16 June 1994

UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel
(DS29/R)

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I. INTRODUCTION

1.1 On 11 March 1992, the European Economic Community ("EEC") requested the United States to hold consultations under Article XXIII:1 on restrictions maintained by the United States on the importation of certain tuna products (DS29/1). The consultations were held on 10 April 1992. As they did not result in a satisfactory adjustment of the matter, the EEC, in

[1] as follows:

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

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

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

(a) the amendments to Section 3 of the Marine Mammal Protection Act of 1972 made by Section 2(c) of the International Dolphin Conservation Act and by Section 401(a) of the High Seas Driftnet Fisheries Enforcement Act;

(b) the new Section 305 of the Marine Mammal Protection Act of 1972, as added by Section 2(a) of the International Dolphin Conservation Act; and

(c) the amendments to Section 101 of the Marine Mammal Protection Act of 1972 made by Section 401(b) of the High Seas Driftnet Fisheries Enforcement Act.

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

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

II. FACTUAL ASPECTS

A. Purse seine fishing of tuna

2.1 Tuna are commonly caught in commercial fisheries using large "purse seine" nets. A fishing vessel using this method sends a small boat carrying one end of the net around

's, the practice of intentionally setting purse seine nets on dolphins to catch tuna has resulted in the incidental killing and injury of many dolphins. In 1986, an estimated 133,000 dolphin were killed in this way. By 1991, the number killed had been reduced to an estimated 27,500, due to the growing consensus on the need to reduce dolphin mortality, and the introduction of improved fishing methods and equipment. The number of dolphin in the eastern tropical Pacific, after a decline in the 1970's and 1980's, is now stable at current levels of mortality.

within

B. International efforts to reduce dolphin mortality

2.3 International efforts to reduce dolphin mortality resulting from the use of purse seine nets in commercial fisheries in the eastern tropical Pacific have been pursued within the Inter-American Tropical Tuna Commission ("IATTC"). These efforts were initiated and urged by the United States. Established by the United States and Costa Rica in 1949 for the purpose of conserving tuna, the IATTC now includes as members most (but not all) states whose vessels engage in purse seine tuna fishing in the eastern tropical Pacific. The IATTC broadened its responsibilities in 1976 to encompass the treatment of problems arising from the tuna-dolphin relationship in the eastern tropical Pacific. In 1986, an IATTC observer program, including all nations with fleets of large tuna vessels operating in the eastern tropical Pacific, became fully operational. As part of the program, the IATTC places observers on all tuna vessels capable of fishing for tuna in association with dolphin in the eastern tropical Pacific. The

connection with the taking. Violation of any prohibition under the Act can lead to a civil penalty of up to $10,000 for each violation.[6]

2.7 Persons or vessels under the jurisdiction of the United States may however take marine mammals incidental to commercial fishing operations, if they obtain a permit granted under the Act.[7] The regulations governing the issuance of the permit aim to reduce the incidental kill or serious injury of marine mammals in the course of commercial fishing to insignificant levels

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

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

2.15 In response to the court order, the United States administration introduced an interim final rule, effective 11 September 1992, modifying the regulatory definition of intermediary nation.[27] Corresponding amendments to the

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

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

3.2 The United States requested the Panel to:

a) find that the import prohibition on tuna and tuna products imposed pursuant to Section 101 (a)(2)(C) of the Marine Mammal Protection Act (the "intermediary nation embargo") was consistent with the General Agreement, since it came withimediary

3.4 The EEC and the Netherlands further maintained that measures taken under the intermediary nation embargo could not be seen as the enforcement at the time or point of importation of an internal law, regulation or requirement which applied equally to the imported product and the like domestic product, within the meaning of the Note ad Article III. A border measure was merely a convenient way of enforcing an internal law, regulation or requirement; it could not

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result of th [redacted] he United [redacted] s to dev [redacted]
dolphin pr [redacted] ures and had adopted r [redacted] hin protection, includ
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3.9 and The United States further maintained t [redacted] eat significance since
represented a challenge under the General Agr [redacted] overeign nations to ad
and enforce measures to safeguard resources in [redacted] which all countries h
shared interest. The United States noted that t [redacted] ea which was currently the subjec
extensive consideration in a working group est [redacted] ARTICIPATING PARTIES:
Group on Environmental Measures and Interna [redacted] At a time when resolution of iss
involved in safeguarding the global commons [redacted] critical, the work of that group a
of the CONTRACTING PARTIES should not

[redacted]

nations in all fields of activity were "unilateral" in this sense. However, the United States stated that the categorization of measures as"unilateral" had no relevance to the provisions of the General Agreement. There was no provision in the General Agreement that supported the

3.17 The United States further maintained that, by their nature, international agreements dealt with matters in the international sphere and not within the jurisdiction of just one nation. There was therefore no general principle of treaty interpretation by which a treaty's provisions were interpreted not to have effect outside the jurisdiction of the country taking the measure. The Vienna Convention on the Law of Treaties contained no such interpretative principle. The United States noted that,

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

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

3.21 The United States maintained however, that *subsequent practice* of parties did exist in the sense of Article 31 (3)(b) of the Vienna Convention on the Law of Treaties. This subsequent practice was that of the contracting parties to the General Agreement pursuant to Articles XX(b) and (g), which included their practice with respect to international environmental treaties. Subsequent practice of the contracting parties with respect to international environmental treaties negotiated after the General Agreement revealed that many provided for the protection by a
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birds, which are defined in Article I as "birds of those species, all or some of whose individual members, may at any season cross any of the boundaries between the American countries". This definition includes all migratory birds in the Western Hemisphere, not just those found in the territories of the parties.

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

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

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

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

> "a Contracting Party shall prohibit the exportation from, the import1 330.96 538.32 Tm/F8 91s1 181.68 447.6 Tm/F8 11 Tes

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permitting "stricter domestic measures" in order to further the objectives of that Agreement.[33]

Convention on the Law of Treaties, there was no [illegible]
interpretation referred to in Article 32 of the Convention[illegible]
means of interpretation were taken into account, they confirmed [illegible]
jurisdictional limitation on the location of the resource or living thing[illegible]

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

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

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

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

a) Trade Agreement between the United States and Canada, Article XII

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

3.34 The United States further argued that it required circular reasoning to attempt to read into paragraphs (g) and (b) of Articles XX limitations restricting their application

measures justified by these paragraphs, then each contracting party could unilaterally determine the international conservation, and life and health protection, policies from which other contracting parties could

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

3.39 The EEC and the Netherlands maintained that, even if treaty practice among only some GATT members could be seen to affect the interpretation of the General Agreement with respect to all its parties, contrary to the Vienna Convention on the Law of Treaties, such treaty practice did not support the United States position. In the Convention Relative to the Preservation of Fauna and Flora, the import restrictions were clearly intended to enable contracting parties to verify the certificates of lawful export of other parties, a matter of mutual help in the enforcement of customs regulations. There was no intent expressed to protect resources outside the importing party's territory. This was confirmed by Article 1 of the treaty, on territorial scope. In the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Article 9 was drafted in terms of mutual help in the parties' enforcement of each other's domestic rules of lawful exportation. In the International Convention for the Protection of Birds, there was no clear indication in the text of Article 3 that this was only applied to imports from [illegible] sources, including those outside the contracting parties to the treaty. Articles 8 and 9 were clearly territorial in scope. In the Agreement on the Conservation of Polar Bears, there was no indication in the text that the treaty covered the polar region as such. Since the treaty was concluded by all the states surrounding the polar region, the prohw1 Tf(region,) TjETBT11 4(all) TjETBT1 073F8 11 Tf(1) TjETBT 11 Tf(

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

fisheries resources, birds or wild animals. This latter provision was not carried through into the General Agreement. However, this distinction clearly indicated that drafters of the ITO Charter did not regard the taking of unilateral measures for the protection of animal health outside the jurisdiction of the

Agreement as a whole, and not merely on Article XX(b). The preamble generally referred to all GATT rules as they related to products. The preamble noted that

3.52 The **EEC** replied that, although the United States and the EEC both agreed that dolphins were in need of conservation, this did not make them into an exhaustible natural resource.

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

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

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

5. Article XX(b)

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

3.61 The United States first made some preliminary observations. It stated that the United States was a major importer of yellowfin tuna, and that the eastern tropical Pacific was a key

a) "Necessary"

3.64 The **United States** argued that the import prohibitions taken under the intermediary nation embargo were "necessary" in terms of Article XX(b) to ensure the life and health of dolphins. In this regard, the term "necessary" in Article XX(b) had to be interpreted in accordance with its normal meaning. "Necessary to protect human, animal or plant life or health" would normally be construed to mean that the measure was *needed* to protect such life or health. Any

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

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

3.69 The United States maintained that, even if the term "necessary" were not interpreted to mean "needed", but to mean "indispensable", "requisite", "inevitably determined", or "unavoidable", the United States measures met this standard. The United States emphasized that the

concerned should have recourse to the measure least inconsistent with other provisions of the General Agreement.[49] The United States itself had requested the panel in *Thailand - Restrictions*

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

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

6. Article XX(d)

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

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

3.80 The **EEC** and the **Netherlands** replied that, since the primary nation embargo measures were

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

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

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

7. Preamble to Article XX

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

C. Primary nation embargo

3.84 The **EEC** and the **Netherlands** stated that the provisions relating to the primary nation embargo were mandatory in nature. Although they did not currently apply to the EEC or the Netherlands, they were entitled to challenge them, since the objective of Articles III and XI was to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. The objective was not merely to safeguard current trade, but also to create the predictability needed to plan future trade. The panel in *United States - Taxes on petroleum and certain imported substances* had observed that "that objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement untf5 226.8 Tm/F8 11 Tf(mai08 213.84 Tm/F8 11 Tf(une) TjETBT1 0 0 1

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

3.86 The EEC and the Netherlands also argued that they had a fundamental legal interest in deE2 Tm/F8 11 Tf(primary) TjETBT1 0 02u0 1 27(deF8 11 TF8 11 Tf(The) TjETBT1m8 Tm/ 1) TjETBT1 0 0

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

3.91 The United States noted that, in examining trade data from 1988 to

[53] The EEC noted that the requirement that a measure apply to a product in order to qualify for adjustment at the border under the Note ad Article III had been discussed at length in the report of the panel in *United States - Taxes on petroleum and certain imported substances.* This panel found that taxes which were not directly levied on products were not eligible for adjustment at the border, and that the policy purpose of the tax was not relevant. If it were considered that taxes not directly levied on the product were eligible for adjustment at the border, and the policy purpose of the tax were relevant for these purposes, then Article III could be turned into an instrument through which certain contracting parties could freely impose what they considered socially desirable on other contracting parties. The EEC and the Netherlands further argued that, even if the United States tuna fishing regulations could be considered as eligible for adjustment

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

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

IV. SUBMISSIONS BY INTERESTED THIRD PARTIES

A. Australia

4.1 Australia stated that the present dispute concerned solely the selective import prohibitions by the United States on yellowfin tuna according to the country of origin of the product. The dispute did not concern prohibitions related to the fishing practices of certain countries, since the prohibition could apply to those countries even if they met or exceeded the

forced imposition of domestic standards on other contracting parties. It could also lead to the exporting country being forced, under threat of trade embargo, to impose indirectly third-country standards on countries from which it imported, and risk breaching its GATT obligations to that third country. Acceptance of the United States view would lead to sovereignty over the environment within the territory or jurisdiction of exporting countries being severely compromised by trade

origin[59] would not become effective until after 1 June

natural resources, but that the resource in question represented an exhaustible natural resource and that the measures were

resulted in the primary nation import prohibition. To either ensure or restore access to the United States market, intermediary nations would have

C. Costa Rica

4.23 Costa Rica stated that it had intervened as a third country because of its direct interest in the dispute, having

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

4.29 Costa Rica stated that the prohibition of imports of tuna and tuna products from countries subject to the primary and secondary nation embargoes were quantitative restrictions inconsistent with Article XI:1 of the General Agreement and could not be justified by any exceptions. Costa Rica agreed with the findings of the previous panel examining the United States

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

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

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

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

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

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

F. Thailand

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

G. Venezuela

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

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

4.46 The facts of this dispute illustrated the dangers associated with trade restrictions based on unilaterally-determined global environmental objectives. The protection of dolphins was an objective generally shared by most nations, including Venezuela. However, the extreme measures prescribed by the Act to achieve that objective lacked a basis in sound science. Contrary to the suggestions in its submission, the United States had officially knowledge that there was no evidence indicating that dolphin populations in the Eastern Tropical Pacific were in danger of extinction.[66] This illustrated that the dolphin population in the eastern tropical Pacific was not in danger of depletion,

V. FINDINGS

A. Introduction

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

1. United States restrictions affecting domestic tuna and tuna fishing

5.2 The Marine Mammal Protection Act of 1972 prohibits any person or vessel under United States jurisdiction from taking any marine mammal in connection with the harvesting of fish.[68] The Act further prohibits the use of any fishing method contrary to regulations issued under the Act, and imposes civil penalties for violations.[69] Persons or vessels under the jurisdiction of the United States may however take marine mammals incidental to commercial fishing operations, subject to the conditions of a permit granted under the Act.[70] The only permit issued by the United States has been to the American Tunaboat Association. This permit specifically requires that: vessels not deploy purse seine nets on, or encircle, any school of dolphin in which eastern spinner dolphin or coastal spotted dolphin are observed; total dolphin mortalities not exceed 800 for the period 1 January 1993 through 1 March 1994; purse seine nets not be deployed after sunset; explosive devices not generally be used; and vessels carry an official observer certified by the United States or by the IATTC.[71] The permit expires on 1 March 1994. If by that date no major purse seine tuna fishing country has entered into an agreement ETBT1 0 0 1 436.56 4ETBT1 0 0 1 475.

"prim0 1 186.96 382.8

prove that it has fishing technology and a rate of incidental taking comparable to those of the United States. In the case of exports of yellowfin tuna from the eastern tropical Pacific, the following requirem8.6jET

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

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

"Subject to

The nature and precise scope of the *policy area* named in the Article, the conservation of exhaustible natural resources, is not spelled out or specifically conditioned by the text of the

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

5.20 The Panel then

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

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

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

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

5.25 The Panel then examined whether, under Article XX (g), measures primarily aimed at the conservation

5.26 The Panel observed that Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision

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

-- First, it had to be determined whether the *policy* in respect of

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

measures

5.37 The Panel also recalled that measures taken under the *primary* nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country's tuna harvesting practices and policies were not comparable to those of the United States. The Panel observed that, as in the case of the intermediary nation embargo, the prohibition on imports of tuna into the United States taken under the primary nation embargo could not possibly, by itself, further the United States objective of protecting the life and health of 693.6 Tmo

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

…

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

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

F. Concluding observations

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

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

VI. CONCLUSIONS

6.1 In the light of its findings above,

Annex A

Excerpts from the Marine Mammal Protection Act of 1972

Definitions

Sec. 3 For the purposes of this Act -

(…)

(5) The term 'intermediary nation' means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that a1 278.88 596.4 Tm36 Tm/F8 11 Tf((5)) Tj263fTf(that) TjETBT

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

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

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

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

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

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

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

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

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

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

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

International

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

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

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

(B) BAN CRITERIA.- The one or more fish and fish product categories to which the President imposes an import ban under subparagraph (A) with respect to a country must be a fish and fish product category or categories with respect to which the articles classified thereunder and imported from that country in the

Annex B

Excerpts from the Vienna Convention on the Law of Treaties

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.