Chicken of the Sea: GATT Restrictions on United States Environmental Measures Designed to Protect Marine Mammals

Alan S. Rafterman*
On August 16, 1991, the United States embargo placed on the importation of yellowfin tuna from Mexico was found to be in violation of the General Agreement on Tariffs and Trade (GATT). The decision, made by a GATT Panel, requires the United States to conform its law to the provisions of GATT. The Panel ruling is a clear illustration of the tension between a government's right to establish and follow its own domestic policies and the obligations that government has to comply with the international agreements it has entered into.

The United States passed the Marine Mammal Protection Act (MMPA) in an effort to prevent the further destruction of such marine mammals as dolphins, whales, seals and walruses. While this is a noble goal for the United States, it appears to violate the GATT prohibitions on import restrictions when the restrictions were actually implemented. The question presented is whether concern for environmental protection outside the borders of the United States is of such magnitude that the GATT obligations of the United States may be disregarded. This Note discusses the conflicts between the United States embargo and the GATT. Part I examines the MMPA and its ecological goals. Part II looks at the Panel's interpretation of the relevant GATT provisions. Finally, Part III compares the August 16, 1991, ruling and its appropriate...
ness in light of growing international law concerns and their application in customary international law. This Note concludes that the decision reached by the Panel is far too narrow a reading of GATT and should be overturned by the full GATT council.  

I. Prohibitions on Tuna Imports Under the Marine Mammal Protection Act

In the last quarter-century the United States has enacted comprehensive environmental legislation to deter ecological erosion. Questions have been raised about the extension of extraterritorial jurisdiction through certain U.S. regulations which Congress enacted to preserve and improve the environment around the globe. One of the strongest attempts by the legislature to preserve the world ecology has been to establish, through the MMPA, import bans on tuna obtained through purse seine fishing methods. 

The objective of the MMPA is to stop the devastation that such fishing techniques cause to porpoise and dolphin life. Yellowfin tuna congregate under schools of porpoise and follow the schools as they move. When the purse seine net captures the tuna, it also traps porpoise and dolphins under water and they are unable to escape. Prior to the passage of the MMPA the effect on marine mammals had been staggering: over half a million porpoise were killed in 1969 by purse seine fishermen.

8. The Panel decision will now go to the full GATT council for approval. Lori Wallach, Sorry Flipper, Your Life is Now a Net Loss, N.Y. Newsday, Oct. 13, 1991, at 44.


11. Purse seines are large nets to be set by two boats around a school of fish and so arranged that the ends are brought together and the bottom is closed. A result is that the dolphins and porpoise which travel in close proximity to the tuna are caught in the net and the porpoise and dolphin drown.


13. Id. at 228.

14. It is estimated by the Department of Commerce that 529,000 porpoise were killed as a direct result of international fishermen using purse seine netting techniques. Id. at 229.
The MMPA imposes a moratorium on United States fishermen taking mammals incidental to the catch. As a result, incidental takings of porpoise by United States fishermen resulting from purse seine fishing has been substantially reduced. The current data suggests that it is no longer the United States fishing industry that is the greatest threat to marine mammals but rather foreign purse seine fishing.

In section 1371 (a)(2) of the MMPA, Congress articulated the purpose of the ban on yellowfin tuna exports to the United States. It states that an "immediate goal that the incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate" is the impetus. There is no indication that Congress intended to primarily affect foreign imports, rather the goal of Congress was to enact legislation that protected the environment.

Congress did not seek only to protect dolphins. In fact, the legislative history indicates a recognition by Congress of the destruction of marine mammal ecology as a whole, and the purpose of the MMPA is to put an end to centuries of destruction. The language of the statute itself echoes such a concern.

As a result of growing concern for dolphin being killed at an alarming rate, Congress later added the three element 1988 amendment to the

---

15. Moratorium is defined as the complete cessation of the taking of marine mammals and a complete ban on their importation into the United States. 16 U.S.C. § 1362(7).
16. Id. § 1371(a).
18. The data before Congress indicated that in 1987, non-U.S. purse seine fishermen were responsible for sixty percent of the tuna caught and more than eighty percent of the dolphins killed in the eastern tropical Pacific Ocean, and that foreign fleets killed over 103,000 dolphins. Ted L. McDorman, The GATT Consistency of U.S. Fish Import Embargoes To Stop Driftnet Fishing and Save Whales, Dolphins and Turtles, 24 GEO. WASH. J. INT'L L. & ECON. 476, 493 (1991).
20. [M]an's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and other, have only rarely benefited from our interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interest of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved. H.R. REP. No. 707, 92d Cong., 2d Sess. 1-2 (1972), reprinted in 1972 U.S.C.C.A.N. 4144-45.
21. Congress recognized that "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." 16 U.S.C. § 1361(1). The issue of species extinction is beyond the scope of this paper, however its importance should not be dismissed. Species extinction has been said to have far reaching and devastating effects on the environment aside from the ethical concerns. See generally Keith Saxe, Note, Regulated Taking of Threatened Species Under the Endangered Species Act, 39 HASTINGS L.J. 399, 406-408 (1988).
22. 1988 MMPA Report, supra note 5 at 6156.
MMPA.\textsuperscript{23} In order for a foreign country to import yellowfin tuna, it must adhere to the three elements contained in the amendments. First, a regulatory program relating to the incidental killing of dolphins was outlined. The program must be adopted by foreign countries. This program must demonstrate that the foreign nation has established the same or like restrictions on their fishermen as the United States restrictions on the incidental killing of marine mammals.\textsuperscript{24} Second, within 60 days of the U.S. ban, any intermediate country must submit proof that it will not be exporting to the United States any of the restricted tuna.\textsuperscript{25} An intermediate country is one which imports yellowfin tuna from another foreign nation and subsequently sells the tuna to the United States.\textsuperscript{26} The final provision requires the Secretary of Commerce to certify to the President that the restrictions have been imposed.\textsuperscript{27}

Following the implementation of the 1988 amendments there were several embargoes placed on countries whose fishermen used purse seine fishing methods.\textsuperscript{28} Although Mexico was initially exempted from the ban,\textsuperscript{29} the judiciary held that such an exemption was improper.\textsuperscript{30}

In \textit{Earth Island Institute v. Mosbacher}, the court found that the lan-


\textsuperscript{24} The Secretary shall not find that a foreign nation is comparable unless it has met the following standards: it has adopted a regulatory program containing the same prohibitions applicable to U.S. vessels, within 180 days after the United States has imposed such restriction on its vessels; that the average kill rate of its fleet is no more than two times the U.S. rate during the same period of time by the end of 1989 and no more than 1.25 the U.S. rate by the end of 1990; the percentage of eastern spinners and coastal spotted dolphin does not exceed 15 percent and 2 percent respectively of its total number of marine mammals taken in any year; its fishing operations are monitored to the same degree as U.S. vessels, by an observer program of the Inter-American Tropical Tuna Commission [IATTC] or an equivalent international program; and it complies with all reasonable requests by the Secretary for cooperation in scientific research.

1988 MMPA Report, \textit{supra} note 5 at 6171.

\textsuperscript{25} 16 U.S.C. § 1371(a)(2)(c).

\textsuperscript{26} \textit{Id}.

\textsuperscript{27} § 1371(a)(2)(D).


\textsuperscript{29} 1988 MMPA Report, \textit{supra} note 5, at 6156.

\textsuperscript{30} Earth Island Institute v. Mosbacher, 746 F. Supp. 964, 976 (N.D. Cal. 1990), \textit{aff'd}, 929 F.2d 1449 (9th Cir. 1991) (granting an injunction requiring an import ban be placed on Mexican yellowfin tuna until such time as Mexican fishermen comply with the established takings rate articulated in MMPA). The judiciary has often required that the intent of Congress and the language of an environmental protection restriction be followed. See \textit{e.g.}, Animal Welfare Institute v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977) (holding invalid a decision by the National Marine Fisheries Service (NMFS) to allow the importation of baby fur sealskins in the face of a statutory moratorium); Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988) (the court struck down NMFS's decision to issue a permit to foreign fishermen which would have allowed the taking of certain marine mammals in violation of the MMPA).
Language of the MMPA clearly stated that there could be no exemption from the Act until the Secretary of Commerce finds that the average rate of incidental takings of dolphin and porpoise is no more than twice that of United States vessels during the same period.\(^1\) In that case, an environmental protection group challenged the exemption that the United States Government allowed Mexico.\(^2\) The exemption was found to be invalid under the MMPA and as a result, a ban was imposed on the importation of yellowfin tuna from Mexico. Mexico then challenged such a ban pursuant to the GATT.\(^3\) A GATT panel was convened and the ban was found to be a violation on August 16, 1991.\(^4\)

II. INTERPRETATION OF THE GATT BY THE PANEL

The GATT is the principle international agreement governing trade between nations.\(^3\) After the Second World War, the world leaders realized that it would be in every nation's best interest to have a multilateral agreement which would seek to enhance world trade.\(^3\) The GATT's purpose, therefore, is to increase the flow of international trade in an unrestricted environment.\(^3\) The principle mechanism utilized to reach this goal is the reduction of tariffs and non-tariff barriers.\(^3\)

In defending itself against the claim that the MMPA violated GATT, the United States made several arguments.\(^3\) The U.S. first argued that

---

32. Id.
36. The preamble to the GATT reads:
Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods . . . .
GATT, \textit{supra} note 1, preamble.
37. The GATT provides in its preamble that its purpose is to facilitate “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” \textit{Id.}
39. This Note assumes that the United States did in fact make a good faith effort at defending the claims of Mexico. There have been claims to the contrary. The European press reported that it was the Bush administration which prompted Mexico to bring the action because the administration was not in favor of the MMPA. Wallach, \textit{supra} note 8, at 44. Such a claim has not been substantiated and is not speculated on by this paper.
Article III, which allowed certain types of import restrictions on products, applied in lieu of Article XI, which extends a general prohibition on import restrictions. Second, even if Article XI applied there was a basis of exception under Article XX, which enumerates several exceptions to the GATT and allows the imposition of import restrictions. Finally, although the GATT forbids restrictions that discriminate against one country, the United States stated that there was no discrimination in the application of the MMPA.\footnote{Panel Report, supra note 2, at 7-8.}

A. Article III Versus Article XI.

The Panel noted that the United States restrictions were in violation of Article XI despite the claim of the United States that the restrictions were pursuant to Article III.\footnote{GATT, supra, note 1, art. III(2) states:
The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.} The United States claimed that since domestic tuna could not be caught in a dolphin harmful way, the restriction on foreign tuna products would be acceptable since it was only an application of internal law to foreign products sold in the United States.\footnote{Panel Report, supra note 2, at 41.} In rejecting the United States argument, the Panel stated that Article III did not apply in this case because, it reasoned, Article III applies to products.\footnote{See United States - Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, 158, para. 5.1.9. (1987) (Art. III applies to imported products in relation to domestic products); Panel Report on United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, 386-7, paras. 5.11, 5.14 (1989).} The MMPA does not apply to products but only to the method by which the products are obtained. The Panel noted, “these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.”\footnote{Panel Report, supra note 2, at 41. This finding seems to be a reasonable one by the Panel. The United States ban on imports does not affect the sale of products in the U.S., all it does is limit what is brought into the country. For article III to apply the restriction must directly affect how something is to be distributed to the people not what is distributed.}

The result of this finding makes it necessary to overcome the prohibition set forward in Article XI. There can be no question that Article XI of the GATT prohibits import prohibitions and restrictions.\footnote{See GATT, supra note 1, art. XI(1). The article states:
No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.} To allow
such restrictions undermines the basic purpose of the GATT. In fact, the Article XI prohibition represents what has been recognized as the heart of the GATT obligation.46

The framers of the GATT felt that Article XI was a prohibition against the worst forms of trade restrictions.47 It is not likely that they wanted that prohibition to be considered optional. Further, GATT panels have noted that although there are many exceptions to Article XI, the prohibition is still considered to be definitive.48

The United States did not present an argument explaining why the provisions of the MMPA were not violations of Article XI.49 The burden, therefore, was on the United States to demonstrate that its restrictions met the requirements of one of the exceptions to Article XI which would allow the initiation of import restrictions. The United States contended that it had met this burden by asserting its actions were permissible under Article XX.

B. The Appropriateness of Article XX

Article XX provides that nothing in the GATT shall be construed to prevent a party from instituting trade restrictions for certain enumerated reasons. The United States raised Article XX(b) and XX(g) as justification for the import restrictions.50 The GATT Panel rejected both of these defenses.51 The reading of the Article XX exceptions to the GATT

---

46. A few scholars have indicated that it is possible to read Article XI as merely aspirational in nature. The argument is made that Part II of the GATT, in which Article XI is contained, was established "insofar as it is compatible with the legislation in force" that the contents of Part II were not intended to be binding. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, para. 1, Sales No.: GATT/1952-4, 35-6 (1952). See also John H. Jackson, et al., Implementing the Tokyo Round: National Constitutions and International Economic Rules 11 (1984). Such an argument has generally been rejected. See infra note 48.


48. See Kenneth R. Simmons & Brian H. W. Hill, Law and Practice Under the GATT 41 (1984) (Noting that in one case before a GATT panel the European Common Market claimed that Article XI had become less restrictive over time. The Panel response was that the prohibition was still considered binding despite the many exceptions and that any trade restriction still needed to satisfy the requirements of the exception in order to be legally valid.

49. Panel Report, supra note 2, at 42.

50. Article XX provides:

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:

(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 2, at art. XX (b) and (g).

51. Panel Report, supra note 2, at 44-47.
cannot be interpreted overbroadly. Certainly it is understandable that import restrictions should be discouraged in the interest of world trade. To accomplish this goal, GATT panels have read Article XX narrowly. The interpretation that the Panel gave to both provisions of Article XX, however, went too far.

1. Use of Article XX(b)

The two factors focused on by the Panel decision were an analysis of the term “necessary” and the question of extraterritorial extension. The decision against the Article XX(b) assertion rested with the fact that the United States had not demonstrated “that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement.” The problem with this finding is that no standard was established by which to judge whether all options had been sufficiently explored. Prior GATT panel decisions had given a definition of “necessary” as it applies to Article XX. The report stated that “necessary” existed when a Contracting Party could not “reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions.” In other words, when all reasonable efforts to resolve the problem within the limitations imposed by the GATT fail, the escape provisions may then be used.

Under this definition of “necessary” a strong argument can be made that the MMPA was a valid action. Although there have been international conventions that have addressed the problem of the killing of marine mammals, there are none that have as yet been able to establish any binding regulation. When this is considered against the amount of

53. “The Panel recalled that previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement . . . .” Panel Report, supra note 2, at 43.
54. Id. at 46.
57. Two examples are the United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS] and Convention for the Prohibition of Fishing with Long Drift Nets in the South Pacific, 14 LAW OF THE SEA BULL. 31-36 (Nov. 23, 1989) [hereinafter SPDNC]. While the establishment of such conventions and other resolutions may demonstrate customary international law, there is no body of law which exists to protect marine mammal life against certain fishing methods. While UNCLOS sets forth conservation goals, there is no language which would mandate a country to stop using harmful fishing methods. The SPDNC does call for a ban on driftnet fishing, but states that the prohibitions may be enforced only as they are consistent with international law. SPDNC art. 3(2)(c). Such language is a “Catch-22.” If GATT panels continue to rule that the necessary requirement has not been met, the
marine mammals that have been and continue to be killed, as well as the great responsibility borne by foreign fishermen,\textsuperscript{5} no alternative exists but to refuse to provide a market for yellowfin tuna taken in these harmful ways. All of the possible solutions within the GATT have not been helpful due to the foreign nation's decision to ignore them. As a result, in order to effect the preservation of marine mammal life as intended by Congress, this measure was "necessary."

It has been argued that the "necessary" provision could not be satisfied for another reason. The actions of the countries that engage in the offending fishing practices are not a direct attack upon marine mammals that swim through U.S. controlled waters. Some have asserted that the killing of marine mammals is only an incidental effect to these types of fishing measures.\textsuperscript{59} As a result, the protection of animal life within the jurisdiction of the United States is only incidental to the trade embargo and such a tenuous connection cannot possibly be upheld as "necessary."\textsuperscript{60}

There are several problems with this analysis. First, the argument assumes that there cannot be an extraterritorial application of the GATT exceptions. Such a claim has no merit when examining either the plain language or framers' history of the GATT. There is no language which would indicate that the framers of GATT precluded an extraterritorial application of Article XX.\textsuperscript{61} Second, at least as far as the MMPA is concerned, the protection of marine mammal life is not attenuated. It is not disputed that marine mammals are killed as a direct result of purse seine fishing methods.\textsuperscript{62} Thus, continuing the United States market for yellowfin tuna caught by such methods means the continued annihilation of marine mammals. Consequently, the embargo placed on yellowfin tuna is "necessary" to preserve animal life.

The GATT Panel next decided that Article XX(b) was not meant to protect plant or animal life outside the territory of the state invoking the escape provision.\textsuperscript{63} To reach such a decision the Panel relied upon the history of the section. The Panel noted that the language that appears in the GATT is the same as language that appeared in the International Trade Organization (ITO) charter upon which the GATT was based.\textsuperscript{64} The Panel relied on the language of the New York Draft of the ITO charter, which read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar

\textsuperscript{58} See supra note 18 and accompanying text.
\textsuperscript{59} McDorman, supra note 18, at 522.
\textsuperscript{60} Id.
\textsuperscript{61} See infra note 67 and accompanying text.
\textsuperscript{62} See supra notes 14, 18 and accompanying text.
\textsuperscript{63} Panel Report, supra note 2, at 45.
\textsuperscript{64} Id.
conditions exist in the importing country” for the proposition that there could be no extraterritorial application of Article XX(b). The Panel concluded that the secondary language indicated a concern for the protection of life solely in the importing country, thus Article XX(b) should not be applied extraterritorially.

There are three problems with this conclusion. First, there is no consensus regarding the GATT framers’ intentions regarding Article XX(b). In fact, “a large number of suggestions were made but proved wanting for one reason or another, and finally the simple clause of the original United States proposal was accepted.” The history indicates that the United States suggestion was taken as a result of its simplicity and not for the purpose of limiting its extraterritorial application.

The second problem with the Panel Report is that the language of the ITO charter which the Panel points to as an indication of the domestic application of Article XX(b) was later discarded by the Preparatory Committee. If there was a major concern for the solely domestic application of Article XX(b), it does not make sense that the framers of GATT would consider such phrasing inappropriate. Even if such a reading were valid, the United States is only regulating what goes on within its borders. The MMPA does not establish a prohibition on any country, it prohibits the United States from being a party to a practice it finds abhorrent.

Finally, the serious concerns for ecology have only emerged within the last 25 years. In fact, when the GATT was created there was very little interest in the environment at all. The realization that certain marine mammals are facing extinction is relatively new. It is, however, this realization that prompted the enactment of MMPA. If the GATT is to function effectively as the conduit for world trade as the years go on, it must be able to adapt to new and emerging concerns.

2. Article XX(g)

Article XX(g) allows relief of GATT obligations if the restrictions relate to conservation of an exhaustible natural resource and are imposed along with domestic measures. The Panel Report found that the provision was intended primarily for domestic application. This was due to

65. Id.
66. Id.
69. The language stating “if corresponding domestic safeguards under similar conditions exist in the importing country” was found to be unnecessary. Report of the GATT Preparatory Committee, U.N. Doc. EPCT/A/PV/30 at 7-15 (1947).
70. See supra note 5 and accompanying text.
71. See supra note 20 and accompanying text.
72. See GATT, supra note 45 for the exact language of Art. XX(g).
73. Panel Report, supra note 2, at 47.
a previous panel decision which stated that in order for Article XX(g) measures to be valid, the measures must be in conjunction with production restrictions "if it was primarily aimed at rendering effective these restrictions." The prior decision does not, however, mean that there can only be a domestic application of Article XX(g). Even adopting the reasoning of the Panel, the provision should still have been found to be valid. To allow the continued importation of yellowfin tuna that had been caught via purse seine nets would render pointless the domestic restrictions on United States fishermen. In order to protect the resource, in this case marine mammals, it is necessary to eliminate a market for those fish caught in the offending way. The MMPA is established to protect marine mammals. Placing restrictions only on the United States fishermen has proven to be ineffective in halting the eradication of the world's dolphin population. In order to make the domestic restriction effective in preserving the exhaustible resource of marine mammals, it is necessary that the attractive United States market be closed to those countries which continue to devastate the ecology by their methods of fishing.

The second concern of the Panel was that if they allowed the United States to employ restrictions, "each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement." Such a fear is unfounded and unrealistic. First, because GATT panels could require a showing that there is in fact an exhaustible resource that needs to be protected. Second, GATT panels have used very liberal standards in allowing escape measures to be used by contracting parties. Despite the existence of lax standards, which still exist today, there has been no claim that the exception to the GATT has swallowed the rule. Finally, that the United States imposed the restrictions

75. The United States provides a very large market for the importation of yellowfin tuna. As a result foreign nations will not willingly give up such a market. In fact, Japan recently changed its fishing laws banning the use of purse seine fishing for yellowfin tuna in order to comply with the laws of the United States.
76. See supra note 18 and accompanying text.
77. Panel Report, supra note 2, at 47.
78. In this case, there was no finding by the GATT Panel that the marine mammals in question were not being killed in alarming rates and in fact found that studies have demonstrated that purse seine fishing does lead to the taking of dolphins during fishing operations. The Panel further took notice that there were methods that could be employed which would "reduce or eliminate the catch of dolphins." Id. at 2.
79. See e.g. Report On the Withdrawal By the United States On A Tariff Concession Under Article XIX of the General Agreement On Tariffs and Trade, Sales No.: GATT/ 1951-3 (Nov. 1951) ("the Hatter's Fur Case"). In that case, the "unforeseen development" requirement was interpreted with great latitude, finding that a change in fashion could not have been foreseen. This was such a loose interpretation that in 1963, a GATT report stated that there was a need to obtain greater stability but no action has ever resulted. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 563 (1969). Thus arguments that a slippery slope can happen have never been proven true in the context of exceptions to GATT.
on its own fishermen as well as any imported product would seem to demonstrate that the actions of the United States were solely directed to protect marine mammals and not an attempt to undercut foreign trade.

3. Article XX(a)

Although the United States did not raise Article XX(a)\(^{80}\) as a defense at the proceedings, it too provides justification for the MMPA. There can be no doubt that the impetus behind the MMPA was to protect the lives of marine mammals from needless destruction.\(^{81}\) Further, it can be demonstrated that the protection the United States seeks to afford to marine mammals under the MMPA is not isolated. In fact, the MMPA exists within a plethora of legislation designed to protect animal life and the environment in general.\(^{82}\) Such legislation demonstrates the creation of a moral ethic established by the United States which it is entitled to protect under Article XX(a).

As such, the question becomes whether the MMPA is "necessary" to protect public morals. The answer to that question must be yes. If the United States is not allowed to continue the embargo, then it necessarily is made a party to an act that it considers immoral. Not only does such a ruling preclude the United States from protecting marine mammals, but it forces it to be a party to killing them. Certainly, there is no greater sovereignty recognized for a nation than to be free from being compelled to engage in a practice it considers immoral.\(^{83}\)

In sum, it appears that the GATT Panel has established a far too narrow reading of Article XX.\(^{84}\) While there can be no doubt that the al-

---

\(^{80}\) Article XX(a) is the exception that allows restrictions necessary to protect public morals. It reads:

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; ...  

GATT \textit{supra} note 1, art. XX(a).

\(^{81}\) One needs only look at the legislative history to make such a determination. See \textit{supra} notes 10-21 and accompanying text.

\(^{82}\) \textit{See supra} note 9.

\(^{83}\) It is a sovereign's exclusive right to determine what is to be considered moral and just within its own borders and no state has a right to interfere with such a decision. \textsc{James L. Brierly, The Sovereign State Today}, 348, 350 (1958). Recognition of this principle is the reason the exception under art. XX(a) was created in the first place, so that a nation did not have to abandon its sovereignty over morality within its borders.

\(^{84}\) The United States also raised a claim under art. XX(d) which provides that an exception is allowable if it is:

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

GATT, \textit{supra} note 1, art. XX(d). This claim of the United States was denied on the basis
lowance of very broad readings of Article XX would threaten the primary purpose of the GATT, the reading afforded by the Panel in this case virtually reads the exceptions out of the document. The logical end to the Panel’s decision is that all contracting parties must adhere to the lowest minimum environmental standard of any contracting party. Such a result is unsound in that it fails to recognize that environmental resources beyond the borders of any nation are the property of all nations and as such nations must be allowed to protect their interest. The MMPA does not regulate what a foreign state can do generally, only what that state may do concerning its sales to the United States. It is well recognized that a country may protect its interests and morals. That is what the MMPA seeks to do.

C. Non-Discrimination of the United States Action

As a result of the findings of the Panel, it was unnecessary for it to address Mexico’s Article XIII claim. If, however, the restrictions placed by the United States were found to be valid, it would have been necessary to make such a determination. Article XIII ensures that when a country does impose quantitative restrictions the imposition of such restrictions must be done in a manner that does not discriminate against some countries. The purpose of Article XIII is to prevent restrictions from being used as a weapon, damaging one country at the expense of another. The rule set forth in the Article states “a preference for global quotas.”

Mexico argued that the United States restrictions were in violation of Article XIII because it discriminated against countries that fished for yellowfin tuna in favor of countries that fished for other types of tuna in other geographical areas. This is not what Article XIII was designed to prevent.

There is no doubt that if the United States had established restrictions aimed at Mexico specifically and no other country then such action

that the embargo was found to be inconsistent with the provisions of GATT and therefore could not find relief under Article XX(d). Panel Report, supra note 2, at 49. An in-depth discussion of this ruling is not necessary in that the Article XX(d) argument can only exist if there is no inconsistency with the GATT. If that was the case, the United States would have found relief under the other Article XX provisions.

85. Panel Report, supra note 2, at 42.
86. Article XIII provides:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

GATT, supra note 1, art. XIII(1).

88. Id.
89. Panel Report, supra note 2, at 10.
would be in violation of Article XIII.90 Similarly, if general restrictions are applied to only one country despite identical actions by other countries, that would be in violation of Article XIII.91 This case does not present such discriminatory application of restrictions.92

The United States has applied the import restrictions to all countries engaging in purse seine fishing for yellowfin tuna in the South Pacific that kill an unacceptable number of marine mammals. The application of such restrictions has not been aimed at any one country.93 The fact that countries that do not kill dolphins escape the restrictions on their imports does not mean that the MMPA is discriminatory within the meaning of Article XIII. It has been recognized that quantitative restrictions on imports are “inherently discriminatory.”94 The implication of Article XIII, however, is that restrictions cannot be applied on a selective basis to countries that engage in the same conduct. In this case, the MMPA does not discriminate in terms of the applicable nations. In fact, the judiciary of the United States made clear that if any country violated the MMPA, the restrictions provided were mandatory.95

The other major provision of the GATT that is relevant to discrimination is Article III(4) which provides for non-discriminatory treatment of foreign products.96 Article III(4) provides that a contracting party to GATT must afford the same treatment to all foreign products.97 “National treatment in GATT means that imported goods will be accorded the same treatment as goods of local origin with respect to matters under government control.”98 Mexico could not claim that the MMPA violates

---

90. EEC—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, GATT, BISD 30S/129 (1983) (the Panel ruled that if a country created nation-specific restrictions and did not place the same restrictions on other nations then that would constitute a violation of Article XIII).

91. See e.g. Norway—Restrictions on Certain Imports of Certain Textile Products, GATT, BISD 27S/119 (1980) (In this case Norway had placed restrictions on Hong Kong for textile imports despite the fact that other countries were engaged in the same practice as Hong Kong. The Panel stated that even if Norway had a valid reason to apply restrictions, in that case Article XIX, that the restrictions must be applied across the board).

92. In fact, the judiciary of the United States refused to allow the government to apply the embargo selectively. See supra note 29.

93. See supra notes 24, 26. There have been many embargoes placed on countries that violate the United States law.


95. See Earth Institute v. Mosbacher, 746 F. Supp. 964, 969 (N.D. Cal. 1990) aff'd, 929 F.2d 1449 (9th Cir. 1991).

96. Article III(2) provides:

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

GATT, supra note 1, art. III(2).

97. ANDREAS F. LOWENFELD, 6 INTERNATIONAL ECONOMIC LAW: PUBLIC CONTROLS ON INTERNATIONAL TRADE § 2.3 (1979).

the national treatment provision of Article III. Under the MMPA, domestic fishermen are prohibited from engaging in purse seine fishing.\textsuperscript{99} Thus, it is not the case that the United States is allowing its domestic producers to engage in a certain practice while placing restrictions on foreign nations that engage in the same practice.

III. CUSTOMARY INTERNATIONAL LAW

The restrictions under the MMPA are not without a foundation in customary international law. Customary international law is a notion of law that has been recognized generally either by nations or international governing organizations.\textsuperscript{100} While it is true that no international body has explicitly recognized the right to establish import restrictions against countries whose fishing methods kill high numbers of marine mammals,\textsuperscript{101} it has been recognized internationally that marine life is a valuable resource that must be preserved.\textsuperscript{102} When a value is incorporated into customary international law, it is logical that that value be considered when decisions are made interpreting international documents.\textsuperscript{103} The Panel stated that "its report would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies."\textsuperscript{104} The Panel's analysis is mistaken on both issues.

The finding by the Panel initially relies solely on an interpretation of GATT and the prior history of GATT.\textsuperscript{105} In fact the Panel explicitly

\textsuperscript{100.} I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 38 (3d ed. 1979).
\textsuperscript{101.} See supra note 52 and accompanying text.
\textsuperscript{102.} See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243 [hereinafter CITES] (CITES operates as an exception to GATT because it does permit limitations on importing endangered species. While CITES does not provide the right to restrict products which are obtained at the expense of endangered species, it certainly does illustrate an international concern for the preservation of endangered species and espouses the idea of a global environmental ethic); International Convention for the Regulation of Whaling, Dec. 2, 1946, 61 Stat. 1716, 161 U.N.T.S. 72 [hereinafter IWC] (IWC calls for the preservation of whales and for enforcement by the state against nationals harming whales. Again the treaty does not explicitly allow an import restriction on products obtained by methods harmful to whales; it does, however, demonstrate an international recognition of the importance of preserving marine mammals); UNCLOS, supra note 57 (providing a 200 nautical mile zone in which a sovereign may exercise jurisdiction to control fishing and protect marine mammals); SPDNC, supra note 57 (This convention actually calls for nations to prohibit the importation of fish or fish products obtained through the driftnet procedure which kills marine mammals but is qualified by stating that the actions must be consistent with existing international law). None of these international agreements explicitly allow the actions of the United States but they do demonstrate an ecological ethic that is pervasive worldwide.
\textsuperscript{103.} It has long been recognized that in the international framework states should properly view themselves as bound together by the whole of international law rather than fragments. JAMES L. BRIERLY, THE LAW OF NATIONS 29 (1963).
\textsuperscript{104.} Panel Report, supra note 2, at 51.
\textsuperscript{105.} Id. at 42-50.
states that "its task was limited to the examination of this matter in light of the relevant GATT provisions and therefore did not call for a finding on the appropriateness of the United States' and Mexico's policies as such." This narrow view precludes a harmonization of international law in general because it does not recognize competing international interests. The very purpose for creating exceptions to the GATT was to accommodate unique circumstances. The fact that international law recognizes a policy as being not only valid but desirable, in this case the protection of marine mammals, is significant and should be considered as a policy to be adopted into the GATT exceptions.

The decision also harms international law as a whole. By looking only at the policies the GATT is concerned with, the Panel isolated the GATT from other policies that international law seeks to implement. Such decisions weaken international legal structures, pitting each international convention or document against the other. If international law is going to be adopted as binding by nations, it must appear consistent and cohesive.

**CONCLUSION**

The GATT Panel decision raises serious problems for environmental conservation. The United States felt that an important moral goal was to cease being a party to the increasing devastation of marine mammal life. The Panel decision forces the United States to allow a market for fish caught in environmentally harmful ways. Despite the exceptions that exist within the GATT that would seem to allow the United States to retain sovereignty over its environmental policies, the Panel's decision effectively made such exceptions meaningless, especially where a nation seeks to apply them in order to protect a legitimate interest outside of its borders. In doing so the Panel ignores the international concern for the protection of marine mammals.

Such a ruling is dangerous. First, it takes away a nation's right to decide what types of practices will be tolerated. The United States is now forced to accept products that have been obtained in a manner that it does not wish to support. It also forces the United States as well as any Contracting Party to the GATT to make a choice: whether to abide by an international agreement that has virtually no enforcement power or to continue to do what it feels is morally correct. Creating such a choice threatens all international agreements.

*Alan S. Rafterman*

---

106. *Id.* at 50.