such embargoes. If trade is hampered by an embargo and domestic products reap the rewards of limited competition, GATT panels clearly will rule the embargo a disguised restriction on trade, thereby precluding imposition of any exception under Article XX.

## 2. Exceptions

Even if a nation can traverse the minefield of Article XX's preamble, it is usually confronted with an equally difficult burden of proving that the exceptions actually justify its unilateral trade embargo.

### a. *Restrictions Designed to Protect Animal Life*

Article XX(b) allows a nation to impose a unilateral trade restriction if it is necessary for the protection of animal health.[33] The exception hinges on the "necessary" language, requiring that "there was no alternative measure reasonably available"[34] to the implementing nation by which to achieve its desired conservation objective before imposing a unilateral trade embargo. As a result, the Article XX(b) exception refers not to the particular animal or plant to be protected, but to the actual "trade restriction chosen by the party."[35]

Theoretically, a nation must have exhausted every possible alternative means of ensuring compliance with its domestic conservationist policies before it can impose a unilateral trade embargo. GATT Dispute Panels have consistently found any attempts to impose an Article XX(b) exception where a nation has failed to negotiate multilateral cooperative

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31. GATT 1947, *supra* note 3, art. XX, T.I.A.S. No. 1700, at 57.
32. *See id.* arts. XI, XX(I)(g), T.I.A.S. No. 1700, at 14, 57, respectively.
33. *See id.* art. XX(I)(b), T.I.A.S. No. 1700, at 57.
34. *Tuna I*, para. 5.24, 30 I.L.M. at 1619.
35. McLarty, *supra* note 1, at 482.

agreements,[36] seek private causes of action,[37] or further pursue diplomatic negotiation to be inconsistent with the "necessary" requirement.[38] Most striking is the fact that GATT panels do not inquire as to the possible success of any of the proffered "alternative measure[s]."[39] GATT panels seem to require that these alternative means be undertaken, even if they are known to have no effect and their implementation would be fruitless in achieving the desired conservation result.

In *Tuna I*, for example, the court found that the United States had not fully exhausted negotiation attempts with Mexico before imposing its embargo,[40] even though Mexico had refused to negotiate any settlement after four years of requests by the U.S. government.[41] Even though it was clear that Mexico had no interest in reaching a negotiated solution with the United States, the GATT panel found that alternative means under Article XX(b) had not been fully exhausted.[42]

Similarly, in pursuing their objective of ensuring continued free trade among contracting nations, GATT panels continually sway towards an interpretation of GATT that permits them to denounce trade restrictive measures. In *Tuna I*, the panel concluded that Article XX(b) could not be applied extraterritorially,[43] even though the "language of Article XX does not explicitly or implicitly contain this territorial element."[44] In *Tuna II*, GATT switched gears, offering that nations could conceivably take unilateral "trade measures to implement policies within their own jurisdiction, including policies to protect living things,"[45] but found the embargo to be inconsistent with GATT for different reasons.[46]

With no precedential authority, GATT can be interpreted in any manner that strikes a particular panel's fancy. In effect, GATT can be shaped and reshaped to find any unilateral trade embargo inconsistent with Article XX(b) if the panel so desires. In addition, with the imposition of the exception focused on the implementing nation's means of imposing the embargo (least restrictive alternative) and not on the nation's motive

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36. *See Tuna I*, para. 5.28, 30 I.L.M. at 1620.
37. *See* McLarty, *supra* note 1, at 486.
38. *See id.*
39. *Tuna I*, para. 5.28, 30 I.L.M. at 1620.
40. *See id.*
41. Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEGAL STUD. 273, 289 (1994).
42. *See id.* paras. 5.26-.29, at 1620.
43. *See id.* para. 5.29, at 1620.
44. McLarty, *supra* note 1, at 483.
45. *Tuna II*, para 5.38, 33 I.L.M. at 897.
46. *See infra* notes 69-72 and accompanying text.

(conservation of a living thing), the exception itself is illusory.

### *b. Restrictions Designed to Conserve an Exhaustible Natural Resource*

Article XX(g) provides that an embargo that fails under Article XI can be upheld if it has been imposed in order to preserve an exhaustible natural resource.[47] In *Tuna I*, the panel denoted a two-part test by which to determine whether a restriction satisfies this exception.[48] First, the restriction must be "related to" or "primarily aimed at" conservation,[49] and secondly, the restriction must fall within an accepted range of conservation policies.[50]

To satisfy the first prong, a nation must show that its imposition of a unilateral trade embargo is primarily aimed at protecting an exhaustible natural resource. In particular, it must show that the desired effect of the embargo is to encourage other nations to adopt conservation *measures* to protect a certain resource, rather than to encourage a particular *type of conservation measure*.

In a recent GATT panel decision, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*,[51] the panel found that the U.S. embargo was not in accordance with the "primarily aimed at" prong of Article XX(g) because it imposed an obligation upon other nations to use a certain type of net that bears a turtle excluder device (TED).[52] Although use of the TED is an environmentally sound means of shrimping that decreases bycatch of sea turtles, the GATT panel held that other means existed by which to conserve the sea turtle without implementing TEDs.[53] In effect, the panel held that the U.S. embargo legislation was primarily aimed at enforcing the use of TEDs upon offending nations and not at the conservation of the sea turtle.[54] Therefore, invocation of Article XX(g) was precluded as an applicable exception to defend the U.S. embargo.

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47. *See* GATT 1947, art. XX (I)(g), T.I.A.S. No. 1700, at 57.

48. *See Tuna I*, paras. 5.30-5.34, 30 I.L.M. at 1620-21.

49. *Id.* para. 5.31, at 1620-21; *see* GATT 1947, art. XX(I)(g), T.I.A.S. No. 1700, at 57.

50. *See Tuna I*, para. 5.32, 30 I.L.M. at 1621.

51. *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, May 15, 1998, WT/DS58/R/Corr.2, *available at* 1998 WL 256632, at *1 (W.T.O.) [hereinafter *Sea Turtle Case*].

52. *Id.* at *51-*52.

53. Though the panel did not specify the alternative means available, clearly the panel recognized that TED nets are not the only way to prevent sea turtle bycatch. *See id.* at *50-*52. In particular, shrimpers cannot shrimp where sea turtles are known to congregate, or they can drop their nets deeper where sea turtles are less likely to be found.

54. *See id.* at *51-*52.

Even the second prong of the Article XX(g) test poses serious obstacles for an implementing nation. In order to comply, a nation must show that it "implemented trade measures . . . in conjunction with domestic conservation legislation"[55] and that these domestic measures fall "within the range of policies to conserve exhaustible natural resources."[56] Where a nation has acted on domestic conservation legislation, the burden to show that it is in compliance with acceptable conservation methodologies is quite difficult, especially in light of the fact that four major bodies of law actively discourage unilateral trade measures: the U.N. Convention on the Law of the Sea,[57] the U.N. Convention on Biological Diversity,[58] the Rio Declaration,[59] and the Stockholm Declaration.[60]

In addition, it will be difficult for a nation to show that the conservation objectives can successfully be imposed on the offending nation. In most instances, the nations targeted by a unilateral trade embargo are developing nations.[61] The typical scenario would involve a developed and diversified nation imposing its trade embargo on a less modernized, developing nation, which is afforded a great degree of latitude pursuant to international environmental policies.[62] Therefore, despite the most narrowly focused and disinterested intentions of a nation in attempting to enforce its domestic policies through the Article XX(g) exception, nearly all attempts to regulate the high seas will fail.

## IV. GATT Dispute Settlement Panels

Nations who choose to take steps to protect the environment are clearly left with no effective alternative but to resort to unilateral trade measures for enforcement of their policies. The problem is that GATT becomes the arbitrator of environmental policies through the interpretation of trade laws rather than environmental law and policy. While GATT does

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55. McLarty, *supra* note 1, at 493.

56. GATT 1947, art. XX(I)(g), T.I.A.S. No. 1700, at 57.

57. *See* UNCLOS, *supra* note 8, pmbl., at 1271.

58. *See* Biological Diversity Convention, *supra* note 12, pmbl., at 823.

59. *See* Rio Declaration, *supra* note 10, princ. 2, at 876.

60. *See* Stockholm Declaration, *supra* note 11, princ. 21, at 1420.

61. In *Tuna I*, the United States targeted the nations of Mexico, Venezuela, Vanatu, and Panama, of which only Mexico can be considered developed. *See Tuna I*, 30 I.L.M. at 1599-1600. Equally, the *Sea Turtle Case* focused its embargo on Malaysia, Thailand, India, and Pakistan, all of which are considered developing nations pursuant to international doctrine. *See Sea Turtle Case*, para. 3.97, 1998 WL 256632, at *51.

62. *See* Rio Declaration, *supra* note 10, princs. 11, 12, at 878; Biological Diversity Convention, *supra* note 12, art. 3, at 824; UNCLOS, *supra* note 8, art. 61, para. 3, at 1281; Stockholm Declaration, *supra* note 11, princ. 21, at 1420.

provide environmental exceptions to allow the use of unilateral trade action, in nearly every instance, in seeking to ensure the continuation of free trade, GATT panels will construe GATT narrowly and find against the environment. This tendency is more than evident in two recent dispute panel decisions rendered against the United States and has clearly set the trend where world trade trumps the environment under GATT.

### *A. United States v. Mexico: Tuna-Dolphin I*

In 1991, the first battle between "the economy" and "the environment" was waged when the government of Mexico presented a case to GATT involving United States restrictions on imports of tuna.[63] The dispute was rooted in U.S. domestic legislation that was aimed at preventing the bycatch of certain dolphin in the Eastern tropical Pacific Ocean by imposing an embargo[64] against all nations engaging in the harvesting of yellow-fin tuna with purse-seine nets.[65] Despite the fact that the embargo was vague in providing that the incidental catch of dolphins be "comparable to the average rate of incidental taking by United States vessels,"[66] the GATT panel found the embargo in violation of international law for various GATT-related reasons.

#### 1. Article XX(b) Exception

The panel found that because the imposition of the embargo hinged on the concurrent taking rates of dolphin bycatch by U.S. fishing vessels, the policies were so vague that "the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards."[67] As such, the imposition of the embargo could not be based on any factual analysis that would bring it under the meaning of "necessary" in Article XX(b).

#### 2. Article XX(g) Exception

The panel limited the Article XX(g) exception to controlling the "production or consumption of an exhaustible natural resource . . . to the extent that the production or consumption is under [that nation's territorial]

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63. *See Tuna I*, 30 I.L.M. at 1594.
64. *See* MMPA, 16 U.S.C. § 1371(a)(2)(B).
65. *See Tuna I*, 30 I.L.M. at 1598.
66. MMPA, 16 U.S.C § 1371(a)(2)(B)(ii).
67. *Tuna I*, para 5.28, 30 I.L.M. at 1620.

jurisdiction."[68] In addition, the panel referred to the vagueness of the standards by which the embargo became enforceable and noted that such "unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins"[69] when they did not distinguish between dolphins caught with purse-seine nets and those that were not.

### *B. United States v. European Economic Community: Tuna-Dolphin II*

In a GATT dispute panel resolution concerning the same U.S. domestic legislation imposed in Tuna I, the United States was equally defeated by the European Economic Community and the Netherlands in 1994.[70]

#### 1. Article XX(b) Exception

The panel, in reiterating its *Tuna I* observations that vague embargo standards cannot be deemed necessary within the meaning of the exception,[71] also found that Article XX(b) failed due to its extraterritorial effects.[72] In particular, the panel noted that the primary and intermediary nation embargoes "could achieve [their] desired effect only if... followed by changes in policies and practices in the exporting countries."[73] The effect of the United States embargo, however, was to "force other countries to change their policies . . . within their own jurisdiction" and therefore it had no "effect on the protection of the life or health of dolphins."[74]

#### 2. Article XX(g) and (d) Exceptions

Article XX(g) was not asserted by the United States in *Tuna II*, as it had been conclusively denounced as an applicable exception in *Tuna I*. The United States, however, did attempt to assert the exception under Article XX(d)[75] of GATT, which allows a nation to impose measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT] agreement."[76]

In furtherance of this article's conclusion that GATT panel decisions

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68. *Id.* para. 5.31, at 1620-21.
69. *Id.* para. 5.34, at 1621.
70. *See Tuna II*, 33 I.L.M. at 839.
71. *See Tuna I*, para. 5.28, 30 I.L.M. at 1620.
72. *See id.*, para. 5.29, 30 I.L.M. at 1620.
73. *Tuna II*, para 5.37, 33 I.L.M. at 897.
74. *Id.*
75. *See* GATT 1947, *supra* note 3, art. XX(I)(d), T.I.A.S. No. 1700, at 57.
76. *Id.*

are predetermined and presuppose defeat of environmental trade measures, it is interesting to note that the panel declined to examine the Article XX(d) exception.[77] Curiously, the panel emasculated the Article XX(d) exception by stating that if the trade restrictions imposed by a nation were inconsistent with the GATT pursuant to Article XI, then they were inconsistent with GATT as a whole, thereby precluding an Article XX(d) invocation.[78] In effect, the panel announced that the Article XX(d) exception is a toothless exception to GATT's general exceptions under Article XX because it can never be invoked. Obviously, the drafters of GATT did not include an exception that they knew could never be invoked, yet the panel saw fit to impose this narrow and ridiculous interpretation in order to defeat the Article XX(d) assertion by the United States.

## V. CONCLUSION

Attempts by the United States to protect dolphin in the Eastern tropical Pacific Ocean were consistently defeated by GATT dispute panels on the basis of their side-effect on international trade. In addition, U.S. attempts to protect the deep sea turtle from harmful shrimping practices were defeated by GATT trade panels. As a result, GATT has become a tremendous obstacle to the imposition of any environmental conservation objectives and has effectively discouraged nations from engaging in such policies for fear of hampering international trade.

To the chagrin of conservationists, international environmental law has come to be governed by international trade law. As Michael J. Kelly espoused in his analysis of the NAFTA Environmental Side Accord, "[I]nternational trade regimes have been institutionalized and have grown strong over the past century. Conversely, international environmental law reflects only a patchwork of treaties and customs between states."[79] Until nations decide to take effective and binding action for the enforcement of globally-agreed upon conservation goals, protection of the environment will continue to be obstructed by the well-established rules of international trade. When the world finally decides to put the environment first, however, it may be too late to save the marine resources of the high seas.

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77. *See Tuna II*, paras. 5.7, 5.40-5.41, 33 I.L.M. at 889, 898, respectively.

78. *See id.*

79. Michael J. Kelly, *Bringing a Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger, But Movement in the Right Direction*, 24 PEPP. L. REV. 71, 96 (1996) (citing Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 707-08 (1993)).