3 September 1991

UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel[1]
(DS21/R - 39S/155)

1. INTRODUCTION

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

1.2 On 12 March 1991, the Council was informed that the Panel

of reference apply[6], as follows:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Mexico in document DS21/1 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in v1(will) TjETBT1 0 0 1 50n4316.8 Tm/F

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

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[1]While this report was discussed by the Council at its meeting on 18 February, 18 March and 30 April 1992, it has not been formally presented to the Council with a view to adoption.

[2]C/M/246/27

[3]DS21/1

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

[5]C/M/247/16

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

terms

2. FACTUAL ASPECTS

implementing regulations.[10] Only one such

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

it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States

3. MAIN ARGUMENTS

Findings and Recommendations Requested by the Parties

3.1 Mexico requested the Panel to find, with

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

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

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

3.8 The United States further requested that the Panel find, with respect to the Dolphin Protection Consumer Information Act, (a) that these measures

Article III:4 because it has already found that they were inconsistent with Article XI"[21]; the expression "subject to" in the Note Ad Article III did not exclude the other GATT Articles but simply meant that Article III also applied. Mexico also referred to a statement in the preparatory work of the General Agreement that "We need also to make sure that internal regulations cannot be so manipulated as to circumvent the intentions of the provisions which we are about to suggest in the matter of quotas and quantitative regulation."[22]

3.13 Mexico also stated that the possible extension of the embargo to all fishery products, under MMPA section 101(a)(2)(D) and the Pelly Amendment, would be contrary to Article XI. The United States responded that the Pelly Amendment was a discretionary provision, which authorized but did not

Article III

3.16 Mexico stated that once the question

3.19 The United States further stated that these regulations were enforced at the time or point of importation and were "subject to Article III" under the Note Ad Article III. Where the United States had

because they had shifted to other areas before the new provisions of the MMPA were introduced) that this fact alone had artificially lowered the figure for ARITMM; if United States vessels no longer fished in the ETP, the United States ARITMM would be zero. Two different formulas, one for the United States fleet and another for foreign fleets, were used to compare the United States ARITMM against a particular foreign fleet's ARITMM. Finally, the formulas themselves were numerically biased in favour of the United States fleet to the detriment of Mexico.

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

3.24 The United States responded that this argument was based on an inaccurate factual premise. The United States requirements established requirements for the overall regulatory program under which yellowfin tuna is produced in the ETP using purse-seine nets. In the case of vessels of other countries, the United States did not apply these standards to each cargo or vessel, but to the overall regulatory program. For example, under the MMPA, if an individual vessel had a mortality rate in excess of 1.25 times the United States rate, that would not preclude the importation of that vessel's cargo. The test was whether the average rate for all vessels of that country was equal to or less than 1.25 times the rate for United States vessels. In the case of United States vessels, tuna and tuna products produced by United States vessels by definition were produced under a regulatory program that met United States requirements, so tuna and tuna products produced by United States vessels were allowed to be sold in the United States. However, individual vessels in violation of United States regulations would have their catch seized or other enforcement action taken against them. In this respect, imported tuna

other countries, including Mexico, since it would not take account of the differences in mortality due to the

3.30 Mexico further stated that the General Agreement was a contractual instrument which regulated trade relations among contracting parties in accordance with rights and obligations

Without efforts to protect them, they would be killed when the tuna was harvested. In order to avoid these needless deaths, the United States had established requirements for tuna production: yellowfin tuna harvested in the ETP using purse-seine nets and imported into the United States must have been produced under a program providing for harvesting methods to reduce dolphin mortality. Furthermore, in the case of vessels other than those of the United States, the resultant mortality had to be no greater per set than 25 per cent more than the average mortality per set for United States vessels during the same period, and the mortality of two stocks especially vulnerable to depletion could not exceed specified per centages of overall mortality. These measures were directly and explicitly to prevent dolphin deaths or severe injury. Accordingly, it was clear that the measures of the United States were necessary to protect animal life or health.

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

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

Article XX(g)

3.40 The United States further recalled the exception in Article XX(g), for measures "relating to the conservation of exhaustible natural

3.42 Finally, the United States stated that Article XX(g) did not specify whether the exhaustible natural resources being conserved must be depleted or threatened, nor was it limited

should be interpreted restrictively. Moreover, extension of Article XX(g) to living beings would require future interpreters of it to become expert on fishery questions and the law of the sea, which would raise institutional and practical problems and overlap with the competence of other organizations.

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

Mexico would mean that a country must allow access to its market to serve as an incentive to deplete the populations of species that are vital components of the ecosystem. There was a general recognition that countries should not be required to allow this situation. CITES, for example, required a CITES party to restrict imports of specimens of species found only in the territory of another country, in addition to restrictions on listed species found in the high seas or in several countries' territories.

3.50 Mexico went on to note that the United States measures applied to imports of yellowfin tuna and yellowfin tuna products from Mexico whereas the Article XX(g) claim by the United States sought to justify the measures on the ground of the conservation of dolphins. Mexico did not permit its fishermen to intentionally catch dolphins; the issue here was unintentional incidental catching of dolphins in the course of tuna fishing in the ETP. Consequently, the United States was not conserving one resource (dolphins) or two resources (dolphins and tuna) but rather a specific combination of products (tuna/dolphins) located in a specific geographical area (the ETP), which did not correspond to any known trade classification either within or outside GATT. This novel claim was not only contrary to the concept of "like product", but would also raise problems practically impossible to resolve. While the interpretation of "the like product" did vary depending on which provision of the General Agreement was in question, justification of the

- As for restrictions on tuna/dolphins, no such product existed either in nature or in any known tariff nomenclature, and therefore its application within the general exceptions to the General

cent import share was sufficient for a country to be a substantial supplier under Article XXVIII. Finally, it was clear that a law that imposed on other fleets mortality rates that increased if the mortality obtained by the United States fleet increased was a law to protect the United States fleet rather than dolphins.

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

4. SUBMISSIONS BY INTERESTED THIRD PARTIES

Australia

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

fied by Article XI:2(b) or (c). Moreover, the prohibitions discriminated between like products, inconsistent with Article XIII.

4.3 Regarding Article XX, Aust.8e2,

Article XX(g). With regard to Article XX(b), Canada considered that the Panel should

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

4.13 Regarding Article XX, the EEC considered that the embargo on intermediary nations could in no way be justified as a measure "necessary" in the context of Article XX(b) or XX(g). In this respect, the EEC recalled two previous panel reports on the interpretation of these provisions.[32] As the intermediary nations embargo applied to countries not engaging in activities entailing risk for dolphins, it was clearly not a measure necessary for the protection of dolphins. The EEC noted that in the hypothetical case that the Panel were to deem the direct embargo to be legitimate, the United States could apply GATT-consistent rules to determine whether imported yellowfin tuna and tuna products originate from the countries under direct embargo - as enforcement of any legitimate measure limited in geographical scope could require application of rules to determine origin. But the scope of the intermediary nations embargo was wider than the result which would be produced by neutral application of such rules. Moreover, and independently of the actual trade scope of the embargo, the very concept of "intermediary nation" and the link between the restrictions applied to such countries and measures to prevent imports from countries subject to the direct embargo needed to be rejected. Such measures would affect the right of each contracting party to determine autonomously its own trade policy, and would create an unwarranted association in the United States market between tuna products from intermediary

dolphins, which were in any event not

4.28 Even if Article III were applicable, Venezuela argued, the embargo was inconsistent with the national treatment principle in Article III:1 and Article III:4. While the MMPA provisions might appear more favourable to

5. FINDINGS

A. Introduction

5.1 The Panel noted that the issues before it arose essentially from the following facts: the Marine Mammal Protection Act (MMPA) regulates, inter alia, the harvesting of tuna by United

products of national origin, consistent with Article III:4. The relevant text of Article III:4 provides:

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

The Note Ad Article III provides that:

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

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

5.11 The text of Article III:1 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale.... of products" and "internal quantitative regulations requiring the mixture, processing or use of products"; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that

individual case of imported products.[36] 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.

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

> "… there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment … Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes".[37]

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

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

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

5.16 The Panel noted that Mexico had argued that the MMPA requirements with respect to production of yellowfin tuna in the ETP, and the method of calculating compliance with these requirements, provided treatment to tuna and tuna products from Mexico that was less favourable

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

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

than the treatment accorded to like United States tuna and tuna products. It appeared to the Panel that certain aspects of the requirements could give rise to legitimate concern, in particular the MMPA provisions which set a prospective absolute yearly ceiling for the number of dolphins taken by domestic tuna producers in the ETP, but required that foreign tuna producers meet a retroactive and varying ceiling

with the General Agreement.[38] Accordingly, the Panel found that, because the Pelly Amendment did not require trade measures to be taken,

5.24 The Panel noted that the United States considered the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico, and the provisions of the MMPA on which this prohibition is based, to be justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health and were "necessary" within the meaning of that provision because, in respect of the protection of dolphin

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.

5.28 The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in

trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.

5.32 The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which

importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the ETP by vessels of Mexico. The Panel therefore found that these measures and the provisions of the MMPA mandating such an embargo were import restrictions or prohibitions inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

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

Article XX(b) and XX(g)

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

Article XX(d)

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

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …".

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

D. Dolphin Protection Consumer Information Act (DPCIA)

5.41 The Panel noted that Mexico considered the labelling provisions of the DPCIA to be marking

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

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

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

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

6.2 The Panel wished to note the fact, made evident during its consideration of this case, that the provisions of the General Agreement impose few constraints on a contracting party's implementation of domestic environmental policies. The Panel recalled its findings in paragraphs 5.10 - 5.16 above that under these provisions, a contracting party is free to tax or regulate imported products and like domestic products as long as