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The Dolphin/Tuna Controversy and Environmental Issues: Will the World Trade Organization's "Arbitration Court" and the International Court of Justice's Chamber for Environmental Matters Assist the United States and the World in Furthering Environmental Goals?

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Cover Page Footnote

J.D., The Florida State University College of Law, 1996; B.A., State University of New York at Binghamton, 1992.

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THE DOLPHIN/TUNA CONTROVERSY AND ENVIRONMENTAL ISSUES: WILL THE WORLD TRADE ORGANIZATION'S "ARBITRATION COURT" AND THE INTERNATIONAL COURT OF JUSTICE'S CHAMBER FOR ENVIRONMENTAL MATTERS ASSIST THE UNITED STATES AND THE WORLD IN FURTHERING ENVIRONMENTAL GOALS?

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I. INTRODUCTION

Throughout history, dolphins have been exploited for a variety of reasons.[1] Today, thousands are killed or maimed by purse-seine fishing methods used to capture yellowfin tuna.[2] In an effort to prevent the wanton destruction of these beautiful and intelligent

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1. Laurel L. Hyde, *Comment, Dolphin Conservation in the Tuna Industry: The United States' Role in an International Problem*, 16 SAN DIEGO L. REV. 665, 665-66 (1979). Dolphins have been exploited as a "source of food, animal food, oil, fertilizer, and leather. They are also captured alive for display, research, and military uses." *Id.* at 666.

2. Karen B. Goydan, *Destructive Fishing Practices and Conflicting International Agendas: Inadequate Structures and Possible Solutions*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 359, 361 n.11 (1992). Dolphins are not the only animals that are inadvertently killed or taken by drift net fishing practices. Northern fur seals, marlin, sharks, porpoises, turtles and seabirds are also victims of this practice. *Id.* at 361.

creatures, the United States passed the Marine Mammal Protection Act[3] and the Dolphin Protection Consumer Information Act.[4] In addition, in *Earth Island Institute v. Mosbacher*,[5] the Ninth Circuit upheld a California District Court decision ordering the Secretary of Commerce to enforce a ban on the importation of yellowfin tuna from countries not employing dolphin-safe fishing practices.[6] However, two GATT panels held that this embargo was in violation of the General Agreement on Tariffs and Trade ("GATT").[7] The decisions revealed that present international treaties and agreements continue to favor trade over environmental issues. Although these attitudes may never change,[8] some "environment-friendly" mechanisms are emerging. It remains unclear whether these mechanisms will provide an adequate means of resolving the world's environmental disputes.

On January 1, 1995, the World Trade Organization was established after seven years of negotiations during the Uruguay Round of GATT negotiations.[9] At the last minute of the Round, environmental provisions were included.[10] With these inclusions and a dispute resolution mechanism, the WTO may be one avenue through which environmental concerns may be advanced. Another mechanism is the newly established Chamber for Environmental Matters of the International Court of Justice.[11] Although no cases have yet been

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3. 16 U.S.C. §§ 1361-1362, 1371-1384, 1401-1407 (1994 & Supp. 1995).

4. *Id.* §§ 1371, 1385.

5. 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

6. *Id.* at 973.

7. The first GATT panel was convened to decide a dispute between Mexico and the United States. *GATT Dispute Settlement Panel Report: United States – Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991), *available in* WESTLAW, IEL Database, I.E.L. I-B-59 [hereinafter *Panel Report I*]. The countries claiming that the embargo was in violation of the GATT include: Mexico, Venezuela, Vanatu, Costa Rica, France, Italy, Japan and Panama, as well as nations that import tuna from these nations for export to the United States. Maureen Dolan-Pearson, *Pulling Purse Strings to Eliminate Purse Seiners: United States Protection of Dolphins Through International Sanctions*, 42 DEPAUL L. REV. 1085, 1085 n.2 (1993). The second GATT panel convened to decide a dispute between the United States and the European Economic Community and between the United States and the Kingdom of the Netherlands. *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 33 I.L.M. 839, 844 (1994) [hereinafter *Panel Report II*].

8. There is a need for change in the underlying views of nations. For example, in Britain, environmental issues are considered a "nagging concern" for small businesses. *Business Monitor: Cloud of Green Issues Over Firms*, THE DAILY TELEGRAPH, March 20, 1995, at 34. The environment should not be viewed as a nagging concern, but as an important concern. Nations should want to preserve the environment for future generations, for its resources and for its beauty.

9. 1 JOSEPH F. DENNIN, LAW & PRACTICES OF THE WORLD TRADE ORGANIZATION at v (1995).

10. *Id.* at vi. The addition of these provisions in the "eleventh hour" may again be indicative of the environment's subordinate status with respect to trade.

11. U.N. CHARTER arts. 92-96. These Articles of the Charter of the United Nations provide for an International Court of Justice. *See also* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

brought before the Chamber, its establishment reveals that the international community is treating environmental matters more seriously. This Article will examine these various mechanisms and attempt to determine which, if any, will promote environmental concerns and protect dolphins and other marine mammals.

II. THE DOLPHIN/TUNA PROBLEM

A. Background

For decades, fishermen have observed that yellowfin tuna swim with dolphins.[12] In fact, in the eastern tropical Pacific,[13] fishermen specifically search for the dolphin in order to locate the yellowfin tuna.[14] The fishermen locate the dolphin as they surface for air and surround them with purse seine nets. The nets enable them to capture the large quantities of tuna that swim below.[15] Tragically, dolphins are also captured in these nets and millions have perished since the 1950's.[16] As the net is pursed, many dolphins dive to the bottom and become entangled.[17] The dolphins are unable to surface for air and therefore drown.[18] Many also drown "as a result of physical injury, shock or the refusal to abandon trapped dolphin."[19] This destruction has led to the possibility of extinction of the Eastern

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art. 26(1) [hereinafter ICJ]. Article 26 of the Statute of the International Court of Justice enables the Court to establish Chambers for dealing with particular categories of cases. *Id.*; *see also* Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1087 n.220 (1994).

12. Hyde, *supra* note 1, at 666; *see also* Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 142, 189 (1992). Scientists still do not know why the dolphin and the yellowfin tuna swim together. Dorothy J. Black, *International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna*, 24 LAW & POL'Y INT'L BUS. 123 (1992).

13. 50 C.F.R. § 216.3 (1994). The "eastern tropical Pacific Ocean . . . includes the Pacific Ocean area bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines on North, Central and South America." *Id.*

14. Mayer, *supra* note 12, at 189.

15. *Id.* Purse-seining is a highly efficient and economical method of capturing yellowfin tuna. *Id.*; Hyde, *supra* note 1, at 667. To employ this method of fishing, the dolphin are "pursued with helicopters and speedboats and encircled with mile-long nets." Mayer, *supra* note 12, at 189. The main ship then draws a cable at the top of the net like a drawstring purse in order to capture the contents of the net—the yellowfin tuna and the dolphin among other marine life. *Id.*; *see also* Hyde, *supra* note 1, at 666 n.7. In the past, fishermen would catch tuna by dumping ground-up bait in the water to attract the fish with unbaited hooks. The dolphins would use their sonar to avoid getting hooked on the bait. Dolan-Pearson, *supra* note 7, at 1086.

16. Mayer, *supra* note 12, at 189. "[O]ver six million dolphins have been drowned or fatally injured . . . since purse-seining began." *Id.*; *see also* Dolan-Pearson, *supra* note 7, at 1087.

17. Hyde, *supra* note 1, at 666-67 n.9.

18. *Id.*

19. *Id.*

Pacific dolphin.[20] As a result of these destructive practices, Congress passed the Marine Mammal Protection Act ("MMPA").[21]

B. *The Marine Mammal Protection Act*

The purpose of the MMPA is to protect marine mammals that are or may be in danger of extinction due to the activities of man.[22] Section 1371(a)(2) of the MMPA deals directly with the incidental taking of marine mammals during fishing operations. In 1988, amendments were added to deal specifically with the problem of the destruction of dolphins and the importation of tuna.[23] Under the MMPA, if a foreign country intended to import yellowfin tuna to the United States, the country would have to follow three elements contained in the amendments.[24] First, the country would have to promulgate and adopt a program limiting the incidental taking of marine mammals by foreign countries to a level similar or equivalent to that of the United States.[25] Second, an intermediary nation[26] must prove, within sixty days of a United States embargo, that it will not export the restricted tuna to the United States.[27] Finally, the Secretary of Commerce must certify to the President that the restrictions have been imposed.[28]

A dispute developed between the United States and Mexico over these amendments,[29] and subsequently between the European Economic Community ("EEC") and the United States and the Kingdom of the Netherlands ("Netherlands") and the United States. Environmentalists filed a lawsuit against the Commerce Department claiming that the United States was not following the provisions of the MMPA.[30] They "sought to force the Department to impose an

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20. Dolan-Pearson, *supra* note 7, at 1087.

21. 16 U.S.C. §§ 1361-1362, 1371-1384, 1401-1407 (1994 & Supp. 1995). The Marine Mammal Protection Act was passed in 1972. Dolan-Pearson, *supra* note 7, at 1087.

22. *See* 16 U.S.C. § 1361 (1994 & Supp. 1995). "The Congress finds that—(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities . . . ." *Id.*

23. Alan S. Rafterman, *Chicken of the Sea: GATT Restrictions on United States Environmental Measures Designed to Protect Marine Mammals*, 3 FORDHAM ENVTL. L. REP. 81, 83-84 (1991).

24. *Id.* at 84.

25. *Id.*; Black, *supra* note 12, at 129.

26. An intermediary nation is a nation that "exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States . . . ." 16 U.S.C. § 1362(5); *see also* Rafterman, *supra* note 23, at 84.

27. Rafterman, *supra* note 23, at 84.

28. *Id.*

29. *Panel Report I*, *supra* note 7, 30 I.L.M. at 1594; *see also* Black, *supra* note 12, at 129.

30. Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991); Goydan, *supra* note 2, at 369.

embargo upon non-certified tuna."[31] The United States Court of Appeals for the Ninth Circuit held that embargoes against any country violating the MMPA were required under the law.[32] Mexico then requested that a GATT panel find that this decision violated the GATT.[33] In 1992, the EEC and the Netherlands also requested that a panel convene to resolve the dispute.[34]

III. THE GATT PANEL DECISIONS

A. General Agreement on Tariffs and Trade

Primarily, the GATT[35] was created to assist nations involved in international transactions.[36] The GATT is a neutral body that attempts to lessen the harms that occur to foreign nations due to self-interested regulation of trade.[37] The GATT

> [p]rovides treaty mechanisms for the establishment and the maintenance of a common code of conduct for international trade. It provides machinery for the stabilization and the progressive reduction of tariffs and a forum of regular consultation and periodic negotiation rounds[38] between its participants. It provides also a structure and procedures for the conciliation and settlement of disputes so as to protect and secure a balance of interest between the contracting parties although this is not an integrated general settlement procedure.[39]

Originally, the GATT was drafted with the hope that an International Trade Organization would be formed.[40] As such, the GATT is not set up like a Constitution.[41] However, the provisions of the GATT are complex and over the years the GATT has revealed "some

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31. Goydan, *supra* note 2, at 369.

32. *Id.*

33. *Panel Report I, supra* note 7, 30 I.L.M. at 1594, 1598; *see also* Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992). On January 25, 1991, Mexico requested that the panel convene. *Panel Report I, supra* note 7, 30 I.L.M. at 1598.

34. *Panel Report II, supra* note 7, 33 I.L.M. at 844.

35. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. (5),(6), 55 U.N.T.S. 187 [hereinafter GATT].

36. Dolan-Pearson, *supra* note 7, at 1088. International transactions are extremely complex due to currency exchanges and controls on imports and tariffs. *Id.*

37. *Id.*

38. The Uruguay Round, during which the WTO was formed, is an example of such a round.

39. 1 KENNETH R. SIMMONDS & BRIAN H. HILL, LAW & PRACTICE UNDER THE GATT 2 (1994).

40. *Id.* at 3.

41. *Id.*

of the flexibility and adaptability to changed economic circumstances which is characteristic of the organization as a whole."[42]

Although each member country of the GATT is a contracting party,[43] the countries are referred to collectively as "Contracting Parties" only when the countries act jointly.[44] There are four categories of GATT membership.[45] A country is a member if it is a signatory to the Protocol of Provisional Applications of 1947,[46] if it has accepted the GATT under Article XXVI,[47] through accession under Article XXXIII,[48] or by gaining independence from a member nation.[49]

The GATT does not contain one specific Article dealing with dispute resolution.[50] Conflict is most easily avoided if, when a contracting party decides to adopt measures that will affect international trade, notice is given to the other contracting parties.[51] However, if a dispute does arise, negotiation is the GATT's favored method of resolution.[52] Parties may use a variety of negotiation methods set out by the Articles. If the parties agree, the Director General[53] may be "called upon."[54] There are also consultation procedures,[55] specific subject area provisions,[56] and non-tariff barrier agreements.[57]

1. The Consultation Procedures

The consultation procedures may be found in Articles XXII, XXIII or XXXVII. Article XXII allows for the contracting parties to consult

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42. *Id.*

43. *Id.* at 4; *see also* Dolan-Pearson, *supra* note 7, at 1089-90.

44. SIMMONDS, *supra* note 39, at 4; Dolan-Pearson, *supra* note 7, at 1089-90.

45. SIMMONDS, *supra* note 39, at 4.

46. GATT, *supra* note 35, art. XXVI; Dolan-Pearson, *supra* note 7, at 1089-90.

47. GATT, *supra* note 35, art. XXVI.

48. *Id.* art. XXXIII.

49. *Id.* art. XXVI.

50. SIMMONDS, *supra* note 39, at 7.

51. *Id.* Possibly, notice will enable the nations to discuss problems that may arise and prevent further problems from arising.

52. *Id.* at 8. "A dispute will occur where there is an impairment of benefit to a contracting party; a breach of the GATT rules is not enough in itself although in practice an impairment of benefit may be presumed when a breach of the rules is apparent." *Id.*

53. The Director General is the head of the Secretariat of the GATT and the Chief Administrative Officer. *Id.* at 6.

54. SIMMONDS, *supra* note 39, at 8.

55. GATT, *supra* note 35, arts. XXII, XXIII, XXXVII; *see also* SIMMONDS, *supra* note 39, at 8.

56. GATT, *supra* note 35, arts. XIX, XXV, XXVIII; *see also* SIMMONDS, *supra* note 39, at 8. The specific subject area provisions include: the safeguard clause in Article XIX, the waiver provisions in Article XXV(5) and the modification of schedules of concessions of Article XXVIII. *Id.*

57. SIMMONDS, *supra* note 39, at 8. These agreements were concluded as part of the Tokyo round. *Id.*

with each other with respect to GATT-related matters.[58] A contracting party may request that the Contracting Parties consult with a contracting party or parties if it is difficult to reach a solution after an initial consultation.[59]

Article XXIII[60] allows a contracting party to submit written representations or proposals to parties that it contends are in violation of the GATT.[61] This Article also provides for the Contracting Parties to investigate a matter if the two contracting parties cannot reach an agreement on their own.[62] The contracting parties that form this panel "are not citizens of the disputing parties and . . . act[] in their individual capacities rather than as representatives of particular GATT members to hear the dispute and make recommendations."[63] Third parties may present their views to the panel.[64] If the parties are still unable to resolve the dispute, the panel will submit a report to the Contracting Parties who will then vote on the recommendation.[65] If the panel's recommendation is adopted by the Contracting Parties,[66] the injuring party will probably be ordered to stop its activity.[67] If the party continues its activities, the injured party may retaliate by suspending GATT concessions.[68]

Article XXXVII provides that when a contracting party is not following the provisions of the Article, an interested contracting party may request that the Contracting Parties consult with the contracting party concerned and all other interested contracting parties in order to reach satisfactory solutions and further GATT objectives.[69]

2. *Specific Subject Area Provisions*

Dispute resolution mechanisms relating to specific subject area provisions are in Articles XIX, XXV, and XXVIII. Article XIX is

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58. GATT, *supra* note 35, art. XXII.

59. *Id.* art. XXIII(2). For the definition of Contracting Parties, *see supra* note 44 and accompanying text.

60. *Id.* art. XXIII. This article is entitled "Nullification or Impairment." Paragraph 2 allows for sanctions against the offending state. *Id; see also* SIMMONDS, *supra* note 39, at 8.

61. GATT, *supra* note 35, art. XXIII(1).

62. *Id.* art. XXIII(2).

63. Dolan-Pearson, *supra* note 7, at 1100.

64. *See* GATT, *supra* note 35, art. XXIII(2); Dolan-Pearson, *supra* note 7, at 1100.

65. GATT, *supra* note 35, art. XXIII(2); *see also* Dolan-Pearson, *supra* note 7, at 1100.

66. *See* Dolan-Pearson, *supra* note 7, at 1100. "A consensus is required and each disputing party is entitled to vote. A disputing party can block the adoption of a panel recommendation." *Id.* Thus, a party may effectively veto a decision. "However, a party rarely blocks a recommendation because it would then likely be subject to GATT-authorized retaliation, such as increased tariffs." *Id.*

67. *Id.*

68. *Id.* at 1100-01.

69. GATT, *supra* note 35, art. XXVII.

entitled "Emergency Action on Imports of Particular Products." The Article states that if unforeseen conditions cause products to be imported into a territory to the detriment of domestic producers, the injured party is free to suspend obligations "in whole or in part or to withdraw or modify the concession[s]" in order to prevent or remedy the injury.[70] The injured party must first give notice to the Contracting Parties and if an agreement is not reached, the injured party may continue to take action if it so chooses[71] and the affected contracting party may suspend equivalent concessions or obligations if the Contracting Parties do not disapprove.[72]

Article XXV is entitled "Joint Action by the Contracting Parties." The Contracting Parties may waive an obligation imposed on a contracting party by the GATT.[73] This waiver must be approved by a two-thirds majority and that majority must be composed of more than one-half of the contracting parties.[74]

Article XXVIII essentially permits the contracting party to modify or withdraw a concession.[75] "An analysis of these procedures shows that, in general, they follow a sequential pattern of consultation (bilateral and multilateral), conciliation, examination by a panel of experts, reports to the Council, and adoption of reports followed by rulings and recommendations by the Contracting Parties."[76]

Thus, the GATT appears to offer a variety of dispute resolution mechanisms. However, the problem again is that trade issues are the primary focus and most disputes will be resolved in favor of trade and at the expense of other issues. The use of experts must not only include trade experts, but experts in other affected areas. For example, in the case of the dolphin-tuna controversies, environmental experts must also be given the opportunity to intervene and submit recommendations. These experts should be involved in every decision that is made by the panel. In addition, when a contracting party begins consultations regarding an environmental matter, each nation should have environmental experts to assist in the negotiations and counter the "trade-heavy" balance. The inability of GATT's dispute mechanisms to enforce decisions has lead to criticism of the GATT.

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70. *Id.* art. XIX(1)(b).

71. *Id.* art. XIX(3)(a).

72. *Id.*

73. *Id.* art. XXV(5).

74. *Id.* (stating that "[t]he Contracting Parties may also by such a vote: (a) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (b) prescribe such criteria as may be necessary for the application of this paragraph.").

75. *Id.* art. XXVIII. This article is entitled "Modification of Schedules." *Id.*

76. SIMMONDS, *supra* note 39, at 8.

This issue was a major focus of the Uruguay Round of negotiations which led to the establishment of the World Trade Organization.[77]

B. The Dispute with Mexico

Mexico sought a finding that the United States' embargo and the restrictions on tuna imports were in contravention of GATT provisions because they violated Article XI's elimination of quantitative restrictions,[78] and Article III's requirement of national treatment of imported goods.[79] Since the MMPA restrictions discriminated against tuna from the Eastern Tropical Pacific, Article XIII's prohibitions on discriminatory administration of quantitative restrictions were also allegedly violated.[80] Mexico also wanted a narrow interpretation of Article XX's exceptions.[81]

In response to Mexico's claims, the United States argued that Article III, rather than Article XI, governed.[82] The United States contended that the embargo was an internal measure which treated domestic and foreign tuna in the same way and should therefore be governed by Article III.[83] The panel rejected this contention.[84] It found that Article III applied to products, while the MMPA applied to the "method by which the products are obtained."[85] As a result,

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77. *See id.* at 9.

78. *Panel Report I, supra* note 7, 30 I.L.M. at 1601, 1602. Article XI is entitled "General Elimination of Quantitative Restrictions." GATT, *supra* note 35, art. XI.

79. *Panel Report I, supra* note 7, 30 I.L.M. at 1601, 1603-05. Article III is entitled "National Treatment on Internal Taxation and Regulation." GATT, *supra* note 35, art. III.

80. *See Panel Report I, supra* note 7, 30 I.L.M. at 1601, 1602. Article XIII is entitled "Non-discriminatory Administration of Quantitative Restrictions." GATT, *supra* note 35, art. XIII.

81. Dolan-Pearson, *supra* note 7, at 1111. Article XX sets out the general exceptions to GATT principles. Article XX states:

> 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:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health; . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT, *supra* note 35, art. XX.

82. *Panel Report I, supra* note 7, 30 I.L.M. at 1601, 1603-05.

83. 30 I.L.M. at 1601, 1602-05; Dolan-Pearson, *supra* note 7, at 1111.

84. *Panel Report I, supra* note 7, 30 I.L.M. at 1616-19.

85. Rafterman, *supra* note 23, at 86. "[I]n order to apply internal measures at the border, the measures must apply to the product itself . . . . [T]he MMPA illegally based its measures on the production process rather than the product." Dolan-Pearson, *supra* note 7, at 1111. The GATT panel reasoned that Article III requires nondiscriminatory application of internal regulations to domestic and imported products. The United States must therefore treat Mexican tuna no less favorably than domestic tuna regardless of whether or not Mexico's incidental

the GATT panel found that Article XI controlled[86] and that the United States was in violation of the Article since the embargo placed a quantitative restriction on tuna imports.[87]

The United States countered that even if Article XI did apply, the embargo was still permitted under the exceptions enumerated in Article XX(b) or XX(g).[88] Article XX(b) allows a contracting party to adopt measures that are "necessary to protect human, animal or plant life or health."[89] Article XX(g) permits measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[90] In addition, the measures may not arbitrarily discriminate between nations and the measures must not be an international trade measure in disguise.[91]

Once again, the panel agreed with Mexico. The panel stated that Article XX(b) applied only to those resources within the jurisdiction of the contracting party.[92] The panel found that the embargo was applied arbitrarily since it was based on the variable taking rate of the United States.[93] The panel also found that Article XX(g) could not be employed as an exception because it did not apply extra-jurisdictionally[94] and, since there was no objective limitation on dolphin deaths, the embargo could not be primarily aimed at dolphin conservation.[95]

The panel found that the Article XX(b) and (g) exceptions should apply internally, otherwise countries would be able to establish their own environmental policies.[96] However, each country would be free

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taking of dolphins exceeds that of vessels of the United States. *Panel Report I, supra* note 7, 30 I.L.M. at 1618. "In other words, because MMPA regulations protect dolphins, not tuna, they affect the production process rather than the products. Tuna is tuna, whether harvested with dolphin-safe methods or with purse seine nets." Black, *supra* note 12, at 134-35.

86. *Panel Report I, supra* note 7, 30 I.L.M. at 1616-18; *see also* SIMMONDS, *supra* note 39, at 135.

87. Dolan-Pearson, *supra* note 7, at 1111.

88. *Panel Report I, supra* note 7, 30 I.L.M. at 1604-12; Daniel C. Esty, *Unpacking the "Trade and Environment" Conflict: Symposium: U.S. Trade Policy in Transition: Globalization in a New Age*, 25 LAW & POL'Y INT'L BUS. 1259, 1266 (1994).

89. GATT, *supra* note 35, art. XX(b).

90. *Id.* art. XX(g).

91. *Id.* art. XX; Esty, *supra* note 88, at 1266.

92. *Panel Report I, supra* note 7, 30 I.L.M. at 1619-22; Dolan-Pearson, *supra* note 7, at 1111.

93. *See Panel Report I, supra* note 7, 30 I.L.M. at 1620. The panel also found that the regulations could not be necessary to protect dolphins because there was no evidence that the United States attempted to employ alternative GATT-consistent options to protect dolphins and because the foreign taking rate was arbitrarily tied to the U.S. rate. *Id.*

94. *Id.* at 42-43; *see also* Dolan-Pearson, *supra* note 7, at 1111; Esty, *supra* note 88, at 1266.

95. *Panel Report I, supra* note 7, 30 I.L.M. at 1620-21; *see also* Black, *supra* note 12, at 136. A previous GATT panel had determined that the provision in Article XX(g) "relating to conservation of natural resources means "primarily aimed at." Black, *supra* note 12, at 136 n.103.

96. Dolan-Pearson, *supra* note 7, at 1112.

to act jointly "to address international environmental problems which can only be resolved through measures in conflict with the present rules of GATT."[97]

Mexico chose not to send the GATT panel decision to a full vote and therefore the decision never became binding.[98] However, had Mexico chosen to pursue the adoption of the panel report, the United States would have been compelled to choose between its environmental policies and obeying the decision. If the United States wanted to resist adoption (and continue its environmental policies), it could have voted against adoption of the recommendation. However, Mexico could have responded with retaliatory measures against the United States and "the international community would view the United States as an 'international scofflaw.'"[99] The dilemma demonstrates that environmental issues are subordinate to trade issues and that there is an inherent defect in the structure and provisions of the GATT. Countries should be permitted to develop and adhere to environmental standards as long as they are applied equally toward foreign and domestic industries. However, such an application would require a favorable definition of "product." Some environmentalists hold that the provisions of the MMPA do not discriminate because the rules are applied equally to all foreign nations.[100] However, "nondiscrimination does not mean simply applying the same regulations to all GATT members."[101] To meet the most-favored-nation requirements of the GATT, "regulations must have the same impact on all 'like' products."[102] Presumably, "product" would have to be defined in such a manner that the process by which the product was acquired would be taken into account.

This aspect[103] may lead to the difficult task of discerning environmental measures that are truly designed to protect the environment

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97. *Id.*

98. *See id.* at 1101.

99. *Id.* at 1101 (quoting from *GATT: Implications on Environmental Laws, Hearing Before the Subcomm. on Health & the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 44 (1991)). "[T]he United States can find itself in a position where its international obligation directly conflicts with a domestic obligation and it cannot legally fulfill both." *Id.* at 1102.

100. *See* Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL L. 475, 493 (1993).

101. *Id.*

102. *Id.*

103. Defining "product" is only one aspect in a complex array of issues that make it difficult to determine if environmental protection measures or trade protection measures are being employed. There is also the problem of where to draw the line. For example, what if a country imports tuna that is harvested in a dolphin-safe manner, but is a great contributor to

and environmental provisions that are simply a pretext for trade/economic protection.[104] Countries may be accused of using environmental protection as a pretext for protectionist measures.[105] Trade, in general, may have either positive or negative affects on the environment. However, "protectionism is inherently destructive because it leads to economic inefficiency and thus deprives societies of the resources necessary for bettering the environment."[106]

Arguments for the environment also exist. Although the GATT has successfully reduced tariffs and increased trade,[107] this success has also increased the rate of exploitation of natural resources which some argue will eventually harm both the environment and the prospects for further economic growth.[108] However, "[t]he GATT's focus on 'products' makes it virtually incapable of capturing the environmental costs of externalities related to methods of production."[109]

> Problems have arisen among GATT contracting parties as those that take steps to protect the environment have found it difficult to compete with those that do not. Less developed countries (LDCs) often feel they cannot afford to indulge concerns about harm to the environment. Many LDCs, which are struggling to grow economically, suspect that behind concern for the environment, most ardently espoused by developed countries, lurk protectionist barriers aimed at inhibiting LDC development.[110]

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air pollution. Could the importing country ban the import of the tuna and argue that it is a measure designed to protect the environment?

104. An even greater problem arises when a measure truly protects the environment, but is also protectionist. In this case, either the environment or trade will be protected. Such a decision should not be made since each is important. Measures must be designed that permit the two to co-exist.

105. In the dispute with Mexico, "Mexico felt that the MMPA imposed burdens on foreign suppliers of ETP tunas that exceeded those imposed upon domestic suppliers generally, and that this constituted a protectionist policy." Stephen J. Porter, *Notes: The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?*, 5 GEO. INT'L ENVTL. L. REV. 91, 100 (1992).

106. Charnovitz, *supra* note 100, at 477. Protectionism refers to restrictions that are designed to aid domestic producers to maintain or increase reliance on domestic production. *Id.* at 477 n.6.

107. Matthew Hunter Hurlock, *Notes: The GATT, U.S. Law and The Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098, 2099 (1992).

108. *Id.* (citing a U.N.-sponsored report by the World Commission on Environment and Development).

109. *Id.* at 2100.

110. *Id.* Concern for the environment has caused industries in developed countries to complain about unfair advantage. Geoffrey W. Levin, *The Environment and Trade-A Multilateral Imperative*, 1 MINN. J. GLOBAL TRADE 231, 234 (1992). Due to more stringent environmental regulations, developed countries incur more costs to repair and prevent further environmental destruction. *Id.* at 231-34. Countries that do not impose such measures have a perceived trade advantage over those that do. *Id.*

The GATT panel decision has been criticized by many environmental and consumer groups as a threat to international conservation efforts.[111] Other groups have espoused that countries will employ environmental protection regulations as a method to mask protectionist policies.[112] "[T]here is an inherent danger that states will use environmental concerns as a pretext for limiting imports. International environmental concerns are real and legitimate, but their invocation as a rationale for limiting imports may in some cases turn out to be a form of 'green protectionism.'"[113]

One method of discerning between valid environmental policies and ones that are protectionist would be to allow the "GATT dispute resolution process to draw upon a body (or bodies) of independent scientific experts . . . "[114] The Dispute Settlement Body of the WTO and the ICJ could employ this method as well. However, the potential always exists that an independent expert will still have some sort of political allegiance. Also, if clear international environmental standards are developed, environmental goals will be realized by all nations. Then, if limitations are placed on trade, countries will be aware of its genuine purpose to aid the environment.[115] In addition, it will be easier to distinguish instances in which measures are enacted to protect the environment from disguised protectionism.

The text of the GATT needs revision. Possibly, the new dispute settlement provisions of the World Trade Organization or the International Court of Justice will be more helpful. Hopefully the new mechanisms that have recently been created will solve the problems that currently exist.

C. The Dispute with the EEC and the Netherlands

The EEC and the Netherlands were involved in this second dispute. The EEC requested that the United States hold consultations as provided by Article XXIII to discuss restrictions on the importation of certain tuna products.[116] These consultations did not

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111. Porter, *supra* note 105, at 106. Many contended that if the GATT adopted the panel report, it would create the potential to "slice away [at] the core of many of our nation's and state's environmental, consumer and work place safety protection." *Id.* (citing the testimony of Ralph Nader at the *GATT Dolphin Decision's Implications on U.S. Health and Environmental Laws: Hearing before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 3 (1991)).

112. *Id.* at 107.

113. Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 382 (1994).

114. Porter, *supra* note 105, at 109.

115. *See* Brown, *supra* note 113, at 382.

116. *Panel Report II*, *supra* note 7, 33 I.L.M. at 844. The EEC commenced this request on March 11, 1992. *Id.*

resolve the matter. The Netherlands also requested a consultation related to the same issue.[117] No agreement was reached and the Netherlands requested that they be a co-complainant in the panel established pursuant to the request of the EEC.[118]

The EEC and the Netherlands requested that the panel find that the MMPA's import restrictions on tuna and tuna products were contrary to Article XI and Article III of the GATT; were not covered by any of the exceptions under Article XX; and that the United States bring its legislation into conformity with its obligations under the GATT.[119] The United States requested that the panel find that the import restrictions were in compliance with the GATT because they fell under the Article XX exceptions; that the primary nation embargo could not apply to the EEC or the Netherlands; that the primary nation embargo came within the scope of the GATT; and that it is impossible to determine at this time whether the prohibitions would be inconsistent with GATT in the future.[120]

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117. *Id.* This request was made on July 3, 1992. *Id.*

118. *Id.*

119. *Id.* at 850. Specifically, the EEC and the Netherlands requested that the panel:

a) find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101(a)(2)(C) of the . . . [MMPA] (the "intermediary nation embargo") were contrary to Article XI of the General Agreement, did not qualify as a border adjustment under Article III and the relevant note to that Article, and was not covered by any of the exceptions under Article XX;

b) find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101(a)(2) and Section 305(a)(1) and (2) of the . . . [MMPA] (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 . . . .

Id.

120. *Id.* Specifically, the United States requested that the panel:

a) find that the import prohibition on tuna and tuna products imposed pursuant to Section 101(a)(2)(C) of the . . . [MMPA] (the "intermediary nation embargo") was consistent with the General Agreement, since it came within the scope of paragraphs (g), (b) and (d) of Article XX;

b) find that the import prohibitions imposed pursuant to Section 101(a)(2) of the . . . [MMPA] (the "primary nation embargo") did not nullify or impair any benefits accruing to the EEC or the Netherlands, since the primary nations embargo did not, and under current EEC laws, could not apply to the EEC or the Netherlands;

c) find that, in examining the primary nation embargo for the purposes of determining that the intermediary nation embargo was consistent with the General Agreement, since it came within the scope of paragraph (d) of Article XX, the primary nation embargo was also consistent with the General Agreement, since it came within the scope of paragraphs (b) and (g) of Article XX;

d) find that it is not possible to determine at this time whether any import prohibitions that might be imposed pursuant to Section 305(a)(1) and (2) of the . . . [MMPA] of 1972 in the future would be inconsistent with the General Agreement, or whether these measures would be within the scope of paragraphs (g) and (b) of Article XX, since these measures would be imposed in the context of a specific agreement between sovereigns, yet to be concluded and whose terms had not all

The GATT panel once again found against the United States, this time, in part, on slightly different grounds. The panel first examined whether the measures of the United States should be examined under the national treatment provisions of Article III, even though the measures were applied at the border.[121] Once again, the panel held that Article III applied to products rather than the manner in which the products were obtained.[122] Under this analysis, Article III was not applicable. The United States' embargoes distinguished between tuna products according to harvesting practices and tuna import policies of the exporting countries.[123] The United States' domestic measures also distinguished between tuna and tuna products according to harvesting methods.[124] The panel also noted that none of these policies could have "any impact on the inherent character of tuna as a product."[125]

Additionally, the panel concluded that the policies of the United States were inconsistent with Article XI. They considered the embargoes, which "banned the import of tuna or tuna products from any country not meeting certain policy conditions, to be a prohibition or restriction in conflict with Article XI."[126]

The panel next addressed the applicability of Article XX. Article XX(g) states that a country may take measures related to the conservation of natural resources if the measures do not discriminate between countries.[127] Article XX(g) suggests a three step analysis to determine whether or not measures fall within the exception. First, the panel determines whether the policy falls "within the range of policies to conserve exhaustible natural resources."[128] Second, it analyzes whether the trade measure relates to the conservation of exhaustible natural resources and "whether it was made effective 'in conjunction' with restrictions on domestic production or consumption."[129] Finally, the panel determines whether the measure

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been defined, including the relation between that agreement and measures taken pursuant thereto and the General Agreement....

Id. at 850-51.

121. *Id.* at 889.

122. *Id.* "The panel noted that Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the policies or practices of the country of origin with those of the country of importation." *Id.*

123. *Id.*

124. *Id.* at 889-90.

125. *Id.* at 890.

126. *Id.* The only prohibitions or restrictions that are permitted under Article XI are duties, taxes or other charges. *Id.* The panel did not feel that the embargoes could be considered under this category. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 891.

arbitrarily or unjustifiably discriminates between countries or constitutes a disguised restriction on international trade.[130]

The panel decided that "dolphin stocks could potentially be exhausted."[131] As a result, any policy that was designed to conserve dolphins was a policy to conserve an exhaustible natural resource.[132] The panel also disagreed with the contention of the EEC and the Netherlands that the GATT absolutely proscribes measures that relate to things outside the jurisdiction of the country taking the measures.[133] Further, the panel examined the measures in light of other environmental and trade treaties and found that they did not relate to the interpretation of the GATT.[134] Thus, they resolved the first prong of the test in favor of the United States.[135] This is one of the pro-environment aspects of the panel's decision that differs from the decision in the Mexico dispute[136] and which appears to leave a little more room for environmental measures. However, the rest of the panel's analysis does not.

The panel next discussed the second test—whether the policies were related to conservation measures. They agreed with the reasoning of the first panel that "relating to" and "in conjunction with" should mean "primarily aimed at." They concurred "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."[137]

The panel first examined the intermediary nation embargo. They noted that the embargo prohibited imports from countries that import tuna from countries not employing harvesting practices comparable to those of the United States. The prohibition applied whether or not the particular tuna was harvested in a manner that harmed

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130. *Id.* at 890-91.

131. *Id.* at 891.

132. *Id.*

133. *Id.* at 891.

134. *Id.* at 892-93.

135. *Id.* at 891.

> [T]he Panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g).

Id. at 893.

136. In that decision, the panel stated that the measures *do* have to be within the jurisdiction.

137. *Panel Report II, supra* note 7, 33 I.L.M. at 893 n.83.

dolphins.[138] The panel further stated that the intermediary embargo itself could not further conservation objectives because it 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."[139]

This analysis does not seem to conform with the idea of an embargo. An embargo is, in effect, designed to induce a party to conform with certain policies or principles. Those intermediary countries desiring to trade with the United States would not import from a country that employed harmful harvesting practices. Thus, conservation goals would be met by the embargo. Even if the panel did not agree that an embargo is the proper avenue that the United States should follow, the embargo itself would seem to produce the desired effect.

The panel employed this same reasoning when discussing the primary nation embargo. Again, embargoes were in place regardless of whether or not the particular tuna was harvested in a harmful manner; it punished countries for merely having harmful policies.[140] The primary nation embargo could achieve its desired effect only if it were followed by changes in the practices and policies of the exporting country.[141] The panel concluded that the intermediary and primary nation embargoes were implemented to force other countries to change policies within their own jurisdiction because the embargoes required such changes in order to have any effect on the conservation of dolphins.[142]

Although it may be inequitable to force a country to change policies within its own jurisdiction, it is also unfair to force a nation to import products that are at odds with its conservation measures. There must be a balance between the rights of each nation. Hypothetically, a country should be permitted to export tuna to the United States if the tuna has been harvested using safe methods even if the

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138. *Id.* at 893.
139. *Id.* at 894.
140. *Id.*
141. *Id.*
142. *Id.*

> The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g) .... The Panel accordingly found that the import prohibitions on tuna and tuna products maintained by the United States inconsistently with Article XI:1 were not justified by Article XX(g).

Id.

country does not have a safe harvesting policy.[143] In this manner, the country would be able to export tuna that was harvested safely and the United States would still be able to follow its own policies. This may allow the exporting country to slowly begin conservation goals of its own which may match those of the United States or other nations.[144]

The panel next examined the Article XX(b) argument. Article XX(b) essentially states that a country may take non-discriminatory measures if they are necessary to protect human, animal, or plant life or health.[145] A three step analysis was once again employed. First, the panel examined whether the policy was designed to protect human, animal or plant life or health. Next, the panel determined whether the measure was "necessary" to protect human, animal or plant life or health. Finally, the panel determined whether the measure was applied in a manner that arbitrarily discriminated between countries "where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade."[146]

All parties agreed that the protection of dolphin life fell under Article XX(b). However, the EEC and the Netherlands once again argued that the measures could not be applied extrajurisdictionally. The Panel disagreed and stated that nothing in the text of Article XX(b) limits the location of the living things to be protected.[147] As a result, "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 the range of the policies covered by Article XX(b)."[148]

The panel next examined whether the embargoes by the United States were "necessary" to protect the life of the dolphins in the sense that no other alternative existed.[149] The panel found that the United States implemented embargoes to force other countries to change their policies with respect to persons and things within their own jurisdiction. The panel noted that this was the only way there could be any effect on the protection of dolphins.[150] The panel

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143. Presumably, this would be difficult to do because it would involve the separation and monitoring of tuna catches.

144. Again, the author is assuming that most nations would prefer to enact provisions that protect the environment were it feasible to do so.

145. *Panel Report II*, *supra* note 7, 33 I.L.M. at 895.

146. *Id.*

147. *Id.*

148. *Id.* at 896.

149. *Id.*

150. *Id.* at 897. The panel used the same analysis it had used for Article XX(g). It stated that with both the primary and intermediary embargoes, tuna would not be imported whether

concluded that if measures were taken to force other countries to change their policies and were effective only if such changes took place, the measures could not be deemed necessary within the meaning of Article XX(b).[151]

In its concluding remarks, the panel essentially revealed the importance of trade over environmental issues.

> It 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.[152]

The panel determined that the measures protecting exhaustible natural resources outlined in Article XX were not meant to permit embargoes of the type imposed by the United States.[153] They also noted that the dispute settlement procedure outlined in the GATT could not add to or diminish the rights of contracting parties. Other procedures existed for waiving the obligations of member nations.[154] They then noted that the relationship between trade and the environment would be considered in the preparation for the World Trade Organization.[155] As a result of these interpretations, the panel recommended that the Contracting Parties "request the United States to bring the above measures into conformity with its obligations under the General Agreement."[156]

Again, it seems odd that the United States could not force other countries to change their internal policies, but that the United States could be "forced" to import tuna that was harvested contrary to the laws of the United States. The measures do not seem contrary to the GATT because there is no disparity in their application; they apply equally to United States fishermen and foreign nations. The panel does leave some room for "change," however. It decided that measures may apply extrajurisdictionally. It acknowledged the existence of waiver provisions and stated that the WTO may allow for more environmental policies. However, the GATT and the WTO are still, in essence, trade organizations with trade issues remaining pre-

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or not it was harvested in a harmful way. Therefore, the nation would be forced to change its own policies. *Id.*

151. *Id.* at 898.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 899.
156. *Id.*

eminent. Thus, it will probably be problematic to continue to employ the GATT dispute mechanisms as a means of deciding environmental issues. Possibly, the World Trade Organization or the newly formed Chamber for Environmental Matters will provide an answer.

IV. THE NEW MECHANISMS

A. The Uruguay Round and the Formation of the World Trade Organization

After seven years of negotiations during the Uruguay Round, the World Trade Organization ("WTO") was born.[157] The WTO differs from the GATT in two notable[158] ways. It has established different dispute resolution mechanisms and has recognized a desire to preserve and protect the environment.[159] Unlike the GATT, which operated on a "consensus" basis, decisions of the WTO's Dispute Settlement Understanding ("DSU") will be binding.[160]

> If one country complained of another country's actions as being inconsistent with their mutual GATT obligations, and a GATT panel, after studying the matter, ruled in favor of one country and against the other, the losing party could, by simply withholding its agreement, prevent the adverse GATT panel decision from being implemented. Under the Dispute Settlement Understanding (DSU) of the new WTO, panel decisions will be binding, in the absence of a consensus to reject the decision and a losing party will have to bring its practices into conformity with the WTO panel's decision or pay a price for refusing to do so.[161]

Article IX of the Agreement is entitled "Decision-Making."[162] According to the Article, the GATT's consensual decision-making practice will still be followed.[163] However, if consensus is not

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157. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 [hereinafter WTO]; *see also* DENNIN, *supra* note 9, at v. The World Trade Organization came into being on January 1, 1995. DENNIN, *supra* note 9, at v.

158. Notable in the sense that they relate to this Article.

159. WTO, *supra* note 157, 33 I.L.M. at 15; DENNIN, *supra* note 9, at 7. The desire to protect the environment is mentioned at the beginning of the Agreement Establishing the WTO. The Agreement notes that there is a desire to allow for the "optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." WTO, *supra* note 157, 33 I.L.M. at 15.

160. DENNIN, *supra* note 9, at vi.

161. *Id.*

162. WTO, *supra* note 157, 33 I.L.M. at 19-20.

163. *Id.* Consensus is deemed to be reached if no member formally objects to the proposed decision. *Id.* 33 I.L.M. 19 n.1.

reached, a vote is taken.[164] The Article also allows the Ministerial Conference and the General Council to adopt interpretations of the agreement provided that a three-fourths majority of the Members agree.[165] The Ministerial Conference may waive a Member's obligations in exceptional circumstances, again with a three-fourths vote.[166]

Annex 2 of the Agreement elaborates on the decision-making process.[167] Section 2.1 of the Annex states that the Dispute Settlement Body ("DSB") has the authority to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."[168]

According to Section 3.1, the Members agree to adhere to the principles for the management of disputes outlined in Articles XXII and XXIII of the GATT, as well as to the procedures outlined in the Understanding.[169] "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[170] The Understanding will only apply to new requests for consultations made on or after January 1, 1995, the date the WTO came into force. For disputes arising prior to that date and consultations arising under the GATT 1947, the dispute mechanisms in force at the time will continue to apply.[171] All members agree to improve the consultation process.[172] If a member requests a consultation, and the other member does not respond within the time designated, the requesting member may directly proceed to request the establishment of a panel.[173] When members cannot reach an agreement through consultation, the complaining party may request a panel within 60 days of the request for consultations if both members agree that the consultations have failed to settle the dispute.[174]

In addition to consultations, the parties may engage in good offices, conciliation, and mediation.[175] Panels may also be established

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164. *Id.*; *see also* DENNIN, *supra* note 9, at 12.

165. WTO, *supra* note 157, 33 I.L.M. at 19.

166. *Id.*

167. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 [hereinafter Disputes].

168. *Id.* at 114.

169. *Id.* at 115.

170. *Id.*

171. *Id.* at 116.

172. *Id.*

173. *Id.*

174. *Id.* at 117.

175. *Id.*

upon written request.[176] The panels should consist of individuals who have a diverse background and a "wide spectrum of experience" and should not include individuals whose governments are parties to the dispute, unless the parties agree otherwise.[177] They must be composed of well-qualified governmental and/or non-governmental individuals, including, among others, persons who have taught or published on international trade law or policy.[178] It is interesting to note that, once again, panel members may include experts on *trade* issues, but that no mention is made of non-trade experts who may have knowledge related to the dispute at issue and who should have the authority to serve on the panel. Obviously, trade expertise is necessary since these disputes and the Articles relate to trade issues. However, with respect to the tuna-dolphin controversy, an environmental expert should also be included on the panel.

> The Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.[179]

If the panel seeks information from an individual or entity within the jurisdiction of a member, the panel must inform the authorities of that member. Members should promptly respond to any requests for information.[180] Thus, it appears that there is more leeway to obtain information that relates to environmental matters. For example, in deciding the dolphin/tuna controversy, a panel may obtain environmental information. However, it would be more helpful were the Article to require that the composition of the panel include experts in variety of relevant areas. At the least, the Article should require panels to obtain information from such experts. Considering that panels are generally composed of only three to five members, it is likely that they will include trade experts. Thus, information from outside sources would be necessary. The panel should not simply seek information which *it* deems necessary since certain issues may be overlooked or never addressed.

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176. *Id.* at 118.
177. *Id.* at 118-19.
178. *Id.* at 118.
179. *Id.* at 122.
180. *Id.*

After the panel meets, an interim panel report is submitted to the parties.[181] Unless the parties submit comments, the interim report becomes the final panel report and is circulated to the members.[182] Twenty days after circulation, the report is considered by the DSB.[183] Members having objections to the report may give written notice and the parties to the dispute may participate in the DSB meeting.[184] Within 60 days after the circulation of the panel report to the members, the report is adopted by the DSB unless a party notifies the DSB that it will appeal[185] the decision or if there is no consensus within the DSB to adopt the panel report.[186]

In order to ensure effective resolution of disputes, DSB recommendations or rulings must be complied with promptly.[187] Once a decision by the DSB is handed down, the member must inform the DSB of its intentions with respect to the recommendations and rulings.[188] If it is not practicable to immediately comply with the decision, the Member will have a reasonable time to do so.[189] The DSB will also supervise the implementation of adopted decisions.[190]

If the recommendations are not implemented within a reasonable period of time, temporary measures such as compensation and suspension of concessions or other obligations may be applied.[191] However, full implementation of a recommendation is the preferred method. Members failing to comply with the recommendations, may enter into negotiations to develop compensation remedies.[192] If no satisfactory compensation can be agreed upon, the party invoking the dispute settlement procedures may "request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."[193] If the member objects to the level of suspension imposed, the matter may be referred to arbitration.[194] The suspension of concessions is only temporary and remains in place until the offending member

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181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 122-23.
185. *Id.* at 123. Sections 17, 18, and 19 set out the standards for appellate review. *Id.* at 123-25.
186. *Id.*
187. *Id.* at 125.
188. *Id.*
189. *Id.*
190. *Id.* at 126.
191. *Id.* at 126-28.
192. *Id.* at 126.
193. *Id.*
194. *Id.* at 128.

removes the inconsistent measures or until some other agreement is reached.[195] The parties may also agree to resolve the dispute through arbitration.[196]

The WTO's dispute resolution mechanisms appear to have more authority and possibilities than those of the GATT 1947. The mechanisms of the WTO will "generate confidence that the WTO rules will be enforced fairly and expeditiously. Such confidence in turn will strengthen the WTO and increase its market-opening leverage."[197]

As a result of the Uruguay Round of GATT negotiations, certain provisions may furnish more leverage to protect the environment. First, the preamble to the agreement establishing the WTO mentions that the nations realize that there is a need to protect and preserve the environment.[198] Consequently, supporters of the environment will now have substantive language to cite in support of their environmental arguments. However, this is the only place where the term "environment" is mentioned.

With this addition, the other provisions of the WTO may be interpreted more favorably in relation to the environment. If not, countries that want to employ environmentally protective measures may have more options. For example, if a member does not comply with a decision, the nations involved may demand compensation.[199] Suspension of concessions is also an option.

Thus, nations will retain their national sovereignty.[200] Even if a country loses a dispute, it is not required to change the national law or practice in order to conform with a WTO settlement verdict.[201] The offending nation may offer compensation or suffer WTO-authorized countermeasures.[202] Thus, countries like the United States will now be able to violate provisions of the GATT, but they will have to pay a price for doing so.[203] "The new dispute settlement process thus may yield a more informed cost-benefit analysis of protectionist actions generally."[204] The United States may now find that instead

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195. *Id.*

196. *Id.* at 129.

197. Judith H. Bello and Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1103 (1994).

198. WTO, *supra* note 157, 33 I.L.M. at 15.

199. *See* Bello, *supra* note 197, at 1103.

200. *Id.*

201. *Id.*

202. *Id.* Such countermeasures would include retaliation against exports. *Id.*

203. *Id.*

204. *Id.*

of winning decisions, it will have to compensate countries more often.[205]

However, the cost-benefit route is a dangerous analysis. Admittedly, in terms of trade, countries may weigh the costs and benefits of protectionist actions. However, environmental issues raise a more troubling question. Can a nation effectively weigh the costs of killing more dolphins (or damaging the environment) against complying with WTO and GATT provisions? The United States should not compensate countries that harm the environment.

Also, the prospect of retaliation against exports from the United States will probably occur less often in practice than in theory.[206] "Imposing trade sanctions generally is shooting yourself in the foot: in a global economy, both consumers and industries that use the sanctioned imports are adversely affected."[207] Most countries will not use retaliatory measures even if authorized because it will hurt the citizenry and the economy. Since the United States is a powerful nation, it will probably be able to take advantage of this fact which will, in turn, hurt developing nations.

B. Amending the GATT and Comparisons with the WTO

If the GATT is to assist the world in attaining its environmental goals it will need to be amended. However, even amendments may not be the answer. The dispute resolution mechanisms of the GATT reinforce the subordinate nature of environmental issues to trade issues.[208] For example, if a party supports its policies under the Article XX exception, the burden of proof is on the party relying upon the exception.[209] Also, panel members are chosen for their expertise in trade and economic issues rather than environmental issues.[210] Once the panel members are chosen, they employ GATT law rather than international law.[211] This has the tendency to discount recent environmental treaties that have been entered into that are relevant to environmental issues.[212] The GATT should re-

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205. However, the "compensation provision" may also be interpreted as only permitting compensation for a limited period of time until a nation can comply with a panel recommendation. Thus, if a country never wants to comply with a decision, problems may arise. Obviously, a nation will not wish to continually compensate another nation.

206. Bello, *supra* note 197, at 1103.

207. *Id.*

208. Dunoff, *supra* note 11, at 1063.

209. *Id.* at 1064. This is extremely problematic. "Given the substantial scientific uncertainty that marks much regulation in the international environmental arena, this risk of nonpersuasion may often be outcome determinative." *Id.* at 1064-65.

210. *Id.* at 1065.

211. *Id.*

212. *Id.*

quire, or at least induce, the panel members to use these laws or treaties and not exclusively GATT law. In this manner, the panel members will be more informed as to the direction that the countries are moving.

Environmental issues have become more important in recent years. The GATT should take notice of this and has appeared to do so in the WTO. However, the WTO still does not require that environmental experts (or any expert related to the instant dispute) be consulted.[213] "No formal mechanism within the GATT ensures that the panel will have access to environmental expertise."[214] This is also a shortcoming of the WTO. Although its dispute mechanisms also allow the panel to access information from outside sources, there are still no provisions requiring or inducing it to actually obtain this information.

In addition, "GATT dispute resolution is largely a closed process. The parties' submissions, the oral arguments, and the transcripts of the panel's proceedings are all confidential."[215] As a result, the public is not permitted to become involved in the environmental decisions that are being made. However, public participation would promote informed decision-making and foster sound environmental policy.[216]

Proposals to amend the GATT have been advanced due to its lack of capability to deal with environmental issues. However, these proposals do not seem to be the answer.

> [N]one of these proposed cures will work, because none address the core problems: the GATT's institutional mission to eliminate barriers to trade, the lack of an institutional mandate to advance global environmental interests, and the institutional inability to identify and value adequately environmental interests in the context of trade-environment conflicts.[217]

Some have suggested that Article XX be amended or expanded. However, this approach probably would not be very successful because of the political hurdles involved in amending the GATT and the popular perception of the GATT as primarily a trade agreement. An amendment to the GATT requires acceptance by two-thirds of

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213. *Id.*

214. *Id.* The panels may consult with environmental experts, but this is the exception rather than the rule. In the tuna-dolphin dispute with Mexico, the panel "did not hear a scientific or ecological defense of the U.S. ban on Mexican tuna from any environmental experts." *Id.* In fact, the panel declined to entertain the argument. *Id.* at 1065 n.90.

215. *Id.* at 1065.

216. *See id.* at 1066.

217. *Id.*

the contracting parties. This is not likely considering the negative reaction that the United States' embargo generated. In addition, proposals to add the word "environment" to Article XX(b) have been rejected.[218]

This is somewhat different from the mechanisms of the WTO because the preservation of the environment is expressly mentioned in the beginning of the Marrakesh Agreement establishing the organization, but not in the substantive provisions.[219] However, an essential problem still exists that may be difficult to overcome. The WTO is still primarily designed to deal with trade issues, and therefore, environmental issues may remain subordinate. The WTO still does not require the DSB to seek information relating to environmental issues. Since the GATT panels did not seek such information, there does not seem to be any reason why the dispute bodies of the WTO will do so. Even though the organization mentions that the preservation of environmental resources is a goal, it is imperative that the Articles themselves mention these goals. In this way, a party that is arguing for environmental issues will be able to cite to specific provisions in the Article.

Another possibility is to employ the waiver provisions in Article XXV.[220] The GATT panel itself even suggested this in its decision involving the Netherlands and the EEC.[221] This is a dangerous method to employ however, because it would signify that trade issues are more important than environmental issues.[222] "To use the waiver provision to 'resolve' trade-environment conflicts is to give the GATT an effective veto over the use of environmental trade measures."[223] The environment should have its own place within the realm of international law and should not be subjected to the whim of various countries. Moreover, the waiver provision appears to be available for exceptional circumstances.[224] Environmental issues would probably not fall under such a category.[225] The same would probably hold true for the WTO.

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218. *See id.* at 1067.

219. *See supra* note 159 and accompanying text. It is also interesting to note that the text establishes a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property. However, there is no Council for Environmental Matters. WTO, *supra* note 157, 33 I.L.M. at 17.

220. Dunoff, *supra* note 11, at 1068.

221. *See supra* notes 151-57 and accompanying text.

222. Dunoff, *supra* note 11, at 1068.

223. *Id.*

224. *See id.*

225. *Id.* at 1069 n.109.

Another suggestion that has been made is to negotiate a separate environmental code. However, environmental issues are too important to wait for such a round of negotiations. In addition, negotiation rounds such as the Uruguay round involved many different issues that allowed for trade-offs between the various nations. In an "environmental round," no such trade-offs would exist,[226] nor should they. The global environment is too important to be subjected to trade-offs and concessions. The parties should put their differences aside and attempt to do what is best for the environment as a whole.

> As presently constituted, the GATT is fundamentally incapable of addressing today's pressing global environmental issues. The GATT lacks the institutional mandate to advance global environmental interests. It possess neither the competence nor the expertise to evaluate environmental threats. It systematically subordinates environmental interests to trade interests where the two are in conflict. Those interested in a more balanced approach to trade-environment issues need to look elsewhere for an appropriate institution to consider these issues.[227]

Therefore, it would appear that the GATT does not really offer any potential for assisting the world in furthering environmental matters. The WTO and its dispute mechanisms appear to offer a little more hope since the organization mentions environmental matters. However, it may be inferred from the past, and the decisions of the GATT panel, that trade issues will still dominate and be the primary focus of this institution as well. Thus, the International Court of Justice may be a better mechanism than either the GATT or the WTO for solving environmental disputes.

C. The International Court of Justice

The International Court of Justice ("ICJ") is another mechanism through which international disputes may be settled. In light of the recent formation of the Chamber for Environmental Matters, the ICJ may prove to be the most promising. Before discussing this Chamber and its potential impact, it is necessary to examine the structure and procedures of the ICJ.

Article 7 of the United Nations Charter establishes the principle organs of the United Nations.[228] One such organ is the ICJ.[229] The

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226. *Id.* at 1071. Dunoff writes that "[w]aiting for a currently unscheduled Green Round of GATT negotiations to address trade-environment conflicts is the legal equivalent of waiting for Godot." *Id.* at 1070.

227. *Id.*

228. U.N. CHARTER art. 7.

229. SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 21 (1995).

ICJ is the principle judicial organ of the United Nations.[230] The Statute of the ICJ is an integral part of the Charter and every member of the United Nations is a party to the Statute of the Court.[231] The three main tasks of the ICJ are to decide disputes between States,[232] to supply "judicial guidance and support for the work of other United Nations organs and for the autonomous specialized agencies through the provision of advisory opinions,"[233] and to engage in "extra-judicial" activities through the actions of the President.[234]

1. The Judges and Chambers of the Court

The Court consists of fifteen judges of different nationalities who serve for a term of nine years.[235] Obviously, the Court should be composed of individuals with exceptional qualifications and who are of high moral character.[236] This would appear to eradicate any bias or influence due to the judges' nationalities. Certain measures may be taken if the Member of the court is of the same nationality as a party to a dispute. A judge of the same nationality, however, has the right to sit in all cases before the Court.[237] If the body that is actually trying a case[238] is the nationality of one of the parties to a case, the other party may chose an individual to sit as a judge.[239]

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230. *Id.*

231. *Id.* Previously, the Statute of the Court was a separate international treaty. Now that the court is the principal judicial organ of the United Nations, it has been elevated in status. *Id.*

232. *Id.* at 31. States that are not members of the United Nations may also be parties in cases before the ICJ. A non-member State may be brought before the ICJ as an applicant, respondent, or intervener. *Id.*

233. *Id.* Any duly authorized organ or specialized agency may request an advisory opinion. However, other "international intergovernmental organizations, and States, cannot have direct recourse to the Court's advisory competence." *Id.* at 31-32.

234. *Id.* at 32. These activities may include the appointing of umpires, presidents of arbitral commissions, and tribunal and like offices. *Id.* at 22.

235. ICJ, *supra* note 11, art. 3; ROSENNE, *supra* note 229, at 53. The judges are elected by the Security Council and the General Assembly. *Id.*

236. ICJ, *supra* note 11, art. 2. "The Court shall be composed of a body of independent judges elected, regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." *Id.*; *see also* ROSENNE, *supra* note 229, at 54.

237. ICJ, *supra* note 11, art. 31; ROSENNE, *supra* note 229, at 73.

238. This body is known as the Bench. ROSENNE, *supra* note 229, at 73.

239. ICJ, *supra* note 11, art. 31; ROSENNE, *supra* note 229, at 73. This individual is known as a judge *ad hoc*. *Id.* The judge *ad hoc* is an equal with the other members of the Bench.

> A judge *ad hoc* may be appointed not only to equalize the situation when the Bench already includes a judge of the nationality of one of the parties, but also when it includes no judge having the nationality of *either* of the parties. But if the Court finds that there are several parties in the same interest and that one of them has a judge of its nationality upon the Bench, the Statute provides for those parties acting in concert to choose one judge *ad hoc*.

The Statute also allows the Court to sit in smaller chambers of three different types.[240] These include the Chamber of Summary Procedure,[241] special chambers,[242] or the *ad hoc* chamber.[243] The special chambers provision paved the way for the birth of the Chamber for Environmental Matters. "The Court first made use of this power in 1993, when it established a special chamber, consisting of seven Members of the Court, to deal with what it termed 'any environmental case falling within its jurisdiction.'"[244] The formation of the Chamber "exemplifies the increasing importance of the environment in international law."[245]

2. How the Court Works

The ICJ has mainline jurisdiction[246] and incidental jurisdiction.[247] Once a judgment is entered by the Court, the Court has the power to interpret or revise it under certain circumstances.[248] Parties do not have to give consent in order for the Court to have jurisdiction over incidental matters. This power of the Court is derived from the Statute. Once a country becomes a Member of the United Nations or a party to the Statute, that State "agrees to the exercise of . . . jurisdiction in accordance with the Statute."[249]

Id.

240. ROSENNE, *supra* note 229, at 75.

241. ICJ, *supra* note 11, art. 29; ROSENNE, *supra* note 229, at 75-76. This chamber is designed to quickly deal with matters. However, only one case has ever been referred to it. *Id.*

242. ICJ, *supra* note 11, art. 26; ROSENNE, *supra* note 229, at 76. "The Court may establish a chamber, consisting of three or more judges as the Court may determine, for dealing with particular categories of cases." *Id.*

243. ICJ, *supra* note 11, art. 26; ROSENNE, *supra* note 229, at 76. The Court may form a chamber at any time to deal with a particular case. The number of judges is to be determined by the Court with the approval of the parties. *Id.*

244. ROSENNE, *supra* note 229, at 76.

245. *Id.*; Dunoff, *supra* note 11, at 1087, 1087 n.20; *see also* Guido de Bruin, *Environment: Special Chamber for "Green" Cases at the World Court*, INTER PRESS SERVICE, Aug. 5, 1993 at 1. At the time the Chamber was established the Court had 11 cases pending, two of which had strong environmental issues involved. *Id.* One of these cases was brought in 1989 by the Pacific island state of Nauru. Nauru demanded "compensation from Australia for building phosphate mines which had an environmentally devastating effect on the tiny island." *Id.* The other conflict is between Slovakia and Hungary and involves the Gabcikovo-Nagymaros dam project in the Danube River. Hungary abandoned construction claiming ecological consequences. "The Court will decide whether Hungary was entitled to stop work on the project in 1989 and whether Slovakia was justified in pushing on with damming up the Danube, thereby changing its course and threatening the important flood plain ecosystem." *Id.*

246. ROSENNE, *supra* note 229, at 81. Mainline jurisdiction refers to the power or authority of the Court to render a binding decision on the substance or merits of a case. *Id.*

247. *Id.* Incidental jurisdiction refers to miscellaneous and interlocutory matters that may arise throughout the course of a case. *Id.*

248. *Id.*

249. *Id.*

The Court's jurisdiction in mainline proceedings is different. In order for the ICJ to decide mainline proceedings, the parties involved must give their consent. "Inherent in that consent is, by virtue of Article 36, paragraph 6, of the Statute, recognition that if a dispute arises as to whether the Court has jurisdiction, the matter shall be settled by the Court."[250] States are not required to refer their cases to the Court. Once the States have given their consent, any decision by the Court is final and binding and without appeal—the States must comply with the decision.[251] Members do, however, have an obligation to seek other modes of dispute resolution such as arbitration and judicial settlement before seeking redress from the ICJ.[252] In addition, there are ways in which States can confer jurisdiction on the Court outside of consent of the parties. In fact, some of these are "moving in the direction of compulsory jurisdiction in the sense that the proceedings can be instituted unilaterally."[253]

The ICJ has been established to settle disputes between States. However, the interests of an individual may also be brought before the Court if the individual's government brings the claim as an international claim in accordance with international law.[254] Despite the fact that only States may be parties before the Court, any public international organization may submit information to the Court on their own initiative or the Court may request such information.[255]

Jurisdiction is conferred on the Court by specific agreement between two or more states or by a "unilateral declaration made by a State, accepting the jurisdiction of the Court for defined types of legal disputes, in accordance with a special procedure contained in the Statute."[256] In addition, jurisdiction may be conferred if a treaty between parties stipulates that disputes should be referred to the Court.[257] Parties may also request permission to intervene in a case if interests of a legal nature will be affected by a decision.[258] If an interpretation of a multilateral treaty is brought before the Court,

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250. *Id.*

251. *Id.*

252. U.N. CHARTER art. 33; ROSENNE, *supra* note 229, at 82.

253. ROSENNE, *supra* note 229, at 82.

254. *Id.* at 83. "[E]spouse the claim in the exercise of its right of diplomatic protection of its nationals, to use the technical expression." *Id.*

255. *Id.*

256. *Id.* at 85.

257. *Id.* There are four systems of conferring jurisdiction on the court by way of international treaty. *Id.* This is one way of providing for recourse to the Court if the ICJ is deemed to be a better mechanism for resolving environmental disputes.

258. ICJ, *supra* note 11, art. 62; ROSENNE, *supra* note 229, at 127.

parties other than those involved in the case also have the right to intervene.[259]

Thus, it would seem that if a dispute arises under the GATT, and is brought before the ICJ, other parties would be able to intervene. In the case of the dolphins, it would appear that a nation that wanted to protect dolphins and was a member of the GATT could intervene on behalf of the United States since its rights would also be affected. However, this could create problems and a "stand off" because developing nations may also intervene on behalf of Mexico. It would seem that intervention would be beneficial because more nations would be involved in the dispute which would hopefully provide more viewpoints and information for the Judges. Although the second type of intervention does not require formal permission, the Court will determine whether the intervention is admissible.[260] Thus, the Court may not allow parties to intervene anyway.

There is an implied obligation that the decisions of the Court will be complied with in good faith.[261] The judgment of the Court is final and without appeal and any nation that is a party to a proceeding must obey the decision.[262] If the nation fails to do so, the matter may be referred to the Security Council which may make recommendations or take appropriate measures.[263] There have been few instances in which there has been a referral to the Security Council. However, in a case between Nicaragua and the United States, the United States refused to acknowledge the jurisdiction of the Court or to accept any decisions in that case. When the matter was referred to the Security Council, the negative vote by the United States prevented the adoption of any resolution by the Security Council.[264] Thus, it appears that even though a decision by the Court is binding, there are ways for a nations to avoid compliance. A nation that does not wish to comply with a decision, may simply vote against it in the Security Council. Therefore, a decision may be handed down and the Security Council can only "[u]rgently call[] for full and immediate compliance" with the decision of the ICJ.[265]

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259. *See* ROSENNE, *supra* note 229, at 127.
260. *Id.*
261. U.N. CHARTER art. 94; ROSENNE, *supra* note 229, at 42-43.
262. ROSENNE, *supra* note 229, at 43.
263. U.N. CHARTER art. 94; ROSENNE, *supra* note 229, at 43.
264. ROSENNE, *supra* note 229, at 44-45.
265. *See id.* at 45-46.

3. Problems with the ICJ

The ICJ appears to offer more hope because it is not a trade organization, but an international court of law. However, it too has defects that will probably prevent it from adequately addressing the world's the environmental concerns.

One of the ICJ's major problems is that nations have been unwilling to limit their sovereignty to the compulsory jurisdiction of the Court.[266] Nations are unwilling to consume time and resources adjudicating matters that are of secondary importance. Nor are they willing to risk adjudicating matters of primary importance in a non-domestic court.[267] Also, in the case of the environment, who determines which issues are of primary and which are of secondary importance? Science and technology are continually changing and discoveries are continually being made. What is not important at one point in time may become important in the future. All environmental issues should probably be considered of primary importance. However, if nations do not share this belief then no case that relates to environmental matters will ever be brought before the ICJ.

Further, litigation is not designed to produce a mutually acceptable solution to the parties. "For this reason, nations commonly prefer diplomatic mechanisms such as negotiation and compromise; these are more flexible and often generate a larger universe of alternative solutions."[268] Thus, the parties generally will not resort to the ICJ and risk losing everything in one decision. Therefore, mediation may provide a more appealing form of dispute resolution whereby the nations may discuss many alternatives to a problem. If the nations are in a forum that provides a neutral mediator to assist the parties in seeing the other nation's views and agreeing to possible solutions, more may be done for the environment. Moreover, in mediation, the parties primarily do the discussing and the deciding. This may ensure that there is a continuing working relationship between the two nations, rather than the anger that usually results after a defeat.

There have been many instances of parties refusing to comply with the decisions of the ICJ.[269] This will probably continue in the future unless a method of enforcing the Court's decisions is implemented. Also, the procedures of the Court do not induce nations to seek its jurisdiction nor are they well suited for resolving

266. Dunoff, *supra* note 11, at 1089.
267. *Id.*
268. *Id.*
269. *Id.*

environmental disputes. The Court is not well adapted for fact finding and its decision-making process is extremely time consuming.[270] These two factors seem critical in an environmental dispute. A pressing problem cannot wait long for a decision. For example, if a species is in danger of extinction, and a nation is taking measures to prevent its extinction, waiting eight years for the Court to make a decision may result in the eradication of the species.

Fact-finding is extremely important in environmental cases, as it is in any case. If the Court does not have the ability to attain all of the facts, a proper decision will not be reached, which could be detrimental or even irreversible. The ICJ does, however, appear to leave more room for outside information than either the GATT or the WTO. Public international organizations may submit information to the Court and third parties may request permission to intervene.[271] Therefore, the ICJ may be a better mechanism than the GATT or the WTO, but it is still not the best mechanism for deciding environmental disputes.

V. CONCLUSION

Although the ICJ offers more ways to access information and the ability to be free of the "trade-bent" that exists in the GATT and the WTO, it may be one more futile mechanism for resolving trade disputes. If the decisions are to be binding, the nations that are involved in the dispute must not be involved in the Security Council vote if the matter is referred to that entity. Therefore, nations must be willing to give up that power which is extremely unlikely. If a nation does give up its vote, there is still no mechanism to force the objecting nation to comply with the order of the Security Council. At that point, it would be unlikely that the United Nations would deploy troops or use some type of force to compel a nation to abide by a decision of the ICJ.[272]

In addition, even though the United Nations is recognized as a neutral body, that is an overly-idealistic view. Even if the nations involved in the dispute are excluded from the Security Council vote, there will still be problems with political allegiances. Countries that support each other will continue to do so, even though they may not completely agree with that nation's policies.

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270. *Id.* at 1091. The Court has taken up to eight years to decide cases. *Id.*

271. *See supra* note 255 and accompanying text.

272. This is especially so in the case of the dolphins and tuna. It would be deemed excessive force to use harsh methods to induce a nation to abide by a decision of the World Court in these types of cases.

There is also a further problem with environmental issues. Even though a nation may want to comply with the GATT, there may be higher values at stake. The desire of the United States or any country to protect its environment should be left to the desire of that nation, as long as all nations are treated equally. Thus, for the United States to comply with an adverse decision would mean that more dolphins would be killed which is contrary to the objectives of Congress and the beliefs of many Americans. However, had the decision been adverse to Mexico, the country would probably view it as the death of one of their means of survival and development out of third world status.

A nation will not want to surrender its ability to protect its beliefs—even to a neutral entity. There must be some other way outside of the ICJ, WTO or GATT to decide issues that relate to the environment. It may be more beneficial for the ICJ, WTO or GATT panels to give recommendations and suggestions or to force the various nations to mediation. The ICJ would be the best entity to run the mediation because it does not hold trade issues above all others. In the alternative, an international mediation center could be developed. Once parties are forced into mediation, they may be able to reach mutually satisfactory agreements on their own.

For example, the United States may be able to assist Mexico in complying with environmental issues, while at the same time ensuring that the country continues to develop. They may be able to point out the necessity of these measures to ensure that species continue to exist and that fishermen's means of livelihood will remain intact. The United States may be able to develop a standard taking rate instead of a variable one so that Mexico will know what to follow. In addition, other nations should become involved in order to solve the problem and to craft alternative solutions—possibly better and more efficient fishing measures. Surely with all of the technologies that the nations have, and with cooperation, a better solution may be reached. If the developed countries are more involved or must contribute more money to come up with a solution, there can possibly be some agreement as to how the developing country will compensate the developed country. This approach may seem idealistic and perhaps it is. However, mediation offers a better alternative than the contentious proceedings that currently exist. Since nations have not always obeyed the decisions of the ICJ, the GATT panels and probably the WTO, this approach may be worth a try.