3 September 1991

DOLPHIN FRIENDLY TUNA - EDITED

UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel1[1]

(DS21/R - 39S/155)

1. INTRODUCTION

1.1 On 5 November 1990, Mexico requested consultations with the United States concerning restrictions on imports of tuna2[2]. These consultations were held on 19 December 1990. On 25 January 1991 Mexico requested the CONTRACTING PARTIES to establish a panel under Article XXIII:2 to examine the matter3[3] as the sixty-day period for consultations had expired without a mutually satisfactory adjustment having been reached.4[4] On 6 February 1991 the Council agreed to establish the Panel and authorized its Chairman to designate the chairman and members of the Panel in consultation with the parties concerned. At that meeting of the Council, Australia, Canada, Chile, Colombia, Costa Rica, the European Communities, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, Singapore, Tanzania, Thailand, Tunisia and Venezuela reserved their rights to be heard by the panel and to make written submissions to the Panel.5[5]

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

2[2] C/M/246/27

3[3] DS21/1

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

5[5] C/M/247/16

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2. FACTUAL ASPECTS

Purse-seine fishing of tuna

2.1 The last three decades have seen the deployment of tuna fishing technology based on the "purse-seine" net in many areas of the world. A fishing vessel using this technique locates a school of fish and sends out a motorboat (a "seine skiff") to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.

2.2 Studies monitoring direct and indirect catch levels have shown that fish and dolphins are found together in a number of areas around the world and that this may lead to incidental taking of dolphins during fishing operations.6[6] In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean surface and intentionally encircling them with nets to catch the tuna underneath. This type of association has not been observed in other areas of the world; consequently, intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the Eastern Tropical Pacific Ocean. When dolphins and tuna together have been surrounded by purse-seine nets, it is possible to reduce or eliminate the catch of dolphins through using certain procedures.

Marine Mammal Protection Act of the United States (Measures on imports from Mexico)

2.3 The Marine Mammal Protection Act of 1972, as revised (MMPA)7[7], requires a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except where an exception is explicitly authorized. Its stated goal is that the incidental kill or serious injury of marine mammals in the course of commercial fishing be reduced to insignificant

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6[6] See, for instance, Simon P. Northridge, "World Review of Interactions between Marine Mammals and Fisheries", consultant report published as FAO Fisheries Technical paper No 251 Supplement 1, FIRM/T251 (Suppl.1), Food and Agriculture Organization of the United Nations (Rome, 1991).

7[7] P.L. 92-522, 86 Stat. 1027 (1972), as amended, notably by P.L. 100-711, 102 Stat. 4755 (1988) and most recently by P.L. 101-627 at 104 Stat. 4467 (1990); codified in part at 16 U.S.C. 1361ff.

levels approaching zero. The MMPA contains special provisions applicable to tuna caught in the ETP, defined as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coasts of North, Central and South America.8[8] These provisions govern the taking of marine mammals incidental to harvesting of yellowfin tuna in the ETP, as well as importation of yellowfin tuna and tuna products harvested in the ETP. The MMPA is enforced by the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, except for its provisions regarding importation which are enforced by the United States Customs Service under the Department of the Treasury.

2.4 Section 101(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by United States fishermen in the course of commercial fishing pursuant to a permit issued by NMFS, in conformity with and governed by certain statutory criteria in sections 103 and 104 and implementing regulations.9[9] Only one such permit has been issued, to the American Tuna-boat Association, covering all domestic tuna fishing operations in the ETP. Under the general permit issued to this Association, no more than 20,500 dolphins may be incidentally killed or injured each year by the United States fleet fishing in the ETP. Among this number, no more than 250 may be coastal spotted dolphin (Stenella attenuata) and no more than 2,750 may be Eastern spinner dolphin (Stenella longirostris). The MMPA and its implementing regulations include extensive provisions regarding commercial tuna fishing in the ETP, particularly the use of purse-seine nets to encircle dolphin in order to catch tuna beneath (referred to as "setting on" dolphin). These provisions apply to all persons subject to United States jurisdiction and vessels subject to United States jurisdiction, on the high seas and in United States territory, including the territorial sea of the United States and the United States Exclusive Economic Zone. Although MMPA enforcement provisions provide for forfeiture of cargo as a penalty for violation of its regulations on harvesting of tuna, neither the MMPA provisions nor their implementing regulations otherwise prohibit or regulate the sale, offer for sale, purchase, transportation, distribution or use of yellowfin tuna caught by the United States fleet.

2.5 Section 101(a)(2) of the MMPA also states that "The Secretary of Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards". This prohibition is mandatory. Special ETP provisions in section 101(a)(2)(B) provide that importation of yellowfin tuna harvested with purse-seine nets in the ETP and products therefrom is prohibited unless the Secretary of Commerce finds that (i) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by United States vessels. The Secretary need not act unless a harvesting country requests a finding. If it does, the burden is on that country to prove through documentary evidence that its regulatory regime and taking rates are comparable. If the data show that they are, the Secretary must make a positive finding.

8[8] Title 50, Code of Federal Regulations (CFR) §216.3 (1990).

9[9] The implementing regulations were codified at Part 216 of Title 50 CFR (1990); regulations on commercial fishing appeared at 50 CFR §216.24 (1990).

2.6 The provisions for ETP yellowfin tuna in section 101(a)(2)(B) of the MMPA provide special prerequisites for a positive finding on comparability of a harvesting country's regulatory regime and incidental taking rates. The regulatory regime must include the same prohibitions as are applicable under United States rules to United States vessels. The average incidental taking rate (in terms of dolphins killed each time the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of United States vessels in the same period. Also, the share of Eastern spinner dolphin and coastal spotted dolphin relative to total incidental takings of dolphin during each entire (one-year) fishing season must not exceed 15 per cent and 2 per cent respectively. NMFS regulations have specified a method of comparing incidental taking rates by calculating the kill per set of the United States tuna fleet as an unweighted average, then weighting this figure for each harvesting country based on differences in mortality by type of dolphin and location of sets; these regulations have also otherwise implemented the MMPA provisions on importation.10[10]

2.7 On 28 August 1990, the United States Government imposed an embargo, pursuant to a court order, on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets in the ETP until the Secretary of Commerce made positive findings based on documentary evidence of compliance with the MMPA standards. This action affected Mexico, Venezuela, Vanuatu, Panama and Ecuador. On 7 September this measure was removed for Mexico, Venezuela and Vanuatu, pursuant to positive Commerce Department findings; also, Panama and Ecuador later prohibited their fleets from setting on dolphin and were exempted from the embargo. On 10 October 1990, the United States Government, pursuant to court order, imposed an embargo on imports of such tuna from Mexico until the Secretary made a positive finding based on documentary evidence that the percentage of Eastern spinner dolphins killed by the Mexican fleet over the course of an entire fishing season did not exceed 15 per cent of dolphins killed by it in that period. An appeals court ordered on 14 November 1990 that the embargo be stayed, but when it lifted the stay on 22 February 1991, the embargo on imports of such tuna from Mexico went into effect.11[11]

2.8 On 3 April 1991, the United States Customs Service issued guidance implementing a further embargo, pursuant to another court order of 26 March, on imports of yellowfin tuna and tuna products harvested in the ETP with purse-seine nets by vessels of Mexico, Venezuela and Vanuatu. Under this embargo, effective 26 March 1991, the importation of yellowfin tuna, and "light meat" tuna products which can contain yellowfin tuna, under specified Harmonized System tariff headings12[12] is prohibited unless

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10[10] NOAA (NMFS), "Regulations Governing the Importation of Tuna Taken in Association with Marine Mammals" (interim final rule), 54 Federal Register 9438 (7 March 1989); "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations" (final rule) 55 Federal Register 11921 (30 March 1990).

11[11] National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals", 56 Federal Register 12367 (25 May 1991).

12[12] The Customs guidance of 3 April specified that the merchandise concerned was provided for under the headings 0302.32.00.00, 0303.42.00.20, 0303.42.00.40, 0303.42.00.60, 1604.14.10.00, 1604.14.20.40, 1604.14.30.40, 1604.14.40.00, and 1604.14.50.00.

the importer provides a declaration that, based on appropriate inquiry and the written evidence in his possession, no yellowfin tuna or tuna products in the shipment were harvested with purse-seines in the ETP by vessels from Mexico, Venezuela or Vanuatu. The importer of such tuna or tuna products is also required to submit the NOAA Form 370-1 "Yellowfin Tuna Certificate of Origin". Form 370-1 requires the importer to declare the country under whose laws the harvesting vessel operated, which is then deemed to be the country of origin of the tuna. Over-the-side sales of fish are subject to the same information requirements. For unprocessed tuna there is no difference between the country of origin for customs purposes and for purposes of the MMPA. The country of origin is the country under whose laws the vessel harvesting the tuna is registered.

2.9 The MMPA also provides that six months after the effective date of an embargo on yellowfin tuna or tuna products, the Secretary of Commerce shall certify this fact to the President. This certification triggers the operation of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)), also known as the "Pelly Amendment". This provision provides discretionary authority for the President to order a prohibition of imports of fish products "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

Marine Mammal Protection Act (Measures on intermediary country imports)

2.10 Section 101(a)(2)(C) of the MMPA states that for purposes of applying the direct import prohibition on yellowfin tuna and tuna products described in paragraph 2.5 above, the Secretary of Commerce "shall require the Government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such importation to the United States". Unless the intermediary nation's ban is effective within sixty days of the effective date of the United States ban, and the Secretary receives this proof within ninety days of the effective date of the United States ban, then imports of yellowfin tuna and tuna products from the intermediary nation are prohibited effective on the ninety-first day. Six months after the intermediary nation prohibition goes into effect, the Secretary of Commerce must so certify to the President, triggering the Pelly Amendment as above.

2.11 On 15 March 1991 NMFS announced that the intermediary nations embargo would go into effect on 24 May 1991.13[13] On 12 June 1991, NMFS published notice that it would request the United States Customs Service to obtain with respect to each shipment of yellowfin tuna or tuna products from a country identified as an intermediary nation both the Yellowfin Tuna Certificate of Origin, and a declaration by the importer that based on appropriate inquiry and the written evidence in his possession, no yellowfin tuna or

13[13] National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals", 56 Federal Register 12367 (25 May 1991).

tuna product in the shipment were harvested with purse-seines in the ETP by vessels from Mexico.14[14] The identified countries are Costa Rica, France, Italy, Japan and Panama.15[15] This requirement has applied to all imports of yellowfin tuna and tuna products from the identified countries since the effective date of 24 May 1991. Importations from these countries without the declaration will be refused entry into the United States.16[16]

Dolphin Protection Consumer Information Act

2.12 The Dolphin Protection Consumer Information Act (DPCIA)17[17] specifies a labelling standard for any tuna product exported from or offered for sale in the United States. "Tuna products" covered include any tuna-containing food product processed for retail sale, except perishable items with a shelf life of less than three days. Under this statute, it is a violation of section 5 of the Federal Trade Commission Act (FTCA) for any producer, importer, exporter, distributor or seller of such tuna products to include on the label of that product the term "Dolphin Safe" or any other term falsely suggesting that the tuna contained therein was fished in a manner not harmful to dolphins, if it contains tuna harvested in either of two situations. The two situations are (1) harvesting in the Eastern Tropical Pacific Ocean by a vessel using purse-seine nets which does not meet certain specified conditions for being considered dolphin safe, and (2) harvesting on the high seas by a vessel engaged in driftnet fishing. Violations of Section 5 of the FTCA are subject to civil penalties. The DPCIA provided that its labelling standard and civil penalty provisions for tuna products would take effect on 28 May 1991. Regulations to implement the DPCIA had not yet been issued at the time of the Panel's consideration.

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3.FINDINGS

14[14] National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations", 56 Federal Register 26995 (12 June 1991).

15[15] Letter from United States National Marine Fisheries Service to United States Customs Service dated May 24, 1991.

16[16] National Marine Fisheries Service, National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations", 56 Federal Register 26995 (12 June 1991).

17[17] Section 901, Public Law 101-627, 104 Stat. 4465-67, enacted 28 November 1990, codified in part at 16 U.S.C. 1685.

A. Introduction

3.1 The Panel noted that the issues before it arose essentially from the following facts: the Marine Mammal Protection Act (MMPA) regulates, inter alia, the harvesting of tuna by United States fishermen and others who are operating within the jurisdiction of the United States. The MMPA requires that such fishermen use certain fishing techniques to reduce the taking of dolphin incidental to the harvesting of fish. The United States authorities have licensed fishing of yellowfin tuna by United States vessels in the ETP on the condition that the domestic fleet not exceed an incidental taking of 20,500 dolphins per year in the ETP.

3.2 The MMPA also requires that the United States Government ban the importation of commercial fish or products from fish caught with commercial fishing technology which results in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards. Under United States customs law, fish caught by a vessel registered in a country is deemed to originate in that country. As a condition of access to the United States market for the yellowfin tuna or yellowfin tuna products caught by its fleet, each country of registry of vessels fishing yellowfin tuna in the ETP must prove to the satisfaction of the United States authorities that its overall regulatory regime regarding the taking of marine mammals is comparable to that of the United States. To meet this requirement, the country in question must prove that the average rate of incidental taking of marine mammals by its tuna fleet operating in the ETP is not in excess of 1.25 times the average incidental taking rate of United States vessels operating in the ETP during the same period. The exact methods of calculating and comparing these average incidental taking rates have been specified by regulation.

3.3 The MMPA also provides that ninety days after imports of yellowfin tuna and yellowfin tuna products from a country have been prohibited as above, importation of such tuna and tuna products from any "intermediary nation" shall also be prohibited, unless the intermediary nation proves that it too has acted to ban imports of such tuna and tuna products from the country subject to the direct import embargo.

3.4 Six months after either the direct embargo or the "intermediary nations" embargo goes into effect, the United States authorities are required to take action which triggers Section 8 of the Fishermen's Protective Act (the Pelly Amendment). This provision enables the President in his discretion to prohibit imports of all fish or wildlife products from the country in question, "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

3.5 Under the MMPA, the United States currently prohibits importation into its customs territory of yellowfin tuna and yellowfin tuna products from Mexico which were caught with purse-seine nets in the ETP. A predecessor embargo was imposed on such tuna and tuna products on 28 August 1990; the

embargo in its present form has been in place since 26 March 1991. Since 24 May 1991 the United States has also implemented the "intermediary nations" embargo provisions of the MMPA by prohibiting the importation of yellowfin tuna or yellowfin tuna products from any other country if the tuna was harvested with purse-seine nets in the ETP by vessels of Mexico. If either of these prohibitions is in effect six months after its inception, then as of that date the President will have the discretionary authority under the Pelly Amendment to prohibit imports of all fish products of Mexico or of any "intermediary nation" for such duration as he determines appropriate and to the extent that such action is "sanctioned by the General Agreement".

3.6 The Dolphin Protection Consumer Information Act (DPCIA) provides that when a tuna product exported from or offered for sale in the United States bears the optional label "Dolphin Safe" or any similar label indicating it was fished in a manner not harmful to dolphins, this tuna product may not contain tuna harvested on the high seas by a vessel engaged in driftnet fishing, or harvested in the ETP by a vessel using a purse-seine net unless it is accompanied by documentary evidence showing that the purse-seine net was not intentionally deployed to encircle dolphins. The use of the label "Dolphin Safe" is not a requirement but is voluntary. The labelling provisions of the DPCIA took effect on 28 May 1991.

3.7 The Panel decided to examine successively:

(a)the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico imposed by the United States and the provisions of the MMPA on which it is based;

(b)the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from "intermediary nations" imposed by the United States and the provisions of the MMPA on which it is based;

(c)the possible extension of each of these import prohibitions to all fish products from Mexico and the "intermediary nations", under the MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment); and

(d)the application to tuna and tuna products from Mexico of the labelling provisions of the DPCIA, as well as these provisions as such.

In accordance with the established practice, the Panel further decided that it would examine each of the above issues first in the light of the provisions of the General Agreement which Mexico claims to have been

violated by the United States and then, if it were to find an inconsistency with any of the provisions invoked by Mexico, in the light of the exceptions in the General Agreement raised by the United States.

B. Prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico

Categorization as internal regulations (Article III) or quantitative restrictions (Article XI)

3.8 The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

3.9 The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. The relevant text of Article III:4 provides:

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

The Note Ad Article III provides that:

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

internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provisions of Article III".

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

3.11 The text of Article III:1 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale.... of products" and "internal quantitative regulations requiring the mixture, processing or use of products"; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure "which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation". This suggests that this Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products.

3.12 A previous panel had found that Article III:2, first sentence, "obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products".18[18] Another panel had found that the words "treatment no less favourable" in Article III:4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and that this standard has to be understood as applicable to each individual case of imported products.19[19] It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products.

18[18] Panel report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

19[19] Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 386-7, paras. 5.11, 5.14.

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

"... there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment ... Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes".20[20]

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

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

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

20[20] BISD 18S/97, 100-101, para. 14

3.16 The Panel noted that Mexico had argued that the MMPA requirements with respect to production of yellowfin tuna in the ETP, and the method of calculating compliance with these requirements, provided treatment to tuna and tuna products from Mexico that was less favourable than the treatment accorded to like United States tuna and tuna products. It appeared to the Panel that certain aspects of the requirements could give rise to legitimate concern, in particular the MMPA provisions which set a prospective absolute yearly ceiling for the number of dolphins taken by domestic tuna producers in the ETP, but required that foreign tuna producers meet a retroactive and varying ceiling for each period based on actual dolphin taking by the domestic tuna fleet in the same time period. However, in view of its finding in the previous paragraph, the Panel considered that a finding on this point was not required.

Articles XI and XIII

3.17 The Panel noted that the United States had, as mandated by the MMPA, announced and implemented a prohibition on imports of yellowfin tuna and yellowfin tuna products caught by vessels of Mexico with purse-seine nets in the ETP. The Panel further noted that under United States customs law, fish caught by a vessel registered in a country was deemed to originate in that country, and that this prohibition therefore applied to imports of products of Mexico.

3.18 The Panel noted that under the General Agreement, quantitative restrictions on imports are forbidden by Article XI:1, the relevant part of which reads:

"No prohibitions or restrictions .... 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 ...".

The Panel therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

3.19 The Panel noted that Mexico had also argued that the prohibition imposed on imports from Mexico was inconsistent with Article XIII. In view of the finding that this measure is inconsistent with Article XI:1

the Panel found that it was not necessary to make a finding on the question of whether it was also inconsistent with Article XIII.

Section 8 of the Fishermen's Protective Act (Pelly Amendment)

3.20 The Panel recalled that Mexico had also argued that the possible extension of import prohibitions to all fish products of Mexico under Section 101(a)(2)(D) of the MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment) was inconsistent with Article XI. The Panel noted that the Pelly Amendment authorized such an embargo, but gave the United States authorities discretion to refrain from taking any trade measures at all. Such an embargo was not now in effect, and might not be imposed by the United States authorities. In the Panel's view, therefore, the question presented to it was whether a statutory provision that authorizes but does not require a measure inconsistent with the General Agreement constituted in itself a measure in conflict with the General Agreement.

3.21 The Panel recalled that it had been recognized by the CONTRACTING PARTIES in previous cases that legislation mandatorily requiring the executive authority of a contracting party to act inconsistently with the General Agreement may be found to be inconsistent with that contracting party's obligations under the General Agreement, whether or not an occasion for its actual application has yet arisen, but on the other hand, legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent

with the General Agreement.21[21] Accordingly, the Panel found that, because the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.

Article XX

General

3.22 The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. 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, and not a positive rule establishing obligations in itself.22[22] Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,23[23] and not to examine Article XX exceptions unless invoked.24[24] Nevertheless, the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting ipso facto an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible.

3.23 The Panel proceeded to examine whether Article XX(b) or Article XX(g) could justify the MMPA provisions on imports of certain yellowfin tuna and yellowfin tuna products, and the import ban imposed under these provisions. The Panel noted that Article XX provides that:

21[21] Panel reports on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 160, 163-4, paras. 5.2.2, 5.2.9-10; and "EEC - Regulation on Imports of Parts and Components", BISD 37S/132, L/6657, adopted 16 May 1990, paras. 5.25-5.26.

22[22] Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 385, para. 5.9.

23[23] Panel reports on "Canada - Administration of the Foreign Investment Review Act", adopted 7 February 1984, BISD 30S/140, 164, para. 5.20; and "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 393 para. 5.27.

24[24] See, e.g., the panel report on "EEC - Regulation of Parts and Components", adopted 16 May 1990, BISD 37S/132, L/6657, para. 5.11.

"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; ...".

Article XX(b)

3.24 The Panel noted that the United States considered the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico, and the provisions of the MMPA on which this prohibition is based, to be justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health and were "necessary" within the meaning of that provision because, in respect of the protection of dolphin life and health outside its jurisdiction, there was no alternative measure reasonably available to the United States to achieve this objective. Mexico considered that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the contracting party taking it and that the import prohibition imposed by the United States was not necessary because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned.

3.25 The Panel noted that the basic question raised by these arguments, namely whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure, is not clearly answered by the text of that provision. It refers to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. The Panel therefore decided to analyze this issue in the light of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.

3.26 The Panel noted that the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, "Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures:...(b) necessary to protect human, animal or plant life or health". In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b)

read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country". This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.25[25] Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.

3.27 The Panel further noted that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards. The conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be "necessary" and not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade", refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the contracting party. The Panel recalled the finding of a previous panel that this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.26[26] The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

3.28 The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

25[25] EPCT/A/PV/30/7-15

26[26] Panel report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, 222-223, DS10/R, paras. 73-74.

3.29 On the basis of the above considerations, the Panel found that the United States' direct import prohibition imposed on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed could not be justified under the exception in Article XX(b).

Article XX(g)

3.30 The Panel proceeded to examine whether the prohibition on imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico and the MMPA provisions under which it was imposed could be justified under the exception in Article XX(g). The Panel noted that the United States, in invoking Article XX(g) with respect to its direct import prohibition under the MMPA, had argued that the measures taken under the MMPA are measures primarily aimed at the conservation of dolphin, and that the import restrictions on certain tuna and tuna products under the MMPA are "primarily aimed at rendering effective restrictions on domestic production or consumption" of dolphin. The Panel also noted that Mexico had argued that the United States measures were not justified under the exception in Article XX(g) because, inter alia, this provision could not be applied extrajurisdictionally.

3.31 The Panel noted that Article XX(g) required that the measures relating to the conservation of exhaustible natural resources be taken "in conjunction with restrictions on domestic production or consumption". A previous panel had found that a measure could only be considered to have been taken "in conjunction with" production restrictions "if it was primarily aimed at rendering effective these restrictions".27[27] A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.

3.32 The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not "constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade" refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without

27[27] Panel report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/98, 114, para. 4.6.

jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).

3.33 The Panel did not consider that the United States measures, even if Article XX(g) could be applied extrajurisdictionally, would meet the conditions set out in that provision. A previous panel found that a measure could be considered as "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g) only if it was primarily aimed at such conservation.28[28] The Panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins.

3.34 On the basis of the above considerations, the Panel found that the United States direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico directly imported from Mexico, and the provisions of the MMPA under which it is imposed, could not be justified under Article XX(g).

C.Secondary embargo on imports of certain yellowfin tuna and certain yellowfin tuna products from "intermediary nations" under the MMPA

Articles III and XI

3.35 The Panel noted that Mexico had claimed that the "intermediary nations" embargo was inconsistent with Articles XI and XIII. The United States considered that these measures fell instead under Article III and the Note Ad Article III as they provided for enforcement of requirements for yellowfin tuna harvested in the ETP using purse-seine nets. The Panel found that since the United States domestic regulations on tuna harvesting were not applied to tuna as a product, the "intermediary nations" embargo did not fall within the scope of the Note Ad Article III, and was therefore a quantitative restriction subject to Article XI.

28[28] Panel report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35S/98, 114, para. 4.6.

3.36 The Panel further noted that the MMPA required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from "intermediary nations", and that the United States was refusing entry to yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the ETP by vessels of Mexico. The Panel therefore found that these measures and the provisions of the MMPA mandating such an embargo were import restrictions or prohibitions inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

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

Article XX(b) and XX(g)

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

Article XX(d)

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

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ...

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

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

D. Dolphin Protection Consumer Information Act (DPCIA)

3.41 The Panel noted that Mexico considered the labelling provisions of the DPCIA to be marking requirements falling under Article IX:1, which reads:

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

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

3.42 The Panel proceeded to examine the subsidiary argument by Mexico that the labelling provisions of the DPCIA were inconsistent with Article I:1 because they discriminated against Mexico as a country fishing in the ETP. The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by

consumers to give preference to tuna carrying the "Dolphin Safe" label. The labelling provisions therefore did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods. The only issue before the Panel was therefore whether the provisions of the DPCIA governing the right of access to the label met the requirements of Article I:1.

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

3.44 The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.

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4. CONCLUSIONS

4.1 (a)The prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the Marine Mammal Protection Act under which it is imposed are contrary to Article XI:1 and are not justified by Article XX(b) or Article XX(g).

(b)The import prohibitions imposed by the United States with regard to certain yellowfin tuna and certain yellowfin tuna products of "intermediary nations" and the provisions of the Marine Mammal Protection Act under which they are imposed are contrary to Article XI:1 and are not justified by Article XX(b), XX(d) or XX(g).

(c)The Panel recommends that the CONTRACTING PARTIES request the United States to bring the above measures into conformity with its obligations under the General Agreement.

4.2 The provisions of Section 8 of the Fishermen's Protective Act (the Pelly Amendment) as such are not inconsistent with the obligations of the United States under the General Agreement.

4.3 The tuna products labelling provisions of the Dolphin Protection Consumer Information Act relating to tuna caught in the Eastern Tropical Pacific Ocean are not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.