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***How has the treatment of marine-based, Article XX
exception trade disputes differed between
the GATT and the WTO?***

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A minor dissertation submitted in *partial fulfilment* of the requirements
for the award of the degree of Master of Social Science

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

How has the treatment of marine-based, Article XX exception trade disputes differed between the GATT and the WTO?

This paper uses a comparative case-study methodology to analyse two marine-based, Article XX exceptions cases: one each brought before the dispute resolution mechanisms of the GATT and WTO respectively. This research is driven by a desire to gain some insight into what happens when the imperatives of liberalised trade confront the interests of environmental protection, and also, to examine the similarities and differences between GATT and the WTO. Trade-restrictive measures (embargoes) imposed on a trading partner in the name of environmental protection – measures claiming the protection offered under the Article XX(b) and (g) exceptions of the GATT – form the essence of each dispute; but it is the purpose of the paper to ascertain whether the mechanism under which the dispute is heard (either GATT 1947 or WTO/GATT1994) had an impact on the eventual outcome.

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Abbreviations & Terms

Article XX	General Exceptions to the GATT principles
CITES.....	Convention on International Trade in Endangered Species of Wild Fauna and Flora (1975)
DSB	Dispute Settlement Body (the General Assembly of the WTO by another name)
DSU	Dispute Settlement Understanding – Technically, the “Understanding on rules and procedures governing the settlement of disputes”; Annex 2 of the Marrakesh Agreement establishing the WTO
GATT	General Agreement on Tariffs and Trade
MFN	Most Favoured Nation –one of the fundamental principles of GATT and WTO
IBRD/WB.....	International Bank for Reconstruction and Development; more commonly termed the World Bank
IMF	International Monetary Fund
LDC.....	Less Developed Country
MMPA.....	Marine Mammal Protection Act (US Act of 1972)
Marrakesh Agreement	The Uruguay Round (GATT) Agreement which established the WTO
NTB	Non Tariff Barrier e.g. import quotas
Shrimp-Sea Turtle.....	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821
Tuna-Dolphin.....	United States - Restrictions on Imports of Tuna (DS21/R)
WTO.....	World Trade Organisation

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Chapter 1: Background and Research Question

Background to Thesis

The growth of international trade since the signing of the General Agreement on Tariffs and Trade (GATT) in 1947 has been, until the recent global economic crisis, sustained and dramatic.¹ Interest in protecting the environment has also grown substantially since the 1960s as evidenced by academic literature, social movements, books, laws and environmental organisations² and numerous UN conferences starting with the UN Conference of Human Environment held in Stockholm in 1972. As international trade affects global patterns of production and resource consumption which impacts upon the environment³ the inevitable tension at the intersection of international trade and environmental protection remains a highly contested area and forms the general context of this paper; thus the different sides of the debate will be briefly sketched below.

The trade-environment nexus

The free trade argument posits that theoretically liberalisation of trade and protection of the environment are not antithetical goals; both are fundamentally an attempt to optimise the use of resources.⁴ This is achieved by countries exploiting their comparative advantage, i.e. by specialising in the sector or industry in which

¹ According to statistics available from <http://stat.wto.org/> imports increased from US\$62000 to US\$12380000(millions) and exports increased from US\$58000 to US\$12062000(millions) in current prices between 1948 & 2006.

² Daniel C. Esty, *Greening the GATT. Trade, Environment and the Future*, (Washington: Institute for International Economics, 1994), p.37

³ Kevin Watkins, *Fixing the rules. North-South issues in International Trade and the GATT Uruguay Round*, (London: Catholic Institute for International Relations, 1992), p.98

⁴ Esty, *Greening the GATT*, 63

they most efficiently use factor endowments or resources.⁵ Comparative advantage is thus interpreted as aiding environmental sustainability.⁶ The argument has two primary facets: one, that growth through trade generates wealth which can be used to address more environmental issues; and two that market forces, allowed to work properly, will directly protect the environment by internalising the costs of environmental impacts.⁷ These arguments, when layered on top of the existing neo-liberal principle that trade makes all participants wealthy and helps people coexist peacefully,⁸ help to entrench the existing international trading regime.

The concern of environmental protagonists however, is that the unfettered operation of comparative advantage may, under certain conditions, promote environmentally destructive production. The market fails when it does not properly value environmental goods with the result that business or the public do not pay the full cost of production or consumption.⁹ This may have several causes: full costs (including environmental damage) may not have been incorporated into the price (have been externalised); the value society places on the environment may not have been accounted for; a lack of defined property rights creates a tendency for overuse – the so-called ‘tragedy of the commons’; or the market itself may not exist.¹⁰ Under these conditions, trade could potentially promote the production and consumption of environmentally damaging products: this is what prompts

⁵ Matthew A. Cole, *Trade Liberalisation, Economic Growth and the Environment*, (Cheltenham: Edward Elgar Publishing Ltd, 2000), p.25

⁶ Duncan Brack, ‘Balancing Trade and the Environment’, *International Affairs*, 71.3(1995), 497-514,(p.498)

⁷ Esty, *Greening the GATT*, 63

⁸ This concept will be explored in more depth in chapter two.

⁹ Esty, *Greening the GATT*, 66

¹⁰ Cole, *Trade Liberalisation, Economic Growth and the Environment*, 23-24

environmentalists to call for limitations on trade.¹¹ Specifically the four main points generally forwarded to support the argument for regulation are: the finite capacity of the earth's sources and sinks;¹² the possibility that a lack of regulation may create 'Pollution Havens';¹³ the overruling by the WTO of sovereign states' attempts at environmental conservation¹⁴ and the necessity of having trade restrictions available as enforcement mechanisms for environmental agreements.¹⁵

Sovereignty, GATT and the WTO

Historically, and theoretically, the Westphalian¹⁶ system of states has recognised the sovereignty of national states wherein matters like economic and environmental policy fell into the ambit of the domestic decision-making structure of an autonomous government (with some exceptions). The conclusion of multilateral agreements like the General Agreement on Tariffs and Trade (GATT) in 1947 and establishment of organisations like the World Trade Organisation (WTO) on January 1st 1995, however, have to some extent curtailed autonomous action by requiring states to conform to generally agreed principles of international trade. That said writers like Hopkins, Puchala and Hedley Bull posit that even under these

¹¹ Gary P. Sampson, *Trade, Environment, and the WTO: The Post-Seattle Agenda*, (Washington: Overseas Development Council, 2000), p.27

¹² Donella Meadows et al, *Limits to Growth. The 30-Year Update*, (London: Earthscan, 2006)

¹³ Edith Brown Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary', *The American Journal of International Law*, 86.4(1992), 728-735, (p,729)

¹⁴ Brown Weiss, *Environment and Trade as Partners*, 730 and Esty, *Greening the GATT*, 94

¹⁵ Esty, *Greening the GATT*, 51

¹⁶ So named for the consensus recognising sovereignty found in the Treat of Westphalia in 1648.

conditions there remains a 'diffuse principle' of the recognition of sovereignty as a "constitutive principle of International Relations".¹⁷

Thus increasing global interdependence has brought with it a peculiar set of challenges for sovereign states: even as the prevailing wisdom in economic circles emphasizes that openness to other economies in the form of liberalised trade brings economic growth and prosperity to people,¹⁸ so the increasingly widespread interest in and concern for the environment evident in society in the latter half of the 20th century has sometimes prompted states to take actions which could be construed as unilateral, hampering liberalised trade and therefore undermining the international trading regime.

The 1980s and 1990s also saw an increasing awareness by individual states of the inability of politically imposed territorial borders to stop environmental problems and the need for coordinated international action to address such issues as a unilateral solution would be both costly and ineffective. A case in point would be the worldwide acknowledgement that the hole in the ozone layer over Antarctica was caused by the widespread use of Chlorofluorocarbons (CFCs – used at the time as a refrigerant and to make Styrofoam) and the necessity of coordinated international efforts to phase out their use which began with the creation of the Montreal Protocol in 1987.¹⁹

¹⁷ Hedley Bull, *The Anarchical Society*, p.8-9 & 70 in Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36.2 (Spring 1982), 185-205 (p.202)

¹⁸ Amrita Narlikar, *The World Trade Organization: A very short introduction*, (Oxford: Oxford University Press, 2005) p.2

¹⁹ Elizabeth Kolbert, *Field notes from a catastrophe. A frontline report on Climate Change*, (London: Bloomsbury, 2007) p.184-5

The Research Question

The impetus for this analysis in this paper is thus twofold: one, a desire to gain some insight into what happens when the imperatives of liberalised trade confront the interests of environmental protection, and two, to examine the similarities and differences between GATT and the WTO. The very brief introduction above provides an indication of the impossibility of tackling both these subjects within the confines of a short thesis. The broad scope of these interests necessitates a much more focused approach, thus this paper will take the form of a comparative case study of two marine-based, GATT Article XX disputes: one each brought before the dispute resolution mechanisms of the GATT and WTO respectively. At the heart of each dispute are trade-restrictive measures imposed on a trading partner in the name of environmental protection – measures invoked under Article XX(b) and (g) exceptions of the GATT. Thus the research question is how the treatment of marine-based, Article XX exception trade disputes has differed between the GATT and the WTO.

The comparative case study approach, it is hoped, will provide an opportunity for analysis in order to isolate both the environmental implications of disputes between states engaged in trade and the differences between the GATT trading regime and the regime and organization combination of the WTO.

Chapter Overview

The remainder of this paper will be divided into four chapters as follows.

Chapter two will begin with a discussion of case selection and methodology before attempting to define both international regimes and international

organizations in order to establish the theoretical framework to be used throughout the subsequent chapters of this paper. The theoretical aspect of this chapter will begin with a discussion of regime theory and criticisms thereof. Next it will analyse GATT as a regime using Stephen Krasner's well-established definition in order to demonstrate how, in the broadest sense, regimes regulate, manage and distribute the costs of conducting trans-national transactions.²⁰ A discussion of regime formation and functioning is crucial to understand why and how states cooperated to create the GATT as the original multilateral trading regime. The chapter will also introduce the WTO as an international organisation underpinned by the GATT regime, but distinguishable from it.

The theoretical assumptions of regime theory will also inform the discussion of why trade disputes arise between states. This is necessary to set up the analytical framework within which to compare and contrast the treatment of the similar marine-based Article XX disputes under the regime of GATT and the organisation of the WTO. Thereafter the chapter will examine whether or why the addition of an environmental 'angle' to trade disputes may complicate matters further.

Chapter three and four are the case studies. Each chapter will discuss how the dispute arose and interrogate the disputants, their claims, the rulings and reaction thereto by the disputants and the public. Most importantly these chapters will conclude by analysing the impact, if any of the respective decisions on jurisprudence of the trading regime in relation to the GATT Article XX exceptions. Chapter three will consider the Article XX dispute heard by the GATT panels; *The*

²⁰ K.L. Holsti, *International Politics. A framework for analysis*, (New Jersey: Prentice Hall, 1988) p.14

United States - Restrictions on Imports of Tuna (DS21/R), more informally known as Tuna-Dolphin I and II. The following chapter will consider the WTO dispute; *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (DS58), more commonly called the Shrimp-Turtle case. This chapter will not include an in-depth analysis of the 2001 Shrimp-Turtle II case, however, because that appeal was based on GATT's Article 21(5) concerning the United States' activities to comply with the 1998 appeal ruling and does not directly invoke an Article XX exception and is thus not applicable to the research question. Both case studies are essentially about the environmentally problematic issue of 'bycatch' – which will be defined in the beginning of chapter three - and the concerns with unilateral action within a multilateral regime.

Chapter five is an analysis and comparison of the two case studies presented in chapters three and four. It will present some conclusions pertaining to the similarities and differences of the approaches to the disputes by the regime and the organisation. To do so this chapter will draw on all the rulings and the considerable debate amongst scholars to compare and contrast what these say about the respective approaches of the GATT and WTO to marine-based Article XX exception trade disputes.

Chapter 2: Methodology and Conceptual Framework

Chapter one contextualised the research topic by sketching the background and the 'meta-interests' which informed the selection of the topic. This chapter will first deal with the methodology of the paper and then discuss the selection of the case studies. Thereafter the chapter will set up the theoretical framework for the remainder of the paper. First it will define the relevant concepts of regimes and international organizations; second, it will provide a discussion of the criticisms of regime theory before providing an analysis of GATT as an international regime.

As noted in chapter one, the concerns which underpin this paper are twofold: a desire to gain some insight into what happens when the imperatives of liberalised trade confront the interests of environmental protection, and two, to examine the similarities and differences between the GATT and WTO treatment of these issues. Given the need to limit the scope of the paper the key research question is how the treatment of marine-based, Article XX exception trade disputes has differed between the GATT and the WTO. This formulation allows analysis of the differences between the treatment of environmental protection mechanisms by the regime and the regime supplemented by the organization.

Research Methodology

This analysis takes the form of a comparative case study. The case study methodology is an in-depth contextual analysis of a single set of events, group of people, or similar related or grouped phenomena. These case studies involve thorough analysis of primary sources - the reports of the GATT and WTO dispute

panels as well as the legal documents constituting the GATT and WTO – and secondary sources in the form of academic journals and books. The paper will use states as its level of analysis because the both GATT and the WTO are state-centric and membership is limited to states to the exclusion of civil-society groups, International (or national) Non-Governmental Organizations or trans-national corporations.

This qualitative method has been selected because it is well suited to the examination of explanatory ‘how’ questions such as the one posed by this paper of how the treatment of the two disputes differed between the GATT and the WTO.¹ The comparative method is used as it is “regarded as a method of discovering empirical relationships among variables”² and is thus useful in establishing links (should there be any) between the differences in outcomes of the two case studies and whether the dispute was heard by GATT or the WTO.

By providing researchers with “tools with which to study complex phenomena within their context”³ the case study methodology facilitates analysis of why a decision was taken, how it was arrived at and what the consequences were.⁴ Furthermore, this approach is particularly helpful when the phenomenon being analysed (the treatment of marine-based Article XX exception disputes) and the context within which it occurs (international trade regime) are difficult to separate

¹ Robert K, Yin, *Case Study Research. Design and Methods*. 3rd ed. (Thousand Oaks: Sage Publications, 2003), p.6

² Arend Lijphart, ‘Comparative Politics and the Comparative Method’, *The American Political Science Review*, 65.3 (1971), 682-693 (p.683)

³ Pamela Baxter and Susan Jack, Qualitative Case Study Methodology: Study design and implementation for novice researchers, *The Qualitative Report*, 13.4(2008),544-559 (p.544)

⁴ Wilbur Schramm, *Notes on Case Studies of Instructional Media Projects* [online].(1971), p.5

and the analysis should also include the context itself.⁵ Thus one of the notable strengths of this methodology is the ability to explore and analyse in depth, whereas its drawback is a lack of breadth (of the type associated with studies of large samples – ‘*n*’).⁶

According to conventional wisdom amongst researchers one of the limitations of this methodology is that the outcome of the analysis cannot be used to generalise too widely⁷, if at all⁸, because it is based on too small a sample of original data (a very small ‘*n*’). Additionally, this methodology does not offer replicable results in the manner of a scientific experiment.⁹ These two limitations – not facilitating generalisation and not producing replicable outcomes – have been taken together to prove that the scientific ‘credentials’ of the case study methodology are ‘ambiguous’ at best.¹⁰ Yin, however, disputes this position contending that case studies, like experiments, are ‘generalizable’ to theoretical propositions and constitute a form of analytic generalisation even if the generalisation does not extend to those about populations, universal measurements or enumerate frequencies of the type generated by statistical generalisations.¹¹

Some social scientists have also proposed a hierarchy of research methods in which the case study methodology is only appropriate for the exploratory phase of research or investigation and not for the more ‘elevated’ uses of the descriptive or

⁵ Yin, *Case Study Research*, 5

⁶ Bent Flyvbjerg, Five Misunderstandings About Case-Study Research, *Qualitative Inquiry*, 12.2(2006), 219-245 (p.241)

⁷ Gina Wisker, *The Postgraduate Research Handbook*. 2nd ed. (Hampshire: Palgrave Macmillan, 2008) p.216

⁸ Lijphart, *Comparative Politics and the Comparative Method*, 691

⁹ Schramm, *Notes on Case Studies*, 10

¹⁰ Lijphart, op.cit.

¹¹ Yin, *Case Study Research*, 10

explanatory phases of research.¹² This hierarchical view though persisting, has been vigorously disputed¹³ in more recent literature on research methods. The case study methodology should not be confused with standard qualitative research. Whilst frequently used in conjunction with it, case studies can incorporate both qualitative and quantitative research methods.¹⁴

Cognisant of both the debate on the strengths and limitations of the case study methodology this paper has adopted it in order to describe the two disputes and attempt an explanatory analysis of the differences and similarities between the two dispute decisions. The decision is also borne of an understanding that meticulously executed case studies may well provide exemplars in a discipline, without which a discipline becomes less effective in uncovering and elucidating ideas and concepts.¹⁵

Case Study Selection

The usefulness and validity of the comparative methodology is performance dependant on the cases which are selected for comparison. Two key problems may surface in the use of comparative methodology – that of having too many variables and of having too few cases.¹⁶ One method which addresses the latter problem is to focus the analysis on ‘comparable’ cases. Comparable in this specific instance means that cases have many characteristics which are similar and which can therefore be treated as ‘constants’, yet have one/some characteristics sufficiently

¹² Yin, *Case Study Research*, 3

¹³ Ibid and Flyvbjerg, *Five Misunderstandings*, 219-245

¹⁴ Yin, *Case Study Research*, 15-16

¹⁵ Thomas, S. Kuhn, ‘What are scientific revolutions?’, in *The probabilistic revolution, Vol. 1: Ideas in history*, ed. by Kruger, Daston, & Heidelberger (Cambridge, MA: MIT Press, 1987), pp.7-22

¹⁶ Lijphart, *Comparative Politics and the Comparative Method*, 685

different which one can compare and relate to each other (across cases).¹⁷ Such comparable cases allow the researcher to establish some control over many variables whilst isolating one/a few in order to establish whether relationships exist between the variables that differ – this may also allow the discovery of partial generalizations in a field of inquiry.¹⁸

It is with this in mind that these two marine-based disputes: *The United States - Restrictions on Imports of Tuna (DS21/R)* and *United States – Import Prohibition of Certain Shrimp and Shrimp Products (DS58)*, have been selected as the case studies. Firstly, the similarities in the details ('variables') of the disputes make them ideal for comparison. The disputes both arose out of attempts by one state to take environmentally protective actions which other states then claimed infringed their multilateral trading regime 'rights'. The respondent in both disputes used as their main defence that their actions were permissible under Articles (b) and (g) of the General Exceptions of GATT (1947 & 1994). Both disputes concern protective measures ostensibly applied to protect marine 'resources' which were not the main object of the trade¹⁹ – dolphins are not harvested for trade, the tuna are & shrimp are the intended harvest, not sea turtles - and not within the disputants' jurisdiction i.e. pelagic marine animals. These case studies straddle GATT (1947) and the creation of the WTO in 1995 (GATT 1994) and as they occurred relatively close in time (1991 and 1998) a comparison of these disputes goes some way in isolating regime change as a variable because other potential variables (e.g. large-scale

¹⁷ Lijphart, *Comparative Politics and the Comparative Method*, 687

¹⁸ Ibid

¹⁹ Article XX exceptions have been invoked in other marine cases like the 1998 "Canada: Measures Affecting Exports of Unprocessed Herring and Salmon", however the resource for which 'protection' was sought was that which would be harvested and traded – herring & salmon

changes in public conscience and multiple government turnovers) are less likely and therefore less significant.

These dispute case studies differ in that the disputes were heard by different dispute resolution mechanisms – one by an ad-hoc GATT panel and one the legalistic mechanism set up by the Dispute Settlement Understanding of the WTO. The similarities can thus be ‘controlled’ to enable an analysis of the differences.

In addition, these two case studies were chosen because marine disputes are analytically interesting as they concern matters of the ‘global commons’ – an area which is thematically important to the understanding of how and why states do or do not cooperate; this will be discussed more fully later in this chapter. Furthermore, the decisions in both these disputes were highly contentious when they were first published and served to bring the trade-environment debate into sharper focus for the public – people in turtle suits frequently make appearances at anti-globalisation demonstrations²⁰ - and academic and policy-making communities.

These two disputes are *sui generis* in the combination of the factors outlined above which makes them ideal for a comparative case study which may shed some light on the differences between the treatment of environmental protection mechanisms under the GATT and WTO. The disputes are also representative of larger issues and it is the aim of this paper to forward some tentative conclusions in this regard in the final chapter.

²⁰ See Appendix 7

Regimes

This analysis of how the treatment of marine-based Article XX disputes has differed between the GATT and the WTO will proceed with a few brief historical comments in order to contextualise the genesis of the GATT and the need for cooperation. Having identified the need for cooperation, this paper will discuss the theoretical foundations of regime theory – including major criticisms – and distinguish regimes from international organizations, before undertaking an analysis of GATT as a regime. Most importantly, given that the case studies to follow concern disputes, the chapter will continue with a comparison of dispute resolution mechanisms of GATT and WTO and then apply all of this information to inform the discussion of the genesis of trade disputes and whether (and why) the environmental dimension complicates trade disputes.

Background: The Genesis of GATT

Prior to World War One international trading relations consisted of a web of bilateral trade agreements that were neither centrally regulated nor the result of multilateral cooperation. Countries were free to set their own tariff codes providing these adhered to the most favoured nation concept.²¹ Trade flourished during this period as it was subject to very few non-tariff barriers (NTBs, e.g. quantitative restrictions or exchange controls) - whilst trade barriers consisted almost entirely of

²¹ Caplin A. & Krishna, K., 'Tariffs and the Most-Favoured-Nation Clause; A game-theoretic approach', in *The WTO's Core Rules and Disciplines, Volume I*. ed. by Kym Anderson and Bernard Hoekman (Cheltenham: Edward Elgar, 2006), 329-352 (p.329). Meaning to extend to a trading partner a tariff rate on the same commodity at least as low as that extended to any other trading partner. This concept goes back as far as the 13th Century when Emperor Fredrick II extended the same trading rates to Marseilles as he had previously extended to Genoa and Pisa.

tariffs.²² The outbreak of World War One in 1914 ended the consensus of the network system and brought with it an increase in tariffs and a range of non-tariff barriers that become entrenched in the interactions of states. With no strong institution or political will to enforce the rolling back of these changes, and the increase of protectionism and ‘beggar-thy-neighbour’ policies during the Great Depression of the 1930s, the inter-war period saw a dramatic slump in international trade and the world economy in general.²³ This situation can be modelled as the classic prisoner’s dilemma game: unfettered trade provides benefits for all states, but each state’s optimal strategy actually involves cheating (unilaterally erecting trade barriers of some kind for instance). This benefit only accrues to one state for as long as the other states don’t do the same thing; but since the cheating option is the optimal strategy for each one, the moment they do cheat the collective outcome is decidedly sub-optimal²⁴ - this was the lesson learnt from the inter-war years.

Cognisant of the costs of the collective economic failure of the inter-war period Allied states – notably the United States (US) and United Kingdom (UK) - began negotiating during the later stages of WWII to bring about an agreement to facilitate the liberalisation of trade. Eventually over 50 states participated in the negotiations which culminated in the conclusion of the Havana Charter in 1947 to establish the International Trade Organisation (ITO) as a specialised agency of the

²² Douglas, A. Irwin, ‘The GATT in Historical Perspective’, *The American Economic Review*, 85.2 (May, 1995), 323-328 (p.323)

²³ *Ibid*, 323-4

²⁴ Arthur Stein, *Why Nations Cooperate*, (Ithaca: Cornell University Press, 1990) p.35-6

United Agency.²⁵ Had the US Congress ratified the Charter and the ITO come into fruition, it would have completed the triumvirate of Bretton Woods institutions intended to place the world economy on a sound footing, taking its place next to the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD- commonly termed the World Bank). These three institutions were to be the foundation of post World War Two reconstruction and ultimately intended to prevent a recurrence of war through the promotion of economic ties and free trade between states.²⁶ The collapse of the ITO lay in the broadness of its proposed mandate - which included restrictive government practises, intergovernmental commodity agreements and economic reconstruction and development²⁷ - and the long list of exceptions to it that the multilateral negotiations produced. In trying to pacify both liberalised-trade and protectionist interests, it satisfied neither.²⁸

The General Agreement on Tariffs and Trade was originally a relatively minor part of the commercial policy chapter of the Havana Charter and was negotiated in 1947 as a multilateral treaty focussed solely on tariff reduction on goods traded between signatories to serve as an interim arrangement underpinning multilateral cooperation until the ITO was established.²⁹ The objective, contained in the preamble, was the elimination of discrimination in trade between contracting

²⁵ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

²⁶ Amrita Narlikar, *The World Trade Organization: A very short introduction*, (Oxford: Oxford University Press, 2005), p.10

²⁷ Jock A. Finlayson & Mark W. Zacher, 'The GATT and the regulation of Trade Barriers: regime dynamics and functions' in *International Organization*, 35.4 (1981), 561-602 (p.561)

²⁸ Narlikar, *World Trade Organization*, 12-14

²⁹ Irwin, *The GATT in Historical Perspective*, 325 and Narlikar, *The World Trade Organization*, 15

parties.³⁰ The interim Agreement that came into force in January 1948 was to provide the basis for the international trading system for the next 47 years – in so doing it was effectively transformed from a temporary agreement into a normative umbrella under which states negotiated tariff reductions and multilateral trade policy.³¹

This brief history is intended to contextualise the realisation by powerful states – like the US and UK - that cooperation with others was the key to building a regime which would facilitate outcomes which they couldn't achieve unilaterally. Whether these states followed this path to overcome obstacles to collaboration (liberal institutionalist view) or to use their power capabilities on a greater audience of states in order to influence the nature and distribution of costs and benefits of the regime (realist view) is a causal question beyond the scope of this paper. However, common assumptions made by these opposing schools of thought in international relations are a useful introduction to a more theoretical understanding of regime formation. Both schools believe that states operate in an anarchic (without ruler) system as rational and unitary actors; states, therefore, are responsible for establishing regimes; furthermore, regimes are established through cooperation and to promote international order.³²

³⁰ Janet McDonald, 'Greening the GATT: Harmonising Free Trade and Environmental Protection in the New World Order', *Environmental Law Journal*, 23,397 (1993), 397-474 (p.403)

³¹ Finlayson & Zacher, *GATT and the regulation of Trade Barriers*, 562

³² Richard Little, 'International Regimes' in *The Globalization of World Politics*, 4th edn. ed. by John Baylis, Steve Smith & Patricia Owens, (Oxford: Oxford University Press, 2008), pp.298-9

Regimes: a definition

This section will provide a brief discussion of regime theory as it pertains to why states cooperate (or not). It will then discuss the critiques of regime theory by reviewing a well-known article by Susan Strange, before going on to discuss how regimes differ from international organizations.

Regime Theory, or Regime Analysis as it is sometimes referred to, is a theory of international politics, which, like many others has attempted to construct a comprehensible and simplified 'version' of reality or a part thereof in order to explain, describe and hypothesize about that reality.³³ Regime theory's genesis was in the 1980s in the United States (US) and fundamentally posits that regimes are intervening variables between causal factors (like power, interests and values) and outcomes and behaviours.³⁴ Thus regime theory is used in this paper to analyse what effect the existence of the regime – GATT – had on the dispute between the US and Mexico, and how this differed from the dispute (between the US and Malaysia, India, Pakistan and Thailand) in a context where the regime had been supplemented by an international organization – the WTO.

Over time governments have created or accepted procedures and rules to govern specific activities where interdependence is unavoidable, necessary or beneficial. These governing arrangements are international regimes.³⁵ This paper will use Stephen Krasner's now well established definition of 'regimes' as being

³³ A. LeRoy Bennett, *International Organisations: Principles and Issues* (New Jersey: Prentice Hall, 1991) p.15

³⁴ Ibid, 20

³⁵ Robert Keohane and Joseph Nye, *Power and Interdependence. World Politics in Transition*. (Boston: Little Brown and Co., 1977) p 5.

*...a set of implicit or explicit principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.*³⁶

Using these four characteristics the paper will sketch the outlines of the GATT and the WTO. First, however, it is worth noting that although some writers like Finlayson and Zacher consider GATT to be only part of the broader post-WWII trading regime because it was so narrow in scope,³⁷ other writers consider it to be a regime and only differentiate between the GATT and the WTO in terms of the level of institutionalisation and convergence of expectations.³⁸ Where there are no formal agreements or converging expectations, there is no regime; as agreements are reached and expectations converge, a regime is the outcome. Thus a regime can be associated with merely a highly formalised agreement - like the GATT – and also with the creation of an international organization like the WTO.

An in-depth discussion and debate of the merits of the different analytic standpoints on the formation of regimes is beyond the scope of this question, and thus this paper admittedly takes a liberal institutionalist position rather than a realist/structural or modified structural position. The liberal institutionalist position avers that regimes are a fundamental and pervasive characteristic of an international system in which continued patterned behaviour must transmute into a

³⁶ Krasner, Stephen D., 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36.2 (Spring 1982), 185-205 (p.185-6)

³⁷ Finlayson & Zacher, *GATT and the regulation of Trade Barriers*, 562

³⁸ Little, *International Regimes*, 299-300

regime in order to be sustained.³⁹ In common with most theories, however, Regime Theory is contested, and this paper will now consider the critique thereof by Susan Strange, one of the most outspoken critics.

Susan Strange vs. Regime Theory

Susan Strange has five criticisms of regime analysis (as she terms it). Her first is that it represents yet another 'academic fad' which in the long term would contribute little to knowledge, but which in the short-term diverts young scientists from other, presumably more worthwhile, academic pursuits.⁴⁰ Furthermore, she claims it is a product of the historical moment (the Oil shocks, Watergate, the perceived 'decline' of American hegemony, etc) in which US academics found themselves at the end of the 1970s and early 1980s.⁴¹ She contends that as a theory it is both 'woolly' and imprecise being stretched in meaning until it is rendered meaningless.⁴² She also finds the use of the term 'regime' problematic because she claims it infers a kind of disciplined organization, a central locus of authority and regularity of behaviour; all of which are present in regimes at a state level, but absent in regimes at international level.⁴³ Next she points to what she interprets as value-bias claiming that regime analysts assume things that should not be assumed, for instance that the desire for order is a universal impetus.⁴⁴ Her fourth criticism is that "it distorts by overemphasizing the static and underemphasizing the dynamic

³⁹ Krasner, *Structural causes and regime consequences*, 1

⁴⁰ Susan Strange, 'Cave! hic dragones: a critique of regime analysis', *International Organization* 36, 2 (1982), 479-496 (p.480-1)

⁴¹ Strange, *Critique of regime analysis*, 481-482

⁴² Strange, *Critique of regime analysis*, 485

⁴³ Strange, *Critique of regime analysis*, 486-487

⁴⁴ Strange, *Critique of regime analysis*, 487-488

element of change in world politics”⁴⁵ because for instance, it doesn’t take into account, and isn’t able to deal with, the key drivers of technology and markets and the effects these have on institutions.⁴⁶ Lastly Strange criticises what she calls the narrowness induced by the state-centric nature of regime analysis as having the potential to blind academics to those aspects of international relations that lie outside the realm of regimes.⁴⁷

Taking into account these criticisms, this paper has nevertheless opted to use regime theory as the theoretical basis for the following reasons. Regime Theory offers a framework within in which to analyse macro level interactions between states. Furthermore, the use of Regime Theory enables this paper to examine how much the level of institutionalism influences the output of the regime itself. This addresses the second of the aforementioned underlying interests: the similarities and differences of GATT and the WTO.

Far from just being an academic ‘fad’ which arose from a particular historical moment, Regime Theory is now an established tool for analysing rule-governed interactions between states in specific issue-areas. It is particularly prevalent in the area of global environmental governance (climate change is an example) and within the broader debate of the trade-environment nexus where the discussion

⁴⁵ Strange, *Critique of regime analysis*, 479

⁴⁶ Strange, *Critique of regime analysis*, 490

⁴⁷ Strange, *Critique of regime analysis*, 491-493

frequently centres on the overlap of the international trade regime with an (admittedly less well defined and institutionalized) environmental regime.⁴⁸

Given the relative novelty (in 1982) of Regime Theory as a subset in the study of international relations, Strange's criticism concerning the 'wooliness' and imprecision of the theory, seems rather harsh, though not (at the time) unfounded. In the nearly three decades since, Regime Theory has been honed with use and application by academics and theorists as is usual with any new conceptual theory.

This paper acknowledges Susan Strange's criticism that Regime Theory potentially facilitates academic emphasis on regimes to the exclusion of other aspects of international relations (states acting alone, or other types of trans-national authorities) or of areas in which states interact but no regime exists. However, as the question posed by the paper focuses on the very narrowly delineated arena of the interactions (in the form of disputes) between states within a regime, this focus does not pose a problem for this paper.

International Organization: a brief definition

As this paper has just demonstrated above classifying concepts in politics is an academic exercise fraught with difficulty as these and the terms used are frequently highly contested. Even a concept as seemingly simple as 'the state' has differing definitions depending on who is wielding the term and can variously mean a legal

⁴⁸ A very recent example is: Fariborz Zelli, *Regime Conflicts in Global Environmental Governance. A framework for Analysis*, Global Governance Working Paper No 36. (Amsterdam: The Global Governance Project, 2008)

abstraction, political community or a government.⁴⁹ Cognisant of these challenges, this paper must perforce, however, adopt definitions in order to proceed with the analysis.

Most broadly defined an international organization (IO) is any institution with formal rules and procedures and a membership of three or more states.⁵⁰ More specifically the WTO could be termed an Intergovernmental Organization (IGO) which is a type of IO established by treaty, in which full legal membership is only open to states, with decision-making authority invested in government representatives and which takes the form of consent and cooperation, has both a broadly representative consultative or negotiating forum and a permanent secretariat (bureaucracy) ensuring the continuous management of the organization.⁵¹ Sessions or sittings of such organizations provide manifest structures for multilateral political communication.⁵² The WTO surpasses in scope (about 25 000 pages which includes a preamble, 16 articles and 4 annexes incorporating 29 agreements – one of which is GATT 1994) and purpose any previous international set of rules for governance of major transactions.⁵³ Furthermore the WTO has a formal legal personality as asserted in Articles I and VIII(1) of the 'Agreement Establishing The World Trade Organization' and is invested, like all bureaucracies according to Max Weber, with a rational-legal character which imbues it with a

⁴⁹ Peter Willetts, 'Transnational actors and international organizations in global politics', in *The Globalisation of World Politics*, 2nd edn., ed. by J. B. Baylis and S. Smith, (Oxford: Oxford University Press, 2001) 356-383 (p.361)

⁵⁰ Ibid, p.376

⁵¹ Ibid and A. LeRoy Bennett, *International Organisations: Principles and Issues* (New Jersey: Prentice Hall, 1991) p.2-3

⁵² Willetts, *Transnational actors*, 375

⁵³ Robert, O. Keohane, 'International Relations, Old and New', in *A New Handbook of Political Science*, ed. by Goodin, R., E & Hans-Dieter Klingemann (Oxford: OUP, 1996), 462-478 (p.467)

form of authority independent of the delegated authority conferred by the constituent states.⁵⁴

In contrast the GATT was little more than a negotiating forum held together over a number of years by an agreement signed by contracting parties. The provisional, non-organisational structure of the GATT involved minimal costs of participation, which may have helped to extend the life span of the 'provisional' regime.⁵⁵ Any collective action was undertaken by the CONTRACTING PARTIES,⁵⁶ which were distinguishable from members of an organisation. Analyst Gilbert Winham described the GATT as a "formally-contracted, rule oriented, non-organizational form of cooperation in international affairs"⁵⁷ which is in contrast to the description of the WTO as the "the common institutional framework" found in Article II(1) of the *'Agreement Establishing The World Trade Organization'*.

With the definitions of regimes and organizations for the purposes of this paper now delineated this paper will now apply the definition of a regime to the GATT in more detail in order to set the theoretical foundation for the GATT case study in the following chapter. Thereafter the paper will briefly discuss the different dispute resolution mechanisms of GATT and the WTO in order to set up the comparative analysis which will take place in the final chapter of the paper.

⁵⁴ Articles VIII(2) and (3) of the *Agreement Establishing The World Trade Organization* and Max Weber in Barnett, Michael N. and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations', *International Organization*, 53.4 (1999), 699-732 (p.707)

⁵⁵ Narlikar, *World Trade Organisation*, 17

⁵⁶ The naming protocol is that signatories to the GATT are termed, "contracting parties", whilst the signatories as a collective are referred to as CONTRACTING PARTIES (capital letters intended).

⁵⁷ Gilbert R. Winham. 'The World Trade Organisation: Institution-Building in the Multilateral Trade System', *The World Economy*, 21. 3(1998), 349-368, (p.359)

Application: The GATT as regime: principles, norms, rules and decision-making procedures.

Principle: trade makes us wealthier and helps us get along.

The guiding principle that underpins both the GATT and the WTO is that economic liberalism and expansion of free trade produce global welfare benefits – this is its *raison d'être*.⁵⁸ This is a theoretical statement about how the world works, and is clearly elucidated in both the preamble to the GATT 1947⁵⁹ and again in the Marrakesh Agreement⁶⁰ establishing the WTO. This guiding principle is a contentious⁶¹ concept of long-standing most commonly associated with the liberal school of thought which posits that trade promotes peace. Cordell Hull, the US Secretary of State between 1933-1944, encapsulated this idea perfectly in this statement, “I reasoned that if we could get a freer flow of trade ... so that ... the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance of lasting peace.”⁶² Karl W. Deutsch proposed the idea that trade is a form of cultural exchange that increases a sense of community and interaction between states

⁵⁸ Finlayson & Zacher. *GATT and the regulation of Trade Barriers*, 601

⁵⁹ “[The signatories] 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, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce...”
General Agreement on Tariffs and Trade (GATT 1947). 1986. Geneva.

⁶⁰ Point 2 of the Marrakesh Declaration states: “Ministers affirm that the establishment of the World Trade Organization (WTO) ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples.”

⁶¹ Both Realists and Marxists contend that trade is just as likely to cause friction as peace.

⁶² Cited in R.N. Gardner, 1956. *Sterling Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of Multilateral Trade*, p.9

which fosters the peaceful resolution of disputes.⁶³ The liberal conception of trade and wealth as a variable-sum interaction has become the dominant idea of the latter half of the 20th Century; this means that states' trade and wealth are positively correlated and improvement for one means improvement for many, possibly all.⁶⁴

Norms: Non-discrimination and reciprocity

The norm of non-discrimination is the lynchpin which allows multilateralism to function in the trading regimes of both GATT and the WTO.⁶⁵ In the early years of GATT it was regarded as the crucial norm; indeed unanimous consent was required to change this norm. In the years since however, it has been gradually eroded by regional trade arrangements – which are discriminatory to those not within the region – the growth of Voluntary Export Restraints, and by preferential trade agreements between developed countries and Less Developed Countries (LDCs).⁶⁶ The non-discrimination norm is necessary to create a trading environment in which goods can compete on a 'level playing field' unimpeded by preferential treatment.⁶⁷

Reciprocity is an essential standard of behaviour if competing states are to achieve any sort of cooperation;⁶⁸ equally it is an important concept that has been

⁶³ Barbieri, Katherine and Gerald Schneider, 'Globalization and Peace: Assessing New Directions in the Study of Trade and Conflict', *Journal of Peace Research, Special Issue on Trade and Conflict* 36.4(Jul. 1999), 387-404 (p.388-9)

⁶⁴ Stein, *Why Nations Cooperate*, 120

⁶⁵ Narlikar, *The World Trade Organization*, 28

⁶⁶ Finlayson & Zacher. *GATT and the regulation of Trade Barriers*, 566-569

⁶⁷ Matthew Hunter Hurlock. 'The GATT, U. S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision' in *Columbia Law Review*, 92(8), p.2101

⁶⁸ Robert O. Keohane, 'Reciprocity in International Relations', *International Organization*, (Winter 1986), p.1

the cornerstone of international trade for over 150 years.⁶⁹ In 1986 Keohane posited that the GATT negotiators had built an intermediate, hybrid form of reciprocity. Built on what he termed 'diffuse reciprocity' in the form of the general MFN rule as discussed below, this hybrid incorporated the 'primary supplier rule' to prevent any 'free-riding' which might be facilitated by the non-discrimination norm. The 'primary supplier rule' required all states supplying more than a negotiated percentage of a specific product to furnish compensation in the event that one made concessions;⁷⁰ in this way only very small suppliers could 'free-ride'. The reciprocity rule is also deemed to be politically necessary for politicians to be able to make concessions palatable in domestic politics.⁷¹ Whilst liberalisation of trade may bring benefits to the domestic economy as a whole, certain industries may be disadvantaged by the changes wrought and thus bring political pressure to bear on decision makers not to go the liberalisation route. Reciprocal liberalisation counterbalances these pressures in that it allows politicians to make promises of visible export gains to other industries.⁷²

Rules: Most Favoured Nation and National Treatment

The rules which govern the GATT include the concepts of Most Favoured Nation (MFN) and National Treatment. The MFN rule puts the non-discrimination norm into practice in that it dictates that in the normal course of trade countries may not

⁶⁹ Keohane, *Reciprocity in International Relations*, 5

⁷⁰ Keohane, *Reciprocity in International Relations*, 25-26

⁷¹ Narlikar, *The World Trade Organization*, 29

⁷² Fredrick Roessler, 'The Scope, Limits and Function of the GATT Legal System' in *The WTO's Core Rules and Disciplines, Volume I*. ed. by Kym Anderson and Bernard Hoekman (Cheltenham: Edward Elgar, 2006), 317-328 (p.326)

discriminate between or favour any trading partners over any others⁷³ and any privileges extended to one state must be extended to all. This rule is enshrined in Article I(1) of the GATT 1947⁷⁴ and guarantees that like products of one state with MFN status should receive the same trading treatment as another state with MFN status; under the GATT all members have MFN status. The term is somewhat misleading as under GATT all member states are technically 'most favoured', but it is derived from the historical use of the concept in bi-lateral trade instruments to discriminate against other non-signatory states. The reciprocity norm is also built into the MFN rule as delineated above: any favourable terms conferred on a state create a reciprocal compensatory obligation.⁷⁵

These two norms also underpin the rule of national treatment expressed in GATT Article III.⁷⁶ This rule dictates that products from a foreign country must be treated (subject to regulations or taxes) no differently to domestically produced like products.⁷⁷ It is this emphasis on 'like-products' that is the crux of the problem in the case studies as this paper will show.

There are of course, some exceptions to both norms, but these are few and have been explicitly outlined. Until the Application of Sanitary and Phytosanitary

⁷³ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

⁷⁴ "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

⁷⁵ Keohane, *Reciprocity in International Relations*, 4

⁷⁶ GATT 1947, Art.III (4) 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."

⁷⁷ Narlikar, *The World Trade Organization*, 28

(SPS) Measures and Technical Barriers to Trade (TBT) agreements were concluded during the Uruguay Round of the GATT, the only exceptions to the founding principles of the GATT were the narrowly delineated Article XX exceptions. This meant that only in very specific instances - and these also subject to the overriding conditions of the article's chapeau - could states impose regulatory measures on imported goods without violating the non-discrimination and reciprocity norms of the regime.

Fundamentally, the two disputes analysed in this paper arose from a departure from the non-discrimination and national treatment rules by the US (the defendant in both cases); departures which the US posited were permissible under 2 clauses of the General Exceptions (Article XX). Whilst these exceptions could be interpreted to allow protection or regulatory measures to be taken pursuant to environmental protection, they don't explicitly mention the environment.

Decision making process: all say 'aye'...

The design of both the consultation process and dispute-resolution mechanisms has important implications in terms of whether and which problems are (or are not) escalated or resolved in a timely and effective manner.⁷⁸ Although technically under GATT each contracting party had one vote, in practice the real bargaining took place in so-called 'green-room' meetings convened, by invitation only, between principle suppliers and consumers (logically the larger states). Decisions were reached through the consensus of parties present and then extended as *fait accompli* to the

⁷⁸ Owen Greene, 'Environmental Regimes' in *The Environment and International Relations* ed. by Vogler, J. and Imber, M.F., (London: Routledge, 1996), p.201

other GATT contracting parties⁷⁹ - large delegations from large states therefore wielded more de facto votes than the one-contracting-party-one-vote system would imply.

So much for cooperation... why then do trade disputes arise?

Having a clearer picture of why states cooperate, this paper will now focus on why disputes arise between trading partners in a regime. In the most generic terms disputes arise when one state takes action which erodes the gains another state accrues from being part of the regime,⁸⁰ thus raising the latter's costs of, or impeding the flow of benefits from, participating in the regime.

Disputes also arise from competing claims for the importance of national interests and sometimes from interest groups within a state, because even though states act as unitary actors - in as much as they might have a single 'trade policy' - they are subject to competing interest groups domestically. The increasing interdependence of states has meant that the delineation between domestic and international politics is increasingly blurred: domestic issues spill over into international politics and a states' foreign policy is frequently informed by, and has an influence on, the domestic arena. The influence of domestic law and civil society on government trade policy is very clear in both disputes as the US government was forced into taking action against a trade partner by the actions of domestic interest groups and its own laws. Thus governments continuously negotiate a fine line

⁷⁹ Narlikar, *The World Trade Organization*, 17

⁸⁰ Narlikar, *The World Trade Organization*, 90

between accruing the benefits of belonging to a regime and ensuring the costs of compliance don't fall too heavily on domestically important groups.⁸¹

Dispute resolution under GATT

GATT's early status as a limited trade agreement was reflected in the ad-hoc nature of the original diplomatic system of dispute resolution; this evolved over time into a non-binding rule-orientated arbitration scheme.⁸² In the early years of the GATT the 'contracting parties' (all signatory states) either handled disputes jointly or set up ad-hoc groups of diplomatic representatives to investigate complaints. From 1995 the GATT Secretariat established independent panels of three to five experts to arbitrate disputes. Although this meant the dispute resolution mechanism gradually became more legalistic it was still formally non-binding, lacking a formal legal personality and the authority to authorise collective action against individual states.⁸³

In GATT parlance potential disputes would arise whenever a state claimed another had acted in such a manner as to have caused the "nullification and impairment" of benefits accrued under the Treaty. Article 23 of the GATT then authorised the aggrieved state to suspend its GATT obligations to the infringing state until such time as the situation had been rectified or a GATT panel had made some recommendation. The consensual dispute resolution mechanism of the GATT,

⁸¹ Stephan Haggard and Beth A. Simmons, 'Theories of International regimes' in *International Organization* 41.3(1987), 491-517 (p.516)

⁸² G., Richard Shell. 1995. 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' in *Duke Law Journal*, 44.5(1995), 829-927 (p.840-1)

⁸³ Narlikar, *The World Trade Organization*, 16 and *Ibid*, p.841

however, allowed the losing party in a dispute to block the adoption of the dispute panel's findings thereby avoiding being subject to compensatory trade measures.⁸⁴

The Dispute Settlement Understanding of the WTO

Annex 2 of the Marrakesh Agreement is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This agreement establishes the procedures with which trade disputes between members are handled by the Dispute Settlement Body (DSB).

The DSU is considered by many analysts to be the major achievement of the Uruguay Round.⁸⁵ Over 300 disputes were brought to the WTO in the period between its inception in 1995 and 2006.⁸⁶ The function of the initial panel – which is judicial in nature – is to make recommendations in an interim report to the DSB;⁸⁷ 'negative consensus' prevails in that the findings of the panel are automatically adopted by the DSB unless a party to the dispute objects within a 60 day period of the circulation of the report to WTO members or the DSB decides by consensus not to adopt the panel's findings.⁸⁸ If a party to the dispute appeals the panel report is not adopted until the appeal is heard. Findings of the Appellate Body are also adopted by negative consensus within 30 days of the circulation of the Appellate Body report.⁸⁹ This means that in contrast to the uncertainty of the more ad-hoc GATT procedures through which a finding could eventually be effectively vetoed by

⁸⁴ Richard J. McLaughlin, 'Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?' in *International Environmental Law Review*, 10.29(1997), 29-96 (p.30)

⁸⁵ Narlikar, *The World Trade Organization*, 85

⁸⁶ WTO, *Ten Benefits of the WTO Trading System*, 3

⁸⁷ Gillian Triggs, 'Dispute Settlement under the World Trade Organization: Implications for Developing Countries', *Bond Law Review*, 15.2(2003), 44-70 (p.48)

⁸⁸ WTO, *Marrakesh Agreement*, Annex 2, Article 16.4

⁸⁹ Supra. Annex 2, Article 17, p.14. [http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm]

the 'defendant' state, the WTO's DSU facilitates a regularised and largely automatic dispute resolution mechanism which brings a crucial element of certainty to the trading regime.

Conclusion

In this paper GATT is understood to be a regime because it conforms to the four characteristics of Krasner's definition, namely it has principles, norms, rules, and decision making practices; all of which have been elaborated upon above. The WTO has elements which conform to the definition which is not unexpected given that it is underpinned by the GATT in its 1994 form. In addition, however, the WTO is an international organization with a structured legal 'personality', bureaucracy and a formalised dispute resolution mechanism.

The next chapter is a case study analysis of the two so-called Tuna-Dolphin disputes - the first between Mexico and the US and the second between the EEC (and the Netherlands) and the US - and highlights the application of the preceding discussion to the question of the nature of the treatment of Article XX exception disputes under the auspices of the GATT.

Chapter 3: The GATT dispute - DS21/R (Tuna-Dolphin)

This chapter will analyse the Tuna-Dolphin cases to ascertain how marine-based Art. XX exception disputes were dealt with under the GATT trading regime. In order to do so this chapter will firstly look at how the dispute arose, the disputants and the significance thereof (if any) and each disputant's specific claims. The discussion of the GATT adjudication panels' rulings will include a brief description of the dispute resolution mechanism. This paper will comment briefly on how the rulings have been interpreted by academic writers and civil society and then examine whether or how the ruling has impacted upon GATT jurisprudence in the final chapter. As the analysis proceeds the insights from regime theory will be applied.

Disputants

Complainant: Mexico
Respondent: United States

Timeline of Dispute

Panel requested:
25 January 1991.

Panel established:
6 February 1991.

Panel composed:
12 March 1991.

Panel Report circulated: 3
September 1991.

Panel Report not adopted.

Background

In essence the Tuna-Dolphin case is about the intersection of the environmental problem of "bycatch" and the politically problematic exercise of unilateralism within the regime. Bycatch is the rather innocuous term for the many unintended and commercially unviable marine animals caught through unselective fishing methods – like using purse seine nets - in addition to the targeted, commercially viable fish. It is of particular environmental concern as it has a marked effect on the marine ecosystem, is unregulated and does not count towards landing quotas enforced to

protect fisheries.¹ In the Tuna-Dolphin cases up to 5 species of dolphin are the bycatch of Tuna harvesting because in the Eastern Tropical Pacific (ETP) Ocean, herds of dolphins swim above schools of tuna; a characteristic which is unique to this ocean. This has been exploited by fishermen for decades as an indicator of tuna schools swimming underneath the surface which can then be encircled with nets up to 1 mile/1.7km long and several hundred feet/meters deep.²

Dolphins (as air-breathing mammals) are particularly vulnerable to the use of purse-seine net method of tuna harvesting as they drown when the net is drawn together through the pursing rings at the bottom and dragged under water in the process of being hauled onto the boat (called a purse seiner).³ They may also be killed in the winching mechanism, or injured trying to escape entanglement leaving them weakened and vulnerable to subsequent predators.⁴ In the 1970s it has been estimated that approximately 400 000 dolphins were killed annually⁵ which incited public opinion and prompted action by the United States Congress in the form of the Marine Mammal Protection Act (MMPA) promulgated in 1972. The MMPA was amended twice in the 1980s in response to the fishing industry's attempts to evade the new regulations - for instance, many US ships simply re-flagged in order to avoid the MMPA restrictions until the amendment requiring foreign fleets to have comparable legislation to that of the USA's was enacted.⁶

¹ Callum Roberts, *The Unnatural History of the Sea*, (London: Octopus Publishing, 2007) p.348

² Eric Christensen and Samantha Geffin, 'GATT sets its net on environmental regulation' in *Inter-American Law Review*. 23.2 (1991-2) 569-612 (note 5 on p.571)

³ <http://www.fao.org/fishery/geartype/249> [Accessed on 22/01/2009]

⁴ Christensen and Geffin, *GATT sets its net*, 570-2

⁵ Stephen J. Porter, 'The Tuna/Dolphin Controversy: Can the GATT become Environment-Friendly?', *Georgetown International Environmental Law Review*, 1992-1993(5), 91-116 (p.92)

⁶ Christensen and Geffin, *GATT sets its net*, 573

The Marine Mammal Protection Act's initial goal (it was made less stringent in later amendments due to pressure from the US tuna industry) was to reduce, as close to zero as possible, death or injury to marine mammals arising from fishing. Furthermore it mandated that there would be a moratorium on the incidental 'taking'⁷ of marine mammals subject to exceptions for which permits would be required.⁸ The MMPA was hailed as a foundation of US environmental protection legislation and specifically employed trade measures to promote conservation as a legislative approach.⁹

How did the dispute arise?

In 1990 a San Francisco-based environment group, the Earth Island Institute, filed suit against the US Government because it sought to have the import ban provisions of the MMPA upheld. Eventually the US Government was ordered by the Federal Court to uphold the provisions of the MMPA by implementing the mandatory ban on imported tuna from countries which would/could not certify that they had a dolphin-kill ratio comparably low to that of the US fishing fleets.¹⁰ In response to the Federal Court ruling the USA unilaterally imposed embargoes (trade-restrictive measures) on several trading partners, including Mexico, which harvested yellowfin tuna using purse seine nets and whose commercial fishermen had a dolphin kill ratio more than 1.25% higher than that of US fishermen.¹¹

⁷ "Taking" is MMPA terminology for attempting to/harass, hunt, capture or kill

⁸ Porter, *The Tuna/Dolphin Controversy*, 93-4

⁹ Thomas, E. Skilton, 'GATT and the Environment in Conflict', *Cornell International Law Journal*, 26 (1993), 455-494 (p.455)

¹⁰ Porter, *The Tuna/Dolphin Controversy*, 96-7 & Skilton, *GATT and the Environment in Conflict*, 455

¹¹ Esty, *Greening the GATT*, 268 & Brack, *Balancing Trade & Environment*, 501

In response to the embargo and the prospect of losing as large market as that of the USA, Panama and Ecuador successfully managed to lower their fleets' dolphin-kill ratio by banning the setting of purse seine nets on herds of dolphins. Mexico, Venezuela and Vanuatu did not agree to comply with US standards and the embargo of their products continued.¹² In accordance with GATT dispute resolution procedures Mexico requested the required 60 days of consultations with the USA, and when these weren't successful in getting the USA to lift the embargo, requested in February 1991 that an adjudication panel be convened according to the dispute resolution procedures of GATT.¹³ The Panel report ruling on the dispute is formally referred to as, "United States - Restrictions on Imports of Tuna (DS21/R)", but it is commonly known as the Tuna-Dolphin I dispute.

The US also unilaterally applied secondary embargoes on 'intermediary' states which failed to show within 90 days that they'd taken action to prevent importation of tuna harvested using purse seine nets.¹⁴ These secondary embargoes would form the basis of the Tuna-Dolphin II dispute and will be discussed below. There were no similar embargoes on US produced yellowfin tuna; rather the US regulated the catching of marine mammals incidental to harvesting tuna in their territorial waters¹⁵ by implementing the MMPA regulations.

¹² Christensen and Geffin, *GATT sets its net*, 574

¹³ Andersson, T. et al. *Trading with the environment*, (London: Earthscan, 1995), p.92

¹⁴ Halina Ward, 'Common but Differentiated Debates: Environment, Labour and the World Trade Organization', *The International and Comparative Law Quarterly*, 45.3 (1996), 592-632 (pp.601-602)

¹⁵ Ward, *Common but Differentiated Debates*, 602

Dispute resolution mechanism

The main dispute settlement provisions are found in Article XXII – consultation and conciliation procedures – and Article XXIII – which governs formal investigations and rulings. Any contracting party contending that its rights or benefits under the regime had been infringed or compromised had the right to approach the allegedly ‘offending’ party and to expect that party to apply due consideration to their request for consultations in order to rectify the matter.¹⁶ This is the reciprocity norm in action and at this point it is applied in the attempt to contain disputes.¹⁷ Should these consultations fail, however, after 60 days the aggrieved contracting party could approach the CONTRACTING PARTIES to request an investigation and ruling into the ‘nullification and impairment’ of their rights.¹⁸ In practice the aggrieved contracting party referred the complaint to the General Council of the GATT and it assigned 3 people to a panel to adjudicate the matter. The ruling was not binding until the CONTRACTING PARTIES adopted it by consensus. This meant that the ‘defendant’ had to adopt it too; and it meant they could potentially block the report.¹⁹ The reciprocity norm is evident in the dispute settlement process as the main purpose is to restore and thus ultimately maintain, the beneficial terms of trade and advantages accruing from regime membership.²⁰ Were the matter deemed serious enough though, the aggrieved party may have been permitted to block the ‘offending’ party from accruing benefits from the regime, whereupon the latter party may have chosen to exercise its right to opt out of the GATT

¹⁶ GATT 1947, Article XXII(1)

¹⁷ Finlayson and Zacher, ‘The GATT and the regulation of Trade Barriers: regime dynamics and functions’, *International Organization*, 35.4 (1981) 561-602 (p.577)

¹⁸ GATT 1947, Article XXIII(2)

¹⁹ Skilton, *GATT and the Environment in Conflict*, 466

²⁰ Finlayson and Zacher, *The GATT and the regulation of Trade Barriers*, 577

altogether.²¹ This step was authorised in only one dispute in the regime's 47 years as it represents a failure of multilateralism and the norms of non-discrimination and reciprocity and as such was to be applied only as a last resort.

Significance of the disputants and their specific claims

The disputants in the primary embargo case were the US and Mexico. The sight of a developing world supplier taking on a developed world giant in the forum offered by GATT was not a common one as developing countries were less likely to participate in the GATT dispute resolution process for a variety of reasons still debated amongst academics.²² One suggestion however, is that disputants could employ delaying tactics and so increase the costs of the action: costs which developing countries often couldn't afford even if the country stood a good chance of winning.²³

The US was one of the most likely candidates to attempt a unilateral action in the name of the environment. Firstly, it was a significant market for many of its suppliers which gave it significant leverage – in Game Theory parlance it had 'go-it-alone' power. Secondly, the US had pioneering environmental protection laws (up to the eviscerating tenures of Reagan and the Bushes) as well as some of the most vocal, well organised and well funded environmental groups in the world.

Mexico's general claims were that the US had undermined its gains from belonging to the trading regime by imposing import embargoes on its tuna exports;

²¹ GATT 1947, Article XXIII(2)

²² Busch Marc L. and Eric Reinhardt, 'Developing Countries and GATT/World Trade Organization Dispute Settlement', *Journal of World Trade* 37.4(2003), 719–735 (p.719)

²³ Amrita Narlikar, *The World Trade Organization: A very short introduction*, (Oxford: Oxford University Press, 2005) p.89

and that the comparison (of dolphin-kill ratios) method imposed by the MMPA protected the US fleet rather than the dolphins as it claimed.²⁴ More specifically Mexico claimed that certain provisions of the MMPA had contravened the GATT Article XI general provision on the prohibition of quantitative restrictions (a non-tariff barrier) and set up geographically defined discriminatory conditions in contravention of Article XIII – the article governing non-discriminatory administration of quantitative restrictions.²⁵

Furthermore Mexico claimed that even should these issues be corrected and the embargo lifted, after importation their tuna products would be further discriminated against in the MMPA's application of comparison between US and Mexican yellowfin tuna harvesting regulations: this would be an infringement of Mexico's rights under the rule of national treatment found in GATT Article III.²⁶ This rule dictates that products from a foreign country must be treated no differently to domestically produced like products²⁷ and is informed by the norms of reciprocity and non-discrimination within the trading regime. In response the USA posited that the embargo was not a quantitative restriction of the kind banned by Article XI, but that the MMPA constituted nothing more than an internal regulation applied to external imports in the manner prescribed by Article III(4) in accordance with the regime's rule of National Treatment.²⁸

²⁴ United States - Restrictions on Imports of Tuna, GATT No.DS21/R, p.26 at 3.58 – hereafter, referred to as '*Tuna-Dolphin I Panel report*'

²⁵ *Tuna-Dolphin I Panel report* at 3.1(a), p.5

²⁶ *Tuna-Dolphin I Panel report* at 3.1(b), p.5

²⁷ Narlikar, *The World Trade Organization*, 28

²⁸ Christensen and Geffin, *GATT sets its net*, 577

Furthermore, the USA contended that even if the measures were not found to be in accordance with Article III, they would be permissible under the general exceptions of Article XX.²⁹ Mexico in turn took issue with what it interpreted as the unilateral application of measures (by the US) which would have had the effect of subordinating its legislative capacity to that of the US. It stated that the Article XX exceptions would necessarily have to be interpreted as being applicable only to measures taken within a contracting party's own jurisdiction in order to avoid introducing the concept of extraterritoriality into the GATT.³⁰ Extraterritoriality is a highly problematic concept in any regime based on the acceptance of other regime members' sovereignty and is also against international law.³¹ In addition Mexico averred that the sections of the MMPA providing for the intermediary embargo against secondary contracting parties which imported Mexican tuna constituted unilateral interference in the trade between other countries³² - the US had arrogated a supervisory role vis-à-vis the tuna trade between other contracting parties.

Ten other countries (Australia, Canada, Indonesia, Japan, Korea, Norway, Philippines, Senegal, Thailand, Venezuela) and the European Economic Community (EEC) also submitted briefs to the panel criticising a variety of the MMPA's sections and thus were considered contracting parties to the dispute.³³

²⁹ Andersson, et al., *Trading with the environment*, 93

³⁰ *Tuna-Dolphin I Panel report* at 3.31, p.13

³¹ Andersson, et al., *Trading with the environment*, 88

³² *Tuna-Dolphin I Panel report* at 3.31, p.13

³³ *Tuna-Dolphin I Panel report* in section 4, p.20-28

Panel Ruling in Tuna-Dolphin 1

The GATT adjudication panel Mexico had requested under the dispute resolution procedure of the GATT reported in September 1991. The panel asserted that it had ruled on the application of GATT rules to the issue and not on the environmental merits of the actions.³⁴ In the interest of a broader understanding of the Panel decision, the following few paragraphs will briefly examine the findings in relation to Article III and Article XI before examining the rulings viz. Article XX in more depth.

The Embargo: quantitative restriction or application of internal regulation?

The USA stated that the restrictions placed on Mexican tuna constituted the application of a domestic regulation in accordance with the MMPA's regulations and as such were consistent with Article III(4) and in accordance with the National Treatment rule of the trading regime.³⁵

The adjudication Panel, however, disagreed and found that the US had based the embargo on the process used to harvest the tuna and according to the Panel's reading of Article III, it "covers only those measures that are applied to the product as such".³⁶ Since the MMPA regulated the actual method of harvesting in order to reduce dolphin kills these regulations were not considered to be applied to the sale of or the end product itself and therefore did not constitute internal regulations of the type covered by Article III as averred by the US.³⁷ Thus the Panel ruled that the US should lift its embargo of imported tuna as Article III(4) called for the

³⁴ http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm under heading, "A GATT dispute: The tuna-dolphin dispute"

³⁵ *Tuna-Dolphin I Panel report* at 3.6(a), p.6

³⁶ *Tuna-Dolphin I Panel report* at 5.14, p.32,

³⁷ *Tuna-Dolphin I Panel report* at 5.14, p.32,

“comparison of the treatment of imported tuna as a product with that of domestic tuna as a product” and thus the comparison of the dolphin-kill ratios of Mexican and US fleets were irrelevant to the tuna trade³⁸ irrespective of the environmental harm caused.

With this statement the GATT ruling laid all process-based environmental trade measures open to challenge as GATT inconsistent.³⁹ This is a prime example of the contentious ‘product’ versus ‘process’ issue at the heart of the antagonism between free trade proponents and environmentalists.

Having found that the embargoes could not be justified as internal regulations under Article III(4), the Panel was obliged to find that the embargoes constituted quantitative restrictions in violation of Mexico’s rights under the trading regime (Article XI).⁴⁰ In addition, the application of the US dolphin kill ratio as a standard was deemed unfair as it was determined retroactively and therefore uncertainty prevailed for Mexican fishermen until after they had brought in their harvests.⁴¹

The Article XX exceptions

Taken at face-value, the actions taken by the USA pursuant to the MMPA’s regulations with the purpose of preserving dolphins from extinction would certainly appear to qualify under the Article XX exceptions to the general rules of the trading regime. The panel, however, rejected the US claim that the embargo was justifiable under the exceptions of Article XX(b) - to protect human or animal health – and

³⁸ *Tuna-Dolphin I Panel report* at 5.15, p.32,

³⁹ Christensen and Geffin, *GATT sets its net*, 578

⁴⁰ Porter, *The Tuna/Dolphin Controversy*, 102

⁴¹ Esty, 1994, p.268

Article XX(g) - to protect exhaustible natural resources. It adopted a very strict reading of the Article XX exceptions to the general GATT rules and stressed that the burden of proof lay on the party claiming the exception.⁴²

The Panel founded its rejection of the use of Art. XX(b) on three broad points. Namely that the embargo sought to protect 'resources' not within the jurisdiction of the US; the GATT regime would be undermined by a broader interpretation of the exceptions and what it interpreted as the lack of necessity of the embargo to lower dolphin mortality rates.

Extra-jurisdictionality

In essence the Panel adopted Mexico's position that the protection of this exception could not be sought for measures applied outside the jurisdiction of the USA. To reach this conclusion the panel took the unusual approach of looking at the drafting history of the clause in order to gain clarity on the issue of jurisdiction as this wasn't clear in the wording of Art. XX(b).⁴³ By doing so they came to the conclusion that because the phrase '*if corresponding safeguards under similar conditions exist in the importing country*' was not included at the end of Article XX(b) as was proposed during GATT negotiations, this omission indicated that the drafters had intended the exception to be applicable to protect the life or health of humans, animals and plants only within the jurisdiction of the country claiming the exception.⁴⁴

⁴² Porter, *The Tuna/Dolphin Controversy*, 102

⁴³ *Tuna-Dolphin I Panel report* at 5.24-5.26, p.34-5

⁴⁴ *Tuna-Dolphin I Panel report* at 5.26, p.35

A broader interpretation would undermine the international trade regime

The Panel ruled that the broader interpretation of Article XX(b) forwarded by the US would jeopardise the multilateral nature of the trading regime by giving all contracting parties the unilateral right to set life or health protection policies from which others could not deviate for fear of losing their rights or benefits under the GATT.⁴⁵ This in turn would limit the application of the regime's norms of non-discrimination and reciprocity to only those contracting parties with identical domestic health and life policy regulations⁴⁶ and in so doing undermine the multilateral nature of the regime.

Necessity

Whilst affirming that each contracting party to the GATT had the right of a sovereign country to legislate its own human, animal or plant health policy, the Panel stated that there were still limitations on the application of Article XX exceptions in relation to the trade measures used. The trade measures for which the exceptions were being claimed must be "necessary" and may not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".⁴⁷ In other words, the exceptions could not be used as a cover to implement protective measures which would ordinarily be against the ethos of unrestricted trade.

The Panel ruled that the MMPA did not qualify for protection under the exceptions because it was not 'necessary'; there were, the Panel concluded, other multilateral measures, less GATT inconsistent, that the USA could have pursued in

⁴⁵ Christensen and Geffin, *GATT sets its net*, 585

⁴⁶ *Tuna-Dolphin I Panel report* at 5.27, p.35

⁴⁷ *Ibid*

order to achieve dolphin conservation.⁴⁸ In this regard the Panel referred to the Panel decision in the Thai-Cigarettes dispute in 1990 in which it was ruled that the exceptions could be used to waive the usual trading regime rights of other contracting parties only to the extent that the use thereof was unavoidable.⁴⁹

Another problem with the MMPA arose from the mechanics of setting the dolphin kill-ratio. The US legislation required imported tuna to have been harvested with a kill-ratio of not more than 25% that of the US tuna fleet: accordingly a foreign fleet fishing in the ETP would not know whether their ratio was under that of the US fleet's until after it had harvested tuna. Thus, for foreign fleets uncertainty prevailed and the Panel ruled that any trade measures based thereon could not meet the necessity test.⁵⁰

The concern with extra-jurisdictionality also underpinned the Panel's rejection of the use of Article XX(g). It found that in applying the embargo, the US was guilty of 'extra-jurisdictionality' because it had effectively attempted to enforce its domestic laws on another country⁵¹ when instead the jurisdiction of the US should delimit efforts to control production and consumption of exhaustible resources.⁵² Again, its concern with this issue stemmed from the potential thereof to undermine the gains from having a consistent set of rules (as opposed to multiple competing

⁴⁸ Massimiliano Montini, 'The Nature and Function of the Necessity and Proportionality Principles in the Trade And Environment Context', *Review of European Community and International Environmental Law*, 6.2(1997),121-130 (p.122)

⁴⁹ "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, 222-223, DS10/R, at 73-74 – *Tuna-Dolphin I Panel report*, p.35, in note 43

⁵⁰ *Tuna-Dolphin I Panel report* at 5.28, p.35-6

⁵¹ Esty, *Greening the GATT*, 268 and Brack, *Balancing Trade & Environment*, 502

⁵² *Tuna-Dolphin I Panel report* at 5.31, p.36

domestic rules) across the GATT regime.⁵³ On the question of whether or not dolphins could be considered exhaustible natural resources the Panel was silent even though Mexico and the US had each presented arguments.⁵⁴ The Panel was critical of the retroactive dolphin-kill ratio aspect of the MMPA because this made trading for Mexico an unpredictable affair: that unpredictability proved, it concluded, that the trade measure was not enforced primarily to conserve dolphins as was required by Article XX(g)⁵⁵ but as a form of protectionism.

As was usual practice when GATT dispute panels were convened, they were held in private, members of the public and NGOs were not permitted into the sessions, nor was the information on which the Panel made its decision made available. However, such was the public furore that the decision was made public before it was adopted by the GATT Council.⁵⁶ This last fact, besides being highly unusual, may have contributed to the eventual non-adoption of this ruling: at the time Mexico was also in negotiations with the USA about a possible North American free trade zone and may have feared the negative publicity and tarnishing of its international image that pushing for the adoption of the ruling may have entailed. After the North American free trade zone talks, the USA, Mexico and Venezuela came to an agreement in March 1992 to reduce the killing of dolphins and the MMPA embargoes were rendered redundant.⁵⁷ The civil society and public outcry,

⁵³ *Tuna-Dolphin I Panel report* at 5.32, p.36-7

⁵⁴ *Tuna-Dolphin I Panel report* at 3.40 to 3.46, p.15-6

⁵⁵ *Tuna-Dolphin I Panel report* at 5.33, p.37

⁵⁶ Christensen and Geffin, *GATT sets its net*, 575

⁵⁷ Porter, *The Tuna/Dolphin Controversy*, 105 & Christensen and Geffin, *GATT sets its net*, 576(note 33)

however, was a salient reminder that GATT rules and the trading regime did not exist in a vacuum.

Reaction to the Tuna-Dolphin I ruling

In practise this ruling has the potential to favour products whose environmental costs have been externalised as these are almost always economically (not socially or environmentally) cheaper: products produced in an environmentally sustainable manner are thus undermined⁵⁸. In a ruling which has been variously called a “strained reading”,⁵⁹ “poorly reasoned”,⁶⁰ and more politely, “sweeping”,⁶¹ civil society and academics focussed their criticism almost entirely on the Panel’s rejection of the use of the Article XX exceptions and ‘artificial’ distinction between product and process and hence this case has become synonymous with any pro-environment criticism of the trading regime.

The Panel’s reading of Article III to include only regulations which apply to actual end products has been criticised as being far too narrow a reading of the text. Article III(4) stipulates that all internal laws, regulations and requirements which are applied to the sale of internal products should also be applied to imported products (national treatment rule); thus since the MMPA regulates the sale of internally harvested tuna, the same regulations should be applied to imported/externally harvested tuna⁶². Critics of the ruling have pointed out that without the ability to enact bans on products produced in environmentally unsustainable processes

⁵⁸ Christensen and Geffin, *GATT sets its net*, 580

⁵⁹ Porter, *The Tuna/Dolphin Controversy*, 102

⁶⁰ Christensen and Geffin, *GATT sets its net*, 571

⁶¹ Skilton, *GATT and the Environment in Conflict*, 456

⁶² Christensen and Geffin, *GATT sets its net*, 580

countries are effectively unable to protect their local environments or encourage environmentally sustainable production methods.⁶³ In addition since under the MMPA US fishermen must meet more stringent standards than importers they are at a competitive disadvantage – a fact which made the MMPA extremely unpopular within the US tuna industry⁶⁴ - but which underscores the USA's point that the regulations meet the conditions of the National Treatment rule in Article III.

Criticisms of Panel's rejection of the applicability of Article XX exceptions

Many lawyers and academics have criticised the drafting history approach used by the Panel to gain clarity on the meaning of Article XX(b) because it represented a marked departure from the emphatically textualist approach it had adopted throughout the report,⁶⁵ and because such an approach is not well-established in public international law.⁶⁶ Where ambiguity exists in international treaties, the correct approach is to interpret the ambiguous clause in accordance with outlines in Article 31 of the Vienna Convention on the Law of Treaties (VCLT);⁶⁷ the Panel should have interpreted Article XX(b) in light of 'the context, the object and purpose, any instrument relating to the treaty and any subsequent agreement or practice of the parties and any relevant rules of international law'.⁶⁸ Article 32 should be resorted to only under strictly specified conditions. In the Tuna-Dolphin I

⁶³ Brown Weiss, Edith, 'Environment and Trade as Partners in Sustainable Development: A Commentary', *The American Journal of International Law*, 86.4(1992), 728-735 (p.728)

⁶⁴ Christensen and Geffin, *GATT sets its net*, 577

⁶⁵ *Ibid*, 582

⁶⁶ Aaditya Mattoo and Petros Mavroidis, 'Trade, Environment and the WTO' in *International Trade Law & the GATT/WTO Dispute Resolution System*, ed by Ernst-Ulrich Petersmann, (London: Kluwer Law International, 1997), 327-343 (p.330)

⁶⁷ Please see Appendices for full text of Article 31 and 32 of the VCLT.

⁶⁸ Mattoo and Mavroidis, *Trade, Environment and the WTO*, 330

case the panel resorted to Article 32 in their quest for clarity without exhausting the outlines of Article 31 first.

The Panel's interpretation regarding the dropping of the phrase '*if corresponding safeguards under similar conditions exist in the importing country*' from Article XX(b) has confounded some writers who point out that the simplest explanation for this is that the drafters thought it confusing and redundant when the clause is read in conjunction with the Article XX chapeau.⁶⁹ Furthermore, the Panel's strict reading of the clause renders it largely redundant by circumscribing the issue of jurisdiction because any measures instituted domestically to protect health and life would already be justified under Article III providing the National Treatment rule requirements were also met.⁷⁰ The Panel's conclusion that the drafting history of Article XX(b) indicated that this exception was only applicable to a party's own jurisdiction rendered the Article XX exceptions virtually meaningless especially when they may be applied to the global commons.⁷¹ Even given the drafting history approach applied, critics do not believe the Panel convincingly demonstrated that the intention of the original drafters – as contained in the cited Article 32 of the Draft Charter of the international Trade Organisation – excluded adoption of measures outside a country's jurisdiction.⁷² In addition, even if the argument (that such a restrictive jurisdictional meaning was to be inferred from the deleted line) was accepted, the fact that the line was dropped should surely have

⁶⁹ Christensen and Geffin, *GATT sets its net*, 584 and Porter, *The Tuna/Dolphin Controversy*, 103

⁷⁰ Porter, *The Tuna/Dolphin Controversy*, 103

⁷¹ *Ibid*, 102

⁷² Mattoo and Mavroidis, *Trade, Environment and the WTO*, 331

meant that the drafters did not intend such a restricted jurisdiction. The logical flaw in the Panel's decision meant they interpreted exactly the opposite.⁷³

Environmentalists have also criticised the Panel's apparent lack of knowledge of the USA's attempts at multilateral dolphin conservation and have pointed out that far from turning to the Article XX exceptions as a first resort in the attempts to protect the dolphin populations of the ETP, the USA had attempted other multilateral approaches, like negotiations on multilateral conservation measures with other countries with tuna fleets in the ETP for a number of years, without success,⁷⁴ before the MMPA forced embargoes. In essence, the Panel erected an incredibly high barrier to environmental measures because it interpreted 'necessary' as 'least GATT inconsistent'. This 'least-trade-restrictive' approach did not appear to take into account that other approaches to addressing an environmental issue might be either complicated, time-consuming (and in the case of exhaustible natural resources the timeframe is critical), or politically impossible to implement.⁷⁵

The Panel report was seen as firmly biased in favour of free trade in asserting that domestic environmental protection regimes may not interfere with international trade. This surprised many as it marked a departure from the slightly more accommodating stance of previous panels considering the broader trade-environment nexus.⁷⁶

⁷³ Christensen and Geffin, *GATT sets its net*, 585

⁷⁴ Christensen and Geffin, *GATT sets its net*, 588

⁷⁵ Brack, *Balancing Trade & Environment*, 512

⁷⁶ Skilton, *GATT and the Environment in Conflict*, 478

Impact on GATT jurisprudence & consequences for the regime

The Panel's report was not officially adopted by the GATT Council because Mexico did not pursue the matter and entered into bilateral discussions with the USA instead. As such it does not form part of GATT legal precedence, however, as an indication of the prioritisation of trade over environment concerns in future it has provoked much debate,⁷⁷ controversy between environmentalists and free trade advocates and a plethora of articles in both the popular press⁷⁸ and academic journals.⁷⁹ The Panel's decision also impacted negatively upon the GATT's public image with a popular cartoon at the time depicting the GATT as a Godzilla-figure trampling all in its path.⁸⁰ What had been a relatively arcane speciality –the GATT Working Group on Environmental Measures and International Trade, for instance, was established in 1971 and failed to meet for the next 20 years - suddenly took centre stage.⁸¹

⁷⁷ Esty, *Greening the GATT*, 269

⁷⁸ See for example:

“GATTzilla versus Flipper”, (7/9/1994) <http://www.greenleft.org.au/1994/158/8924>;

“GATT-Zilla Ate Flipper!”, (3/1/2003) <http://www.citizen.org/pressroom/release.cfm?ID=1291>

⁷⁹ Of which the bibliography to this paper contains many examples

⁸⁰ See Appendix 3

⁸¹ Thomas J. Schoenbaum, ‘International Trade and Protection of the Environment: The Continuing Search for Reconciliation’, *The American Journal of International Law*, 91.2(1997) 268-313, p.268

Tuna-Dolphin II

In order to prevent tuna importers from circumventing the MMPA's provisions by simply shipping tuna products which would otherwise be embargoed via other non-embargoed countries, the US Congress had enacted an 'intermediary nations' embargo; to prevent an importer from doing indirectly what it couldn't do directly.⁸²

Disputants and specific claims

The European Economic Community (EEC) was at the forefront of efforts to get the GATT Council to adopt the Tuna-Dolphin I panel report as it suspected the USA and Mexico of collusion to prevent the adoption thereof. In this they were unsuccessful. By 1994, however, the EEC⁸³ and the Netherlands, representing some of the countries affected by the USA's 'intermediary nations' embargoes successfully applied for the convening of an adjudication panel under GATT Article XXIII(2) to address the matter of the secondary embargo.⁸⁴ This dispute is commonly termed 'Tuna-Dolphin II'⁸⁵ and the Panel report thereof was circulated on 16 June 1994.⁸⁶ This raised similar issues regarding the right of one state to

Disputants

Complainant: The European Economic Community (EEC) and the Netherlands.

Respondent: United States

Timeline of Dispute

Panel requested:
5 June 1992.

Panel established:
14 July 1992.

Panel composed:
25 August 1992.

Panel Report circulated:
16 June 1994.

Panel Report not adopted.

⁸² Christensen and Geffin, *GATT sets its net*, 573-4

⁸³ The EEC became the EU in 1993 with the signing of the Maastricht Treaty, however, the term EEC is used in the Panel report DS29/R and so will be used in this chapter.

⁸⁴ Porter, *The Tuna/Dolphin Controversy*, 105

⁸⁵ United States - Restrictions on Imports of Tuna, GATT No.DS29/R, – hereafter, referred to as '*Tuna-Dolphin II Panel report*'

⁸⁶ Gary P. Sampson, *Trade, Environment, and the WTO: The Post-Seattle Agenda*. (Washington: Overseas Development Council, 2000) p.146

unilaterally impose restrictions on others in pursuit of domestic environmental regulations.

Article XI and Article III

The EEC and Netherlands took the same stance on the intermediary embargo as Mexico had on the primary one: the embargo was a quantitative restriction explicitly prohibited by Article XI of the GATT and not an internal regulation permissible under Article III⁸⁷. The US did not dispute the EEC argument vis-à-vis Article XI or Article III and proposed that the burden of proof in that regard lay with the EEC.⁸⁸

The Article XX exceptions

In the matter of the intermediary nations embargo, the US claimed that its measures were permissible under general exceptions of Article XX (b), (d) and (g).⁸⁹ In refuting this claim the EEC and Netherlands averred that the location was a key factor and thus the US measures which applied to living things to be protected or a natural resource to be preserved outside of the jurisdiction of the US, were not covered by the Article XX exceptions they claimed.⁹⁰ The US in turn argued that location was irrelevant to the interpretation of Article XX (b) and (g).⁹¹ In order to support its claim that the intermediary embargo met the stated requirements of Article XX(g), the US pointed out that not only were dolphins an exhaustible natural resource,⁹² but that there were stringent restrictions on domestic supply and

⁸⁷ *Tuna-Dolphin II Panel report* at 3.3-3.5, p.7-8

⁸⁸ *Tuna-Dolphin II Panel report* at 3.6, p.8

⁸⁹ *Tuna-Dolphin II Panel report* at 3.7, p.8

⁹⁰ *Tuna-Dolphin II Panel report* at 3.15, p.10

⁹¹ *Tuna-Dolphin II Panel report* at 3.35, p.17

⁹² *Tuna-Dolphin II Panel report* at 3.50, p.22

consumption in place as required.⁹³ Furthermore the US claimed that the intermediary nations embargo was within the ambit of Article XX(d) – “necessary to secure compliance with laws or regulations” - because it was a measure necessary to ensure compliance with the primary embargo.

Panel Ruling in Tuna-Dolphin II

This Panel placed the emphasis on extraterritoriality and not extra-jurisdictionality⁹⁴ as had Tuna-Dolphin I report. It was on the point of unilateral application of measures that the panel found the actions of the USA to be GATT inconsistent. Furthermore the application of trade measures based on the process and not the product was also found to be GATT inconsistent.⁹⁵

From the formulation of Article XX this panel deduced a three step process for interpreting Article XX (b) and (g). First, the Panel would determine whether the policy in question (the MMPA) was in accordance with the provisions of paragraphs (b) and (g). Secondly, the panel would assess whether the measure for which the exception was being invoked was “necessary” in the case of Article XX(b)⁹⁶ or “related to” the conservation of exhaustible natural resources and applied “in conjunction” with restrictions on domestic production and consumption.⁹⁷ Lastly it would assess whether the measures which had been taken were in the spirit of the chapeau of Article XX which required that measures “not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

⁹³ *Tuna-Dolphin II Panel report* at 3.54, p.23

⁹⁴ Mattoo and Mavroidis, *Trade, Environment and the WTO*, 331

⁹⁵ *Tuna-Dolphin II Panel report* at 5.9, p.48

⁹⁶ *Tuna-Dolphin II Panel report* at 5.29, p.53

⁹⁷ *Tuna-Dolphin II Panel report* at 5.12, p.49

countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade”.⁹⁸

The second Tuna-Dolphin Panel concluded unambiguously that living creatures could be considered exhaustible natural resources and thus potentially trade measures to protect them could be deemed permissible under the Article XX(g) exception.⁹⁹ Furthermore, it could find no reason to support the first panel’s insistence on domestic jurisdiction as the text of article does not contain reference to location.¹⁰⁰ In a ruling which criticised the first Tuna-Dolphin Panel’s skewed use of the drafting history and improper application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties,¹⁰¹ this Panel found that the US policy to conserve the ETP dolphins fell within the type of policies covered by the Article XX(g) exceptions providing these were applied extraterritorially only against their own nationals and vessels.¹⁰²

Civil Society and academic reaction to Tuna-Dolphin II

Critics have pointed to the sweeping nature of the rulings against the environmental protection measures implemented in both cases as leaving little scope for future GATT-legal trade measures to protect environmental resources.¹⁰³

Writers like Andersson, Folke and Nyström, however, posited that this Panel’s interpretation of use of the Article XX exceptions represented a significant step in GATT jurisprudence in relation to the trade and environment nexus. In particular

⁹⁸ *Tuna-Dolphin II Panel report* at 5.12, p.49 and GATT 1947, Article XX, p.37

⁹⁹ *Tuna-Dolphin II Panel report* at 5.13, p.49

¹⁰⁰ *Tuna-Dolphin II Panel report* at 5.15, p.51

¹⁰¹ See Appendix 4 for text

¹⁰² *Tuna-Dolphin II Panel report* at 5.20, p.51

¹⁰³ Chang, Howard F., ‘Toward a greener GATT: environmental trade measures and the shrimp-turtle case’, *Southern California Law Review*, 74.31(2000), 31-47 (p.33)

they point to paragraph 5.20 as “open[ing] up for discussion” the question of when Article XX(g) exceptions may be used to legitimize extra-territorial trade measures used to preserve exhaustible natural resources.¹⁰⁴ Academic commentators like Schoenbaum and Cheyne assert that the Tuna-Dolphin II decision clearly and correctly makes the distinction between extrajurisdictionality and extraterritoriality. According to customary international law, states have an obligation to prevent damage to the environment of other states and the environment beyond any national jurisdiction (like the deep oceans), thus the exceptions of Article XX (b) and (g) could be interpreted as allowing national measures designed to protect extraterritorial resources, providing such extraterritorial jurisdiction is exercised within the scope and limitations of international law. In other words, the Tuna-Dolphin II Panel ruling that Article XX has extraterritorial, but not extrajurisdictional effect¹⁰⁵ has good grounding in international law.

Mattoo and Mavroidis (members of the WTO secretariat writing in their own capacity), whilst agreeing that the second Panel report’s use of extraterritoriality is less confusing than the first Panel’s use of extrajurisdictionality, state that nonetheless the second Panel did not address the important issue of whether exercise of extraterritorial jurisdiction by the USA was legitimate.¹⁰⁶

¹⁰⁴ Andersson, et al., *Trading with the environment*, 95

¹⁰⁵ Schoenbaum, *International Trade and Protection of the Environment*, 280

¹⁰⁶ Mattoo and Mavroidis, *Trade, Environment and the WTO*, 331

Impact on GATT jurisprudence & consequences for the regime

Even though the Panel found in favour of the EEC and Netherlands, the grounds on which it did so were not as restrictive as the first Panel's reasoning. Firstly, ruling that living creatures could be considered exhaustible natural resources ensured that Article XX(g) could potentially provide cover for future conservation measures to be taken. This was an unambiguous statement, quite unlike the Tuna-Dolphin I Panel which avoided the issue by focussing on the issue of jurisdiction instead.

Secondly, the Panel ruled that Article XX(g) was not necessarily limited to measures undertaken in the domestic jurisdiction. In leaving open the question of the extra-juridical application of environmental protection measures, however, it might have proved problematic for the trade-liberalisation camp in the future had it been accepted and become part of GATT jurisprudence.

This report wasn't accepted by consensus by the CONTRACTING PARTIES before the GATT made way for the WTO in 1995. As such it did not formally enter into the GATT jurisprudence that was absorbed into the WTO.

Conclusion

The GATT treatment of the two Article XX disputes differs somewhat even though the issues at stake were very similar: discrimination and unilateralism. The 1991 Tuna-Dolphin I ruling was extremely contentious, raised the profile of the 'trade and environment' debate significantly within academia and the general populace and seemingly raised the ire of almost every environmentalist in the USA. Applying a much maligned logic all of its own, the Tuna-Dolphin I Panel declared the

US to be acting unilaterally and beyond its jurisdiction in applying the embargo to tuna harvested using Purse-Seine nets in the Eastern Tropical Pacific.

Circumscribing the jurisdiction of the environmental exceptions to the domestic arena only renders the exceptions unable to deal with problems that may arise at the intersection of international trade practices and the global commons; any attempts to address these may potentially violate GATT.¹⁰⁷ A general concern amongst the environmental community, particularly in the US, was that other countries would use the GATT and specifically, the Panel ruling, to call into question the GATT legitimacy of the existing raft of environmental protection legislation.¹⁰⁸ In addition, environmentalists contend that sometimes only trade measures get results in terms of saving species and the eventual outcome of the Tuna-Dolphin I dispute proves their point: having pursued multilateral talks to preserve dolphins in the ETP for nearly 20 years, it was this unilateral action by the US which, whilst offensive to the GATT, finally produced action on dolphin conservation. When the Panel found sections of the MMPA GATT inconsistent, the public outrage helped fuel a momentum which led twelve states, including the United States and Mexico, to sign the International Agreement for the Reduction of Dolphin Mortality under the auspices of the Inter-American Tropical Tuna Commission in 1992.¹⁰⁹ This is just

¹⁰⁷ Janet McDonald, 'Greening the GATT: Harmonising Free Trade and Environmental Protection in the New World Order', *Environmental Law Journal*, 23 (1993) 396-474 (p.473)

¹⁰⁸ Kristin White, 'What GATT begot: Environment vs Trade', *Environmental Health Perspectives*, 103.3(1995), 240-242 (p.240)

¹⁰⁹ Schoenbaum, *International Trade and Protection of the Environment*, 301

one of numerous well documented occasions when unilateral action by a state posing a credible 'threat' preceded multilateral environmental action.¹¹⁰

The Panel decision in the Tuna-Dolphin II (1994) dispute was far less contentious and legally more coherent, but still did not find the USA's environmental legislation to be GATT consistent. In finding that the Article XX exceptions weren't circumscribed by territory necessarily, it left unanswered the central issue of the legitimacy of jurisdictional reach¹¹¹ in pursuit of environmental objectives.

Thus the differences between the first and second Tuna-Dolphin panels demonstrated that the GATT regime was a relatively flexible 'contract embodying trade rules'¹¹² which was able to evolve over time and as such was able to reflect the changing preferences and priorities of the contracting parties.¹¹³ This paper will now analyse the Shrimp-Turtle disputes (panel and AB) which were adjudicated under the WTO's dispute resolution mechanism, the Dispute Settlement Understanding.

¹¹⁰ Steve Charnovitz, 'Free Trade, Fair Trade, Green Trade: Defogging the Debate', *Cornell Journal of International Law*, 27(1994), 459-526 (p.498)

¹¹¹ Matoo and Mavroidis, *Trade, Environment and the WTO*, 329

¹¹² Winham, *Institution-Building in the Multilateral Trade System*, 349

¹¹³ Andersson, et al., *Trading with the environment*, 89

Chapter 4: The WTO dispute

S58 (Shrimp-Sea Turtle)

In 1994 the countries participating in the Uruguay Round of the GATT negotiations signed the Marrakesh Agreement formally establishing the WTO as an international organization on the 1st of January 1995. During the Uruguay Round the GATT was also reviewed and revised;¹ it remains, however, the principle multilateral agreement governing the trade in goods. Now it is but one of over 60 agreements and schedules administered by the WTO.² Given the new context of an international organization – albeit underpinned by the GATT regime - this chapter will explore the Shrimp-Sea Turtle disputes to establish how marine-based Article XX exception disputes were dealt with under the more judicial dispute resolution mechanism of the WTO.

The chapter will examine both the original Panel report and the Appellate Body (AB) decision in the following manner. Firstly it will discuss the environmental background of the dispute then how the dispute arose, the disputants and the significance thereof. The discussion of each disputant's specific claims will be preceded by a brief description of the dispute resolution mechanism of the WTO.

¹ GATT 1994 is legally distinguishable from GATT 1947 – see Article II(4) of the 'Agreement Establishing the World Trade Organization'

² World Trade Organization, *The World Trade Organisation: In Brief* [online]

http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

(Geneva: WTO Publications, 1995) no page numbers; s.v. "WTO Agreements".

Disputants

Complainant: India, Malaysia; Pakistan and Thailand.
Respondent: United States.

Timeline of Dispute

Panel requested:
9 January 1997 (Malaysia and Thailand);
30 January 1997 (Pakistan) and
25 February 1997 (India).

Panel established:
25 February 1997 and 10 April 1997 (for India).

Panel composed:
15 April 1997 (Joint)

Panel Report circulated:
15 May 1997.

Notice of appeal:
13 July 1998.

Appellate Body Report circulated:
12 October 1998.

Adoption:
6 November 1998.

With a better understanding of the mechanism in place the Panel and Appellate Body reports will be thoroughly analysed to set up the comparison with the GATT case study which will follow in chapter five. A brief commentary on how the rulings impacted upon WTO jurisprudence will conclude the analysis in this chapter. Throughout the analysis the theory of regimes and organisations will be applied.

Background

Sea turtles have extremely large habitat ranges and as such are very difficult to protect without the collaborative effort of all the states of the exclusive maritime zones through which the turtles move. The normal migratory pattern of the Olive Ridley sea turtle, for instance, is through the territorial waters of 80 states, and they nest on the beaches of about 60 states in the tropical areas of the globe.³ Unilateral conservation efforts by one state have little effect if other states continue unsustainable practices – protection across the turtles’ entire range is necessary.

There are seven species of marine turtles and all are listed in Appendix 1⁴ of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁵ This is the highest level of protection offered by the treaty and means they are considered to be threatened with extinction and may not be traded except where the purpose of the trade is non-commercial (e.g. for scientific research).⁶ In 1996 three of the seven - Loggerheads (*Caretta caretta*), Green Turtles (*Chelonia mydas*) and Olive Ridleys (*Lepidochelys olivacea*) - were listed on the International Union for the Conservation of Nature’s (IUCN) “Red List of Threatened Species” as

³ <http://www.iucnredlist.org/details/11534> [accessed on 12/02/2009]

⁴ <http://www.cites.org/eng/app/E-Jul01.pdf>, p.26 [accessed on 12/02/2009]

⁵ In force from 1 July 1975

⁶ <http://www.cites.org/eng/app/index.shtml> [accessed on 12/02/2009]

endangered. A further three - Hawksbill Turtle (*Eretmochelys imbricata*), Kemp's Ridley (*Lepidochelys kempii*) and the Leatherback (*Dermochelys coriacea*) were listed as critically endangered – the last step before a species becomes extinct in the wild.⁷ Only the Flatback (*Natator depressus*) has not been registered on the Red List as insufficient data has been collected to give it a designation. The Flatback sea turtle is also the only one of seven species which is not listed in the Appendices of the International Convention on the Conservation of Migratory Animals (also known as the Bonn Convention). From this information it is evident that there is significant scientific evidence of pressure on sea turtle populations.

Like the Tuna-Dolphin disputes this dispute pivots on the differing approaches to bycatch. Owing to the harvesting method, Shrimp (and prawn) trawling has one of the biggest bycatch problems: for every kilogram of prawns harvested, between 5 and 15 kilograms of assorted other marine-life also dies.⁸ Bycatch is unregulated and does not count towards landing quotas prescribed to protect fisheries. Researchers have produced several inventions to reduce the bycatch associated with different types of fisheries, but the costs of implementation have meant that the Turtle Excluder Device (TED) is one of the only such devices to have been commercially implemented. The TED is an angled plastic grid set into the shrimping net which guides turtles to a flap in the net through which they can escape.⁹

⁷ <http://www.iucnredlist.org/search> - search terms: CHELONIIDAE & DERMOCHELYIDAE

⁸ Callum Roberts, *The Unnatural History of the Sea*. (London: Octopus Publishing, 2007), p.348

⁹ See Appendix 6 for a detailed description and illustration of TEDs

Extensive shrimp fishing without TEDs has led several species to the brink of extinction.¹⁰ This is because although sea turtles can, for instance, survive under water for several hours whilst sleeping, their ability to do so is affected by strenuous activities, such as diving for food, and stress, which is why traumatised sea turtles drown in shrimp trawls within a relatively short time-period.¹¹

Commercial trawlers frequently have trawl-times in excess of the 40 minute safe period for turtles in order to be more commercially viable. In the US the implementation of TEDs was not a popular step and did not come about as a voluntarily on the part of fishermen, but rather as the result of legal regulations initiated by political will and backed by international treaties. As will be explored below, it is precisely this step – legal enforcement – which became problematic when the US tied imports of foreign shrimp to the exporter's use of TEDs.

How did the dispute arise?

Pursuant to its 1973 Endangered Species Act, the United States issued regulations in 1990 requiring all domestic shrimp trawlers to install TEDs in their nets in an effort to limit sea turtle mortality. In support of these domestic regulations, Public Law 101-162, section 609 has two subsections which attempt to induce other nations to use TEDs in their trawlers by embargoing shrimp harvested by trawlers without TEDs. This law was enacted in 1989 but the US State Department initially only applied it to fourteen Caribbean/Western Atlantic States citing concerns over political tensions which would possibly ensue from a globally

¹⁰ Roberts, *The Unnatural History of the Sea*, 356

¹¹ <http://marinebio.org/species.asp?id=51> [accessed 12/02/2009]

applied embargo.¹² Furthermore these states were given a period of three years in which to make their regulations equivalent to those of the US and install TEDs on all their trawlers so as to be compliant with the terms of subsection (b) by May 1991 and secure their access to the large US market.

The limited application caused much controversy within the USA and eventually the Earth Island Institute (an environmental NGO) sued the State Department on the grounds that section 609 was intended to be applied globally and not just to trawlers of Caribbean states. In December 1995, in *Earth Island Institute v Christopher*, the US Court of International Trade (CIT) found for the plaintiff and decided that the scope of Section 609(b) was clearly intended to be global and not geographically circumscribed. It ordered the State Department to apply Section 609(b) globally by May 1st 1996.¹³ The State Department complied but provided another exception which allowed shrimp harvested by individual trawlers which were certified by their host-state as having TEDs even if the host-state did not have US-comparable laws. Again, the Earth Island Institute sued the State Department on the grounds that the new exception eliminated the need for States to enact TED regulations governing their whole fleet and thus the exceptions undermined the intent of Section 609(b) by allowing trawlers fishing for other markets to continue to harvest in a way detrimental to the sea turtle population.¹⁴ Again, in November 1996, the US Court of International Trade found that the State Department had

¹² Jacob Werksman, 'Case Notes', *Review of European Community and International Environmental Law*, 8.1(1999), 78-82 (p.78)

¹³ David, E. Kaczka, 'Primer on the Shrimp-Sea Turtle Controversy', in *Review of European Community and International Environmental Law*, 6.2 (1992), 171-180 (p.172)

¹⁴ Ibid

acted illegally and ordered it to apply Section 609(b) without limitations or exceptions.

In October 1996, even before the final CIT verdict, India, Malaysia, Pakistan and Thailand acted jointly in requesting consultations with the USA concerning its embargo of a selection of their shrimp exports under Section 609 of U.S. Public Law 101-162. This they did according to Article XXII(1) of the GATT 1994 and Article 4 of the “Understanding On Rules And Procedures Governing The Settlement Of Disputes” otherwise referred to as the Dispute Settlement Understanding (DSU).¹⁵ When these consultations produced no results, these four States¹⁶ requested that an adjudication Panel be convened to assess the GATT compatibility of US Public Law Statue 101-162, section 609(b) which banned imports of shrimps and shrimp products from countries which had not been certified as having regulatory measures comparable to those of the US to save turtles.¹⁷

The WTO dispute resolution mechanism

Much like the GATT dispute resolution mechanism, the WTO relies on voluntary compliance with its dispute panel rulings as there is no enforcement through policing, no possibility of payment of damages for harm inflicted and no threat of incarceration.¹⁸ However, unlike the GATT, the WTO has a very structured and largely automatic process with which to deal with disputes which is delineated in

¹⁵ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by *Appellate Body report*, WT/DS58/AB/R, DSR 1998:VII, 2821, at 1.1, p.1 – hereafter referred to as ‘Panel report’

¹⁶ Malaysia and Thailand acted together, followed by Pakistan and then by India – all three requests were then consolidated into one Panel. see *Panel report* at 1.1 – 1.3, p.1

¹⁷ Chang, *Toward a greener GATT*, 31

¹⁸ Judith Hippler Bello, ‘The WTO Dispute Settlement Understanding: Less is More’, *The American Journal of International Law*, 90.3 (Jul., 1996), 416-418 (p.417)

Annex 2 of the Marrakesh Agreement - the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This agreement establishes the procedures with which trade disputes between members are handled by the Dispute Settlement Body (DSB), which is the convocation of all members of the WTO under another name. Unlike GATT, which has been characterized as having a more flexible and political-diplomatic model of dispute resolution, the DSU is a legalised model¹⁹ with a standing Appellate Body appointed for a four year tenure²⁰ and a set timeframe within which a dispute must be resolved. For instance Panel reports must be adopted by the DSB within 60 days unless there is an appeal;²¹ any appellate review must not exceed 90 days and the whole process from the establishment of the panel by the DSB to adoption of its report as WTO 'law' must take no more than 9 months if a ruling is uncontested or 12 months if a ruling was appealed.²²

As mentioned briefly in Chapter two of this paper the DSU differs fundamentally from the GATT as the adoption of a Panel/AB report is 'automatic' i.e. reports are considered adopted by consensus if no member present at the DSB meeting where the report is being considered formally objects; this is known as 'negative consensus'.²³ Options for a WTO member state when faced with a DSB decision (an adopted Panel or AB ruling) not in their favour remain much the same as under GATT. The state may comply with the ruling and withdraw the GATT-inconsistent

¹⁹ Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', *The American Journal of International Law*, 98.2 (Apr., 2004), 247-275 (p.247)

²⁰ DSU, Article 17(1) and (2)

²¹ DSU, Article 16(4)

²² DSU, Article 20

²³ DSU, Article 2(4) and footnote thereto attached

measure, or provide compensation for the 'nullification and impairment' of the rights of the other party, or resolutely refuse to comply and anticipate retaliation from other countries, which usually takes the form of an embargo of the offending country's exports.²⁴

Significance of the Panel disputants and their specific claims

Much like the Tuna-Dolphin I case of 1991, this dispute pitted developing states against a developed state, however, unlike that case; this case is part of a growing trend since the formation of the WTO, in which developing countries are the complainants.²⁵ When they do face each other over trade-environment matters the different concerns of the parties involved is highlighted. Developing states level the criticism that the implementation of highly environmentally demanding regulations by developed states is a form of protectionism or even 'eco-imperialism'. Developed states evince concern that developing states' lower environmental regulations give them a competitive advantage and cause a variation of Gresham's law of a 'race to the bottom' resulting in less and less environmental protection as states try to outdo each other in terms of lack of restrictions.²⁶ Furthermore the disputants were all developing states from Asia. Essentially, the four states were claiming a derogation of their regime rights because of an infringement of the GATT norm of non-discrimination which was incorporated into the WTO as part of the single undertaking which created the organization.

²⁴ Hippler Bello, *The WTO Dispute Settlement Understanding*, 418

²⁵ Between 2000 and 2003 60% of all disputes brought before the DSB were initiated by developing countries noted in Gillian Triggs, 'Dispute Settlement under the World Trade Organization: Implications for Developing Countries', *Bond Law Review*, 15.2(2003), 44-70 (p.45)

²⁶ Edith Brown Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary' in *The American Journal of International Law*, 86. 4 (Oct., 1992) 728-735 (p. 729)

Complainants' position: US violation of GATT Articles I(1), XI and XIII(1)

To provide a comprehensive analysis, this section has been included although it doesn't deal directly with Article XX as per the thesis question. India, Pakistan and Thailand combined their claims, but Malaysia forwarded its own claims to the panel. The complainants claimed that the US had violated Articles I(1), XI and XIII(1) of the GATT. Specifically, India, Pakistan and Thailand claimed that the Section 609(b) embargo of their shrimp imports was a violation of their MFN rights as embodied in Article I(1) because it treated physically identical end products (shrimp) differently based upon how the product was made or produced (harvested).²⁷

These three states also claimed that the embargo was a *de facto* quantitative import restriction of the type expressly forbidden by Article XI of the GATT.²⁸ In addition they claimed that the state-level certification required by Section 609(b) facilitated discrimination against the product of individual trawlers which might have invested in a TED with which to harvest shrimps.²⁹ Again, contended India, Pakistan and Thailand, this constituted differential treatment between 'like products' based on the process/method of harvesting which is prohibited by Article XIII(1) of the GATT.

Malaysia took issue with the subsection because they considered that the intention of the measures was to induce it to change its conservation policies and as such was arbitrary, discriminatory and a disguised restriction on international trade formulated only to protect the domestic US shrimp industry from foreign

²⁷ Panel report at 3.135, p.67

²⁸ Panel report at 3.136, p.68

²⁹ Panel report at 3.138, p.69

competition.³⁰ Furthermore, they claimed that the material facts of the two GATT Tuna-Dolphin disputes – whilst not adopted – were similar enough to the facts of this case and therefore could be used to support their position that the Panel should find Section 609(b) to be an import quota as per Article XI(I).³¹

In addition, India, Pakistan, Thailand and Malaysia all took issue with the disparity between the phase-in period granted to the Asian and Caribbean states. They insisted that they had been further discriminated against because they had only been given four months to fit their trawlers with TEDs whereas the original fourteen Caribbean states were given a three year grace period before Section 6089(b) was applied to their exports.³² This would be antithetical to the regime norm of non-discrimination and as such in contravention of GATT Article XIII(1), the '*Non-discriminatory Administration of Quantitative Restrictions*'.

US position: The Article XX exceptions

The US in turn claimed that the burden of proof was the claimants' and it didn't provide any arguments to reject the claim that the embargoes constituted quantitative restrictions.³³ Its main defence was that the actions taken pursuant to Section 609(b) were covered by the General Exceptions to the GATT (Article XX), particularly subsections (g) and (b).³⁴ These exceptions, the US claimed allowed them to take measures that would be ordinarily classified as discriminatory (embargo based on the PPM) in order to protect scarce natural resources. The US

³⁰ Panel report at 3.140, p.69

³¹ Panel report at 3.141, p.69

³² Panel report at 3.139, p.69 and 3.142, p.70

³³ Panel report at 3.143, p.70

³⁴ Panel report at 3.146, p.70

pointed out that all the complainants had previously agreed that Sea Turtles needed to be protected and conserved and went on to note that, “[t]here had never been a clearer or more compelling case presented to the WTO for the conservation of an exhaustible natural resource or the protection of animal life or health than this dispute”.³⁵ The US claimed that underlying their actions was the desire not to let shrimp consumption by the large US market negatively affect the dwindling sea-turtle populations. Since local fishermen were required to harvest shrimp in a manner which did not adversely affect turtle populations, the US stated it saw no conflict in seeking to extend such a *modus operandi* to other shrimp headed for the US market.³⁶

To further bolster its position the US contended that no wording in the GATT 1994 could be interpreted as precluding the adoption and enforcement, by a state, of measures "necessary to protect human, animal or plant life or health" (Article XX(b)) or of measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption" (Article XX(g)). The US did accept the concomitant requirement that the measures were not applied arbitrarily or discriminatorily or as a disguised constraint on international trade, but averred that the measure it had taken was within the scope of Article XX (b) and (g) and thus consistent with its commitments under the regime.³⁷ The US also argued that the WTO was the first multilateral trade organisation to be established after the UN Conference on Environment and Development (the ‘Earth Summit’) held in Rio de Janeiro in 1992

³⁵ *Panel report* at 3.145, p.70

³⁶ *Ibid*

³⁷ *Panel report* at 3.146, p.71

and as such contained a commitment, in the preamble, to using the world's resources in a manner compatible with sustainable development whilst still striving to "protect and preserve the environment and to enhance the means for doing so".³⁸

The complainants' position on the use of Article XX

In response to the US position that Section 609(b) was permissible under the Article XX exceptions of GATT, India, Pakistan and Thailand stressed that the dispute was about the unilateral imposition of the US measures which they claimed were designed to coerce other states to adopt similar conservation policies to those of the US.³⁹ They did not believe the dispute to be about conservation of sea turtles per se and asked the panel to find accordingly.

The matter of jurisdiction in the application of Article XX exceptions

The next aspect of the complainants' case was the issue of jurisdiction. India, Pakistan and Thailand posited that even though Article XX exceptions were ambiguous on the point of jurisdiction, when interpreted in conjunction with other international law instruments (like the UN Charter), as directed by Article 31 of the Vienna Convention on the Law of Treaties,⁴⁰ the applicability of the exceptions was to be circumscribed to measures taken within the jurisdiction of the US.⁴¹ In reply, the US raised the point that seas-turtles' ranges were international in scope and therefore any limitation on the jurisdiction of conservation measures would render

³⁸ Panel report at 3.147, p.71

³⁹ Panel report at 3.148, p.71-2

⁴⁰ See Appendices for text

⁴¹ Panel report at 3.157, p.74

them ineffective and therefore should not be applied.⁴² In addition, the US maintained that the jurisdiction of Article XX was not ambiguous simply because the wording did not explicitly include jurisdiction; ambiguity did not exist because of omission. Additionally, the US reminded the Panel that CITES, which all the complainants had ratified or acceded to,⁴³ required them to take trade measures in order to conserve natural resources regardless of the jurisdiction these may fall under. Thus the US claimed that it had the backing of international law in taking conservation measures with regards to species located in other states' jurisdiction.⁴⁴

It is a feature of the DSU that any member may bring a complaint even if it cannot demonstrate a legal interest i.e. it was not directly or indirectly affected by the alleged transgression.⁴⁵ Australia, Ecuador, El Salvador, the European Communities,⁴⁶ Guatemala, Hong Kong, Japan, Nigeria, Philippines, Singapore and Venezuela all notified the DSB of their interest in the matter and submitted arguments thus becoming party to the dispute.⁴⁷ They all opposed the US position.

⁴² *Panel report at 3.159, p.74*

⁴³ Date on which CITES in force in: India: 18/10/1976; Pakistan: 19/07/1976; Thailand: 21/04/1983; Malaysia: 18/01/1978; United States: 01/07/1975 - <http://www.cites.org/eng/disc/parties/chronolo.shtml> [06/03/2009]

⁴⁴ *Panel report at 3.161, p.75*

⁴⁵ Triggs, *Dispute Settlement under the World Trade Organization*, 49

⁴⁶ Legally, the European Union is known officially as the European Communities in all WTO matters www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm [accessed 02/04/2009]

⁴⁷ *Panel report at Section IV, p130-151*

The Panel ruling

Whilst finding that the US had breached its WTO obligations and applied quantitative restrictions – the embargo – in contravention of article XI(1),⁴⁸ the panel went on to note in its concluding remarks that the US had the right to protect resources providing it did so in a manner consistent with its GATT obligations.⁴⁹ It also noted that the ruling was not about the merits of sea-turtle preservation but about the GATT compatibility of the measures taken pursuant to section 609(b).⁵⁰

In the matter of jurisdiction, the panel circumvented the issue by addressing what it termed the ‘scope’ of the Chapeau instead. To do so it employed the interpretive techniques embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and deduced that the primary focus of the WTO (of which GATT and its Article XX exceptions form part) was economic development through trade. Thus it averred, the exceptions could not be used in a manner that would undermine the WTO’s multilateral trading system.⁵¹ In other words a measure such as section 609(b) would not be considered as falling within the ‘scope’ of the Article XX exceptions if it impinged on other states in a manner which endangered the multilateral trading system.⁵²

⁴⁸ *Panel report* at 7.17, p.278

⁴⁹ *Panel report* at 9.1, p.295

⁵⁰ *Panel report* at 7.60, p.293

⁵¹ *Panel report* at 7.42- 7.44, p.285-6

⁵² *Panel report* at 7.51, p.289

The panel did not rule on the alleged infringements of Articles I(1) - MFN - and XIII(1) - different application periods - as it concluded that finding the US had infringed the complainants' rights in terms of Article XI(1) - quantitative restrictions – was sufficient remedy.⁵³ The Panel found that the discriminate application of the Section 609 measures contravened the chapeau of Article XX which states that “such measures [should not be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”.⁵⁴ Having established this the panel did not deem it necessary to examine the US defence under subsections (g) and (b) of Article XX as it had already found the US in violation of its GATT obligations.⁵⁵ The panel also ruled that it would not accept *Amicus briefs*.⁵⁶

Appellate Body Report

Disputants and their specific claims

According to Article 16(4) of the procedures set out in the DSU, disputants are entitled to appeal the finding of a Panel within 60 days of the circulation of the Panel ruling report to the members.⁵⁷ The Panel ruling - “United States - Import Prohibition of Certain Shrimp and Shrimp Products - WT/DS58/R” was circulated on the 15th of May 1998 and on the 13th of July 1998 the United States appealed the

⁵³ *Panel report* at 7.23, p.280

⁵⁴ GATT 1947, p.20

⁵⁵ *Panel report* at 7.63, p.294

⁵⁶ *Panel report* at 7.8, p.275

⁵⁷ WTO, 1994, *Dispute Settlement Understanding*, Article 16(4)

Panel ruling and sought to have it overturned. The Appellate Body presented its report on the 12th of October 1998.⁵⁸

The US contested two key findings of the Panel ruling. One, that non-requested information from NGOs (*Amicus Curiae*) would not be accepted as it was outside the remit of the DSU to do so.⁵⁹ And two, that the US measures at issue constituted unjustifiable discrimination between goods from countries where the same conditions existed and therefore could not be exempted under the General Exceptions of Article XX.⁶⁰ The analysis in the next section will concentrate on the second part of the ruling as it is of most relevance to this paper.

The Appellate Body (AB) repealed the Panel's finding on the inadmissibility of 'Amicus Curiae' briefs stating that the Panel had the discretion to accept, use or disregard any information provided whether or not it had solicited it.⁶¹

On the second matter – that the US measures constituted unjustifiable discrimination between like products - the US appealed the ruling on the following grounds. Firstly, that Section 609 was indeed within the scope of the Article XX chapeau, and clauses (g) in the first instance and (b).⁶² Secondly, that the Panel had based its findings on an incorrect interpretation of the ordinary connotation and context of the term "unjustifiable discrimination". The US claimed that in dealing with the 'scope' of the chapeau the Panel had created a new test, that of a "threat

⁵⁸ WTO, *One-Page Case Summaries*, 20

⁵⁹ *Appellate Body report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755 hereinafter referred to as the *Appellate Body report*, at 98(a), p.38

⁶⁰ *Appellate Body report* at 98(b), p.38

⁶¹ *Appellate Body report* at 108, p.38 and at 110, p.39

⁶² *Appellate Body report* at 10, p.6

to the multilateral trading system", which had no basis in the GATT text and which precluded any discriminatory measures which would normally be justifiable under the Article XX given the ordinary meaning of "unjustifiable discrimination".⁶³

India, Malaysia, Pakistan, Thailand, the Appellees, proposed that the rejection by the Panel of Amicus Curiae briefs should be upheld.⁶⁴ Unsurprisingly the Appellees also claimed that the original Panel finding vis-à-vis the interpretation of the term "unjustifiable" did not constitute a new test but was a correct interpretation of the chapeau's meaning to prevent the general exceptions being used for protectionist purposes.⁶⁵ In addition, and leaving aside even this point, the Appellees claimed that the manner in which the embargoes had been applied constituted a sufficient erosion of their substantive GATT rights for the AB to uphold the Panel decision. In this regard they highlighted the lack of any attempt to multilaterally protect the resource, the phase-in period variation between Caribbean and Asian countries and lastly that the narrowness of the proposed US interpretation of "unjustifiable discrimination" rendered the chapeau meaningless.⁶⁶

The Third Participants, Australia, Ecuador, the European Communities, Hong Kong, China, Mexico and Nigeria, weren't named parties to the dispute, but they did submit arguments to the Appellate Body.

⁶³ *Appellate Body report* at 10 - 15 on pp.6 -8

⁶⁴ *Appellate Body report* at 29-33, pp.12 -13

⁶⁵ *Appellate Body report* at 36-39, pp.14-15

⁶⁶ *Appellate Body report* at 40-43, pp.17-18

Appellate Body Ruling

While ultimately reaching the same finding on the applicability of Article XX as the original Panel, the Appellate Body (AB) reversed the Panel's legal interpretation of the proper sequence of steps in applying Article XX and analysing whether a member could validly invoke the exceptions. The proper sequence of steps it ruled, was to first assess whether a measure could be provisionally justified by one of the categories under paragraphs (a)-(j), and, then, to further appraise the same measure under the Article XX chapeau.⁶⁷ The specifics of the ruling are dealt with in more depth below.

The US relied primarily on the Article XX (g) exception – and only invoked (b) should (g) not be applicable, thus the AB, in finding that the Section 609 was indeed justifiable under (g) did not consider the arguments relating to Article XX (b).⁶⁸

The AB ruled that the Section 609 met the requirements of the Article XX(g) exception – Sea-Turtles were exhaustible natural resources,⁶⁹ the measure related to the conservation of exhaustible natural resources⁷⁰ and was applied in conjunction with domestic restrictions.⁷¹ This effectively overturned the Panel's ruling that Section 609 (the US measure) "was not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994". This seemingly odd statement (given that the AB later also finds the measure inconsistent with the chapeau) reflects the Appellate Body's rejection of the interpretative sequencing

⁶⁷ WTO, *One-Page Case Summaries*, 20

⁶⁸ *Appellate Body report* at 146, p.55

⁶⁹ *Appellate Body report* at 134, p.51

⁷⁰ *Appellate Body report* at 142, p.54

⁷¹ *Appellate Body report* at 145, p.55

applied by the Panel. From a legal standpoint, the AB thus rejects the outcome from the 'chapeau-down' approach applied by the Panel and finds that Section 609 is provisionally justifiable under Article XX (g)– potentially meaning that unilateral measures based on PPMs are not *per se* GATT incompatible providing they also meet the provisos of the chapeau.⁷²

The use of Article XX exceptions, however, is also subject to the application of the provisions of the chapeau; specifically “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 [be] a disguised restriction on international trade”.⁷³ The AB ruled that the Section 609 measure failed to comply with two of the chapeau’s three requirements, namely that the measures not constitute a means of arbitrary or unjustifiable discrimination.⁷⁴ The AB found that the measure constituted an unjustifiable restriction on international trade because the US had effectively set itself up the unilateral arbiter of good practice relating to the use of TEDs when it required that all other states adopt essentially the same (not similar) comprehensive regulatory policies, i.e. bring their own policies in line with the US policies, and be certified as having such by the US in order to export shrimp to the US⁷⁵. Furthermore the AB found that the US had not consistently pursued the same objectives through diplomatic channels,⁷⁶ and had applied different phase-in periods and levels of technology transfer to different

⁷² Sampson, *Trade, Environment, and the WTO*, p.109

⁷³ GATT 1947, Article XX

⁷⁴ *Appellate Body report* at 184, p.75

⁷⁵ *Appellate Body report* at 165, p.65

⁷⁶ *Appellate Body report* at 167-172, pp.66-70

countries,⁷⁷ all of which created an unjustifiable restriction according to the AB. The AB ruled that Section 609 constituted arbitrary discrimination because of the rigidity and inflexibility of the certification program it required: the certification process which potential exporters had to undergo was seemingly haphazard and unpredictable, lacking in fairness and transparency regarding technical requirements or even the reasoning behind denial of certification.⁷⁸

Having found that Section 609 constituted both unjustifiable and arbitrary discrimination between countries where the same conditions prevailed, the AB did not deem it necessary to analyse whether it might also constitute a disguised restriction on international trade (the chapeau's third proviso). In summary, the Article XX(g) exception is a limited and conditional exemption from the usual GATT obligations which is only available if the invoking member complies with the requirements of the chapeau. Section 609 was found to be provisionally compliant with the requirements of Article XX (g), but not compliant with the chapeau of Article XX and so the measure was found to be GATT inconsistent.

Reactions and conclusions

The Shrimp-Turtle Case has been heralded by some writers, like Howard Chang and Marc Williams, as a significant jurisprudential step towards more inclusive treatment of environmental trade measures.⁷⁹ Both have interpreted the Appellate Body's ruling as an indication that the use of unilateral import bans to support domestic environmental legislation would not be automatically overruled providing

⁷⁷ *Appellate Body report* at 173-175, pp.70-72

⁷⁸ *Appellate Body report* at 177-184, pp.72-75

⁷⁹ Marc Williams, Trade and Environment in the World Trading System', *Global Environmental Politics* 1.4(November 2001), 1-9 (p.8)

the application thereof was not arbitrary or discriminatory.⁸⁰ The Appellate Body's decision not to overturn the lower panel's finding was criticised by more environmentally inclined writers as once again indicating the WTO's prioritisation of trade issues over environmental protection. However, some environmental lawyers⁸¹ and the Appellate Body itself⁸² emphasized that the findings addressed only the application and not the substance of the US environmental statutes and measures thereto pursuant.

Furthermore the Appellate Body affirmed that the order of interpretation was important. First, panels should assess whether any measures or policies under dispute can be justified under any of the specific Article XX exceptions of (a) to (j) and then only apply the chapeau's provisos.⁸³ This sequencing is crucial because besides being a more literal reading of the text it theoretically allows for a broader application of the Article XX exceptions.⁸⁴ This point has been criticised by some writers as proof that the AB was engaging in judicial lawmaking by 'changing the goalposts'⁸⁵ and going too far in favour of environmental protection. The government of India – even though it was on the 'winning side' – believed the AB ruling would allow future application of trade measures based on PPMs. Thailand concurred and went as far as to say that the ruling had fundamentally altered the

⁸⁰ Chang, *Toward a greener GATT*, 32

⁸¹ Carrie Wofford, 'A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT', *Harvard Environmental Law Review*, 24(2000) 563-592 (p.17)

⁸² *Appellate Body report* at 185 and 186, pp.75-76

⁸³ WTO, *One-Page Case Summaries*, 20

⁸⁴ Chang, *Toward a greener GATT*, 34

⁸⁵ Triggs, *Dispute Settlement under the World Trade Organization*, 46

balance of rights and obligations of the Members under the regime⁸⁶ by allowing measures inconsistent with GATT to be justified under the rubric of Article XX.

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⁸⁶ Sampson, *Trade, Environment, and the WTO*, 110

Chapter 5: Conclusion

This paper applied regime theory in order to underpin a macro-level analysis of why states interact in a particular manner in international trade disputes involving marine based environmental exceptions. This chapter will highlight the most salient points from the preceding chapters and then synthesize the concepts and ideas presented in order to answer the question posed in the first chapter of how the treatment of marine-based Article XX trade disputes has differed between the GATT & WTO.

The two disputes analysed in this paper have several things in common beyond being environmental disputes dealing with matters of the global commons. Both the Tuna-Dolphin cases (treated as one case study) and the Shrimp-Turtle cases (the panel report being adopted only in conjunction with the AB report) were initiated by embargoes placed on an importer's products pursuant to domestic environmental policies to reduce 'bycatch'; both thus raise the question of the application of one country's domestic environmental policies to products from another country. Furthermore both highlight the issue of Process and Production Methods (PPMs) - the question of whether it is permissible to implement a trade measure (like an embargo) based on how a product is harvested/produced or manufactured (PPM) and not the qualities of end product. Both highlight the tension in today's interconnected world: the balancing act between the right of a

country to employ policy in pursuit of domestically desired environmental goals and the obligations of each country to its partners in the multilateral trading regime.¹

Chapter three was a case study analysis of how the regime (GATT) treated the marine-based Article XX trade dispute between Mexico and the United States. The dispute was declared by Mexico in reaction to the application of an embargo of its products pursuant to domestic US legislation - the MMPA. Applying the terminology of Krasner's definition, Mexico accused the US of infringing the regime norm of non-discrimination when it embargoed Mexico's tuna products and of breaking the national-treatment rule by treating Mexico's like-products differently to its own. Decision-making procedures are the fourth part of Krasner's definition. This paper has dealt with one type of decision-making procedure – the panel findings in a dispute between members of the regime. Thus understanding the dispute resolution mechanism is a key part of understanding any regime. The GATT regime's dispute resolution mechanism was ad-hoc in nature, could be drawn out by recalcitrant disputants and most importantly could be obstructed by one state - even a party to a dispute – exercising its veto right on the mechanism's findings. In the first of the two Tuna-Dolphin cases, Mexico did not push for the adoption of the panel report even though it was in its favour, but entered into bi-lateral negotiations with the US instead. In part because of this the EEC instituted the second Tuna-Dolphin case concerning the intermediary nations embargo; this Panel was not adopted before the GATT 1947 was replaced with the GATT1994/WTO in

¹ This is neatly summed up in the *Tuna-Dolphin Panel report* at 3.145, p.70: "This dispute dealt with issues that were central to how the rules of the multilateral trading system interacted with the ability of Members, both individually and collectively, to meet critical environmental objectives".

1995. Technically therefore the two Panel reports do not form part of GATT precedence since they were not adopted, however, this has not stopped other disputants referring to the cases and subsequent panels using the reasoning behind their findings as guidance.²

The Tuna-Dolphin I panel found that Article XX(b) did not extend to measures (the embargo) intended to 'protect human, animal or plant life' outside of the jurisdiction of the country taking the measure (in this case the US). The same applied to measures to protect 'exhaustible resources' outside of a state's jurisdiction for the purposes of Article XX(g).³ The Panel evinced concern that the extrajurisdictional interpretations of Articles XX (b) and (g) could lead to multiple competing conservation policies which had been unilaterally decided upon by member states. This would result in a bewildering array of policies from which member states could only deviate at the risk of losing their rights under the regime.⁴ Thus in a multilateral regime the matter of jurisdiction is of utmost importance given the interdependence of the members of the regime, the diffuse principle of sovereignty and the regime norms of non-discrimination and reciprocity. The Panel was careful, however, to point out that it is the *measure* taken (for which Article XX exception is claimed) that has to meet the Article XX

² The Shrimp-Turtle Panel (at 652) and some of the complainants (including Malaysia at 7.12) referred to the Tuna-Dolphin cases in that case

³ *Tuna-Dolphin I Panel report* at 5.26, 5.32

⁴ *Tuna-Dolphin I Panel report* at 5.27

requirements, not the original *policy* goal.⁵ This Panel only implicitly recognised that protection of dolphin life or health was a policy that could fall under Article XX(b).⁶

The Tuna-Dolphin II Panel also considered the question of jurisdiction. In the matter of the applicability of Article XX (g) to measures taken to protect resources outside the jurisdiction of the US, it could find no reason to support the first panel's insistence on domestic jurisdiction; it found similarly with regard to Article XX (b).⁷ It did, however, find that measures which might fall under Article XX exceptions were only valid when applied extraterritorially against US nationals and vessels.⁸ Notwithstanding this difference with Tuna-Dolphin I, the panel found that measures taken pursuant to the MMPA were taken so as to coerce other countries to change their harvesting/conservation policies and as such could not be considered "necessary" in the sense required by Article XX(b), or "primarily aimed at" in the sense required by Article XX(g).⁹ The unilateralism of the measures thus rendered the exceptions unavailable. It also explicitly recognised that protection of dolphin life or health was a policy that could fall under Article XX(b).¹⁰ Thus the Tuna-Dolphin I panel found the embargoes pursuant to the MMPA legislation to be GATT inconsistent because they were not covered by the exceptions of Article XX (b), (g) or (d) of the General Agreement, did not constitute internal regulations covered by Article III and were contrary to Article XI:1.¹¹

⁵ *Tuna-Dolphin I Panel report* at 5.32 and *GATT/WTO dispute settlement practice*, p.8

⁶ *Tuna-Dolphin I Panel report* at 5.24-5.27

⁷ *Tuna-Dolphin II Panel report* at 5.15, 5.20 and 5.31

⁸ *Tuna-Dolphin II Panel report* at 5.20,

⁹ *Tuna-Dolphin II Panel report* at 5.39 and 5.27 respectively

¹⁰ *Tuna-Dolphin II Panel report* at 5.30

¹¹ *Tuna-Dolphin II Panel report* at 6.1

Chapter four examined how the newly formed international organization of the WTO handled the marine-based Article XX trade dispute between Malaysia, India, Pakistan and Thailand as joint complainants and the United States. The dispute was declared by the joint complainants in reaction to an embargo of their shrimp and shrimp products pursuant to domestic US legislation, specifically Section 609 of Public Law 101-162. The complainants argued that the embargoes on their shrimp and shrimp products were in contravention of their MFN rule rights under Article I(1), inconsistent with ban on quantitative restrictions in Article XI:1 (against the norm of non-discrimination), and that the differential treatment meted out according to certification status contravened Article XIII:1 of the GATT and the regime norms of non-discrimination and reciprocity. The US, the Respondent, did not argue to any of the above but claimed that because Article XX was not subject to limitations of jurisdiction or location (of sea-turtles) the Section 609 measures were justified under Article XX (b) and (g).

The Shrimp-Turtle Panel addressed the matter of jurisdiction only indirectly through a discussion of the Article's 'scope'.¹² It did this by applying a top down approach to analysis i.e. first assessing whether the measure for which Article XX justification was claimed met the standards of the chapeau; namely it was not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", nor was it "a disguised restriction on international trade". As the Panel found that the Section 609 Measure did not meet the standards of the chapeau it didn't go on to the

¹² *Shrimp-Turtle Panel report* at 7.51, p.289

second step of considering whether it would be justifiable under the Article XX(g) subsection and found instead that it wasn't within the 'scope' of Article XX.¹³ It therefore also did not make a finding on whether Turtles could be considered 'exhaustible natural resources' for the purposes of Article XX(g). It echoed the Tuna-Dolphin I panel's concern with the seemingly inherent unilateralism of the environmental measures when it stated that a broader interpretation of the chapeau (to include those measures conditioning market access to adoption of environmental policies) would lead to a threat to the multilateral trading system.¹⁴

The Shrimp-Turtle AB, in contrast, did find that sea-turtles could be considered 'exhaustible natural resources' for the purposes of Article XX (g) as the definition was not limited to mineral or non-living resources.¹⁵ Most importantly for the purposes of this paper, it addressed the US appeal - on the question of whether Section 609 constituted "unjustifiable discrimination" and was therefore precluded from using the Article XX exceptions - by clarifying the interpretive steps which it hoped would be applied by future panels.

Analysing whether a measure was justified under Article XX by first applying the chapeau would render any environmental measures which condition market access, automatically discriminatory.¹⁶ However, this is the essence of Article XX – that it be used to justify *exceptions* to the usual course of trade interactions within the

¹³ *Shrimp-Turtle Panel report* at 7.63, p.294

¹⁴ *Shrimp-Turtle Panel report* at 7.45, p286-7

¹⁵ *Shrimp-Turtle AB report* at 128

¹⁶ *Appellate Body report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R at paragraph 121

regime. Thus the reversal of the interpretative sequencing of Article XX (from that used in the Tuna Dolphin cases and the Shrimp-Turtle Panel report) meant that environmental measures would not automatically be found GATT inconsistent.¹⁷ In so doing the AB has been charged with reversing existing jurisprudence¹⁸ and criticised as engaging in a form of judicial lawmaking which potentially opens the door for unilateral measures by members.¹⁹ Others have lauded the move, calling it a 'radical step'²⁰ which more clearly delineates the procedure with which Article XX should be analysed and provides a clear approach to balancing trade-environment disputes and issues.²¹

Dispute outcomes: a sea-change 'in' or 'of' the regime?

The question posed by this paper was how the treatment of Article XX, marine-based disputes differed between the GATT and the WTO. Given the preceding case analyses there are two ways to answer this question.

To see differences in the treatment of the disputes between GATT and the WTO, it is necessary to look beyond the obvious broader brush-strokes of the outcomes to the finer details of the reasoning behind the decisions to see how they may have changed.

¹⁷ Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, 27.2(2002), 491-522 (p.500)

¹⁸ Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO': *International Affairs* (Royal Institute of International Affairs 1944-), 77.1 (Jan., 2001), 15-29 (p.28)

¹⁹ John H. Jackson, 'Comments On Shrimp/Turtle And The Product/Process Distinction', *European Journal Of International Law*, 11(2000), 303-307 (p.306)

²⁰ Ibid

²¹ Steinberg, Richard H., 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', *The American Journal of International Law*, 98.2 (Apr., 2004), 247-275 (p.252)

The Shrimp-Turtle panel found the Section 609 measures to be quantitative restrictions (of the kind prohibited by Article XI²²) because it had also found the embargo could not be justified under the Article XX exceptions because it did not meet the non-discrimination standards embodied in the chapeau.²³ The Panel was concerned that allowing such measures would raise the spectre of unilateralism within the regime as it would undermine the autonomy of member states to set their own policies without contravening other members' policies during the course of international trade.²⁴ The AB decision to reverse the Panel's interpretive sequencing when applying Article XX (subsections first and then chapeau), indicates a willingness to countenance that environmental measures, by their very nature, may require discriminatory actions on the part of regime members.²⁵ The discriminatory action in this instance was the US making access to its markets conditional on exporting countries adopting a sea-turtle conservation and regulatory program (use of TEDs) it had effectively prescribed. The AB found that this type of action would not necessarily render a measure *a priori* unjustifiable under the Article XX exceptions – applying the interpretive sequencing used by the Panel, however, would have found precisely that.²⁶

This is a potentially significant jurisprudential step for the use of environmental measures and represents a departure from the Tuna-Dolphin decisions. In the first Tuna-Dolphin decision the MMPA's direct and the intermediary embargoes were automatically considered GATT inconsistent because the embargoes for which XX

²² *Shrimp-Turtle Panel* at 7.17

²³ *Shrimp-Turtle Panel report* at 7.49

²⁴ *Shrimp-Turtle Panel report* at 7.51

²⁵ *Shrimp-Turtle AB report* at 121

²⁶ *Ibid*

(g)²⁷ and (b) justification was sought were applied outside of the jurisdiction of the country taking the measure. The Shrimp-Turtle AB, however, left open the question of whether an extraterritorially applied environmental measure, based on a PPM for instance, might be justifiable under the Article XX exceptions if it were applied in manner which met the provisos of the chapeau and did not represent a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade."²⁸

Changes have been identified in the manner in which disputes are dealt with: the WTO DSU process is more clearly defined and automatic than the GATT dispute resolution process was and includes strict timelines and procedures which must be adhered to in the normal course of a dispute. As one commentator put it, the "GATT dispute resolution process has, in short, been "juridified" under the WTO".²⁹ As a standing body of experts, the Appellate Body of the WTO is tasked to address any issues of law which arise from Panel rulings and to make judgements on the interpretation the law of the WTO.³⁰ This the AB did in the Shrimp - Turtle dispute by overturning the interpretive sequencing of Article XX employed by the Panel.

Writers have suggested that the WTO represents a bureaucracy with its own 'agenda',³¹ and the AB in turn, not a neutral judge but one that considers its own interests and shapes its judgements accordingly.³² In this way the decisions of the

²⁷ *Tuna-Dolphin I* at 5.32

²⁸ Sampson, *Trade, Environment, and the WTO*, 109

²⁹ Triggs, *Dispute Settlement under the World Trade Organization*, 47

³⁰ WTO, *Dispute Settlement Understanding*, Article 17(6)

³¹ Weber in Barnett, Michael N. and Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, (p.707)

³² Jay Smith, McDougal and Lasswell in Gregory Shaffer, 'Power Governance and the WTO' in *Power in Global Governance*, ed. by Barnett, Michael and Raymond Duvall (Cambridge: CUP, 2005)

AB might actually have an impact on the principles and norms of the underlying regime – sufficient to change the nature of the regime itself. The change of the decision-making procedure (the introduction of the more judicial Appellate Body) might have facilitated changes in the principles and norms through enhancing the process of judicial interpretation. Thus if the reversal of the interpretative sequencing of Article XX is a radical as some writers have suggested³³ and has as far-reaching implications for justifying unilateral action based on PPMs as both India and Thailand suggested,³⁴ then perhaps it may be considered a change of the fundamental norm of non-discrimination and the diffuse principle of sovereignty and as such an alteration of the regime itself. Nevertheless it should be noted that the DSB is but one type of decision-making within the WTO and that during trade negotiations (another type of decision-making procedure) many WTO members have resisted making significant changes to the rights and obligations of the GATT that would permit environmental measures, eschewing even the conservative case-by-case changes the AB's interpretive approach offers.³⁵

From a broader perspective, however, the outcome of the disputes has differed little between the regime and the WTO as the environmental measures imposed (the MMPA embargos and the Section (609) embargo) were found to be GATT inconsistent and construed instead as unilateral attempts to coerce other states into changing their environmental policies through the use of economic embargoes based on PPMs. Notwithstanding the preamble's commitment to sustainable

³³ Howse, *A New Legal Baseline for the Trade & Environment Debate*, 500

³⁴ Sampson, *Trade, Environment, and the WTO*, 109

³⁵ Jan McDonald, "It's not easy being green": Trade and Environmental linkages beyond Doha' in *The WTO and the Doha Round: The Changing Face of World Trade*, ed. by Ross P. Buckley, (The Hague: Kluwer Law International, 2003), 145-167 (p.156)

development, the WTO has been severely criticised for its perceived prioritization of trade over environmental considerations. For example, the Earth Island Institute (the US NGO whose domestic law suits precipitated both disputes) called the AB's decision a, "death-blow to sea-turtles".³⁶

This perceived lack of difference between the treatment of the disputes may be accounted for by returning to Krasner's definition of regimes. In his seminal paper - 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' - Stephen Krasner draws a distinction between the principles and norms of a regime and its rules and procedures. Principles and norms, he states, are the defining characteristics of a regime, thus any changes to these actually change the regime. Rules and decision-making procedures on the other hand may be changed without fundamentally altering the very nature of the regime.³⁷ Therefore the similarity in the 'anti-environment' outcome of both of these disputes may indicate that the principles and norms of the regime have persisted and the addition of the WTO bureaucracy has only changed the rules and procedures; as such there is not a fundamental change in the regime, but rather a change within the regime.

Thus the answer to the question posed by the paper is highly dependent on level of nuance inherent in the interpretation of the respective outcomes. If the Shrimp-Turtle AB Report – and specifically its findings vis-à-vis the interpretive sequencing of Article XX exceptions – is interpreted as the beginning of a trend

³⁶ Gregory Shaffer, 'United States-Import Prohibition of Certain Shrimp and Shrimp Products. WTO Doc. WT/DS58/AB/R', *The American Journal of International Law*, 93. 2 (Apr., 1999), 507-514 (p.513)

³⁷ Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36.2 (Spring 1982), 185-205 (p.187)

toward unilateralism it would indicate a potential change in the principles and norms of the regime which underpins WTO and thus a change of the regime itself. If, however, the report is interpreted merely as another step in the process of the evolution of WTO/GATT 1994 jurisprudence, then the regime itself persists as the change has occurred within it at the level of rules and decision-making procedures. Answering that question definitively requires further disputes in order to see how the AB's finding on interpretive sequencing is used by subsequent DSU Panels to resolve similar Article XX marine-based disputes; and to see how decisions emanating from the negotiating table interact with that finding to shape future dispute outcomes.

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Appendix 1: Article XX (General Exceptions)

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) ...

(b) necessary to protect human, animal or plant life or health;

(c) ...

(d) 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, trade marks and copyrights, and the prevention of deceptive practices;

(e) ...

(f) ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) ...

(i) ...

(j) ...

Appendix 2: The Purse-seine fishing method

This method of operation can comprise either a single vessel – a purse seiner – or a two boat combination for larger operations. Upon finding an aggregation of pelagic fish – either through spotting herds of dolphin, or surface water disturbance, or the use of sonar¹, for example – a purse seine net is set upon the school of fish. In larger, commercial operations the seine ‘skiff’ (usually a motorboat) guides and unfurls the net around the school of fish before returning to the seiner to close the circle by attaching the net to the boat².

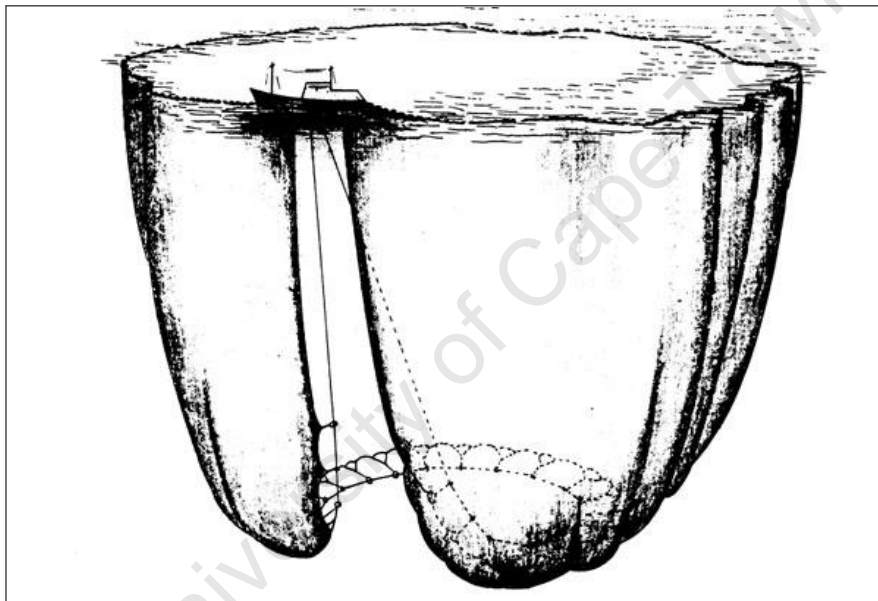


Figure 1: The Purse-seine net in the ocean³

¹ <http://www.fao.org/fishery/geartype/249> [22/01/2009]

² Tuna-Dolphin I Panel report, p.2, at 2.1

³ Image source: http://www.fao.org/fishery/common/format/popUpImage.jsp?xp_imageid=7262

The net, which can be hundreds of metres deep and several miles long, is then “pursed” by drawing the bottom of the net tightly together using the pursing wire – see image below.

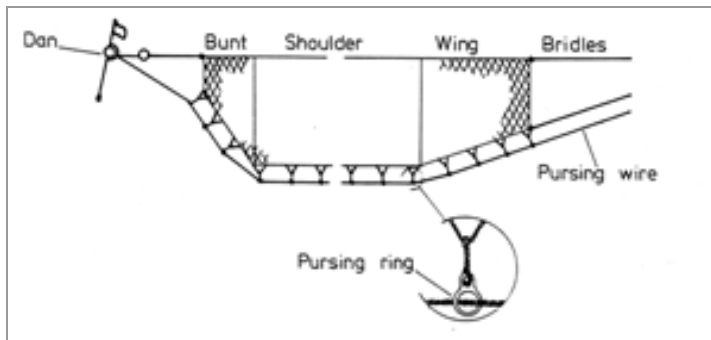


Figure 2: The principal net sections and ropes for a purse-seine⁴

The top wire, termed the floatwire, is then also drawn together to capture whatever is trapped in the purse⁵. It is at this point that many dolphins are killed as they are trapped under the water and eventually drown⁶.

⁴ Image source <http://www.fao.org/fishery/geartype/249> [22/01/2009]

⁵ Tuna-Dolphin I Panel report, p.2, at 2.1

⁶ FAO. © 2001-2009. Fishing Gear Types. Purse seines. In: *FAO Fisheries and Aquaculture Department* [online]. Rome. Updated 21 October 2008. <http://www.fao.org/fishery/geartype/249/en> [first accessed 9/02/2009]

Appendix 3: The GATT-zilla cartoon.

This drawing/cartoon first appeared as a poster in Washington DC, USA, in 1994 after the Tuna-Dolphin I GATT ruling and encapsulates the pro-environment/anti-trade public perception

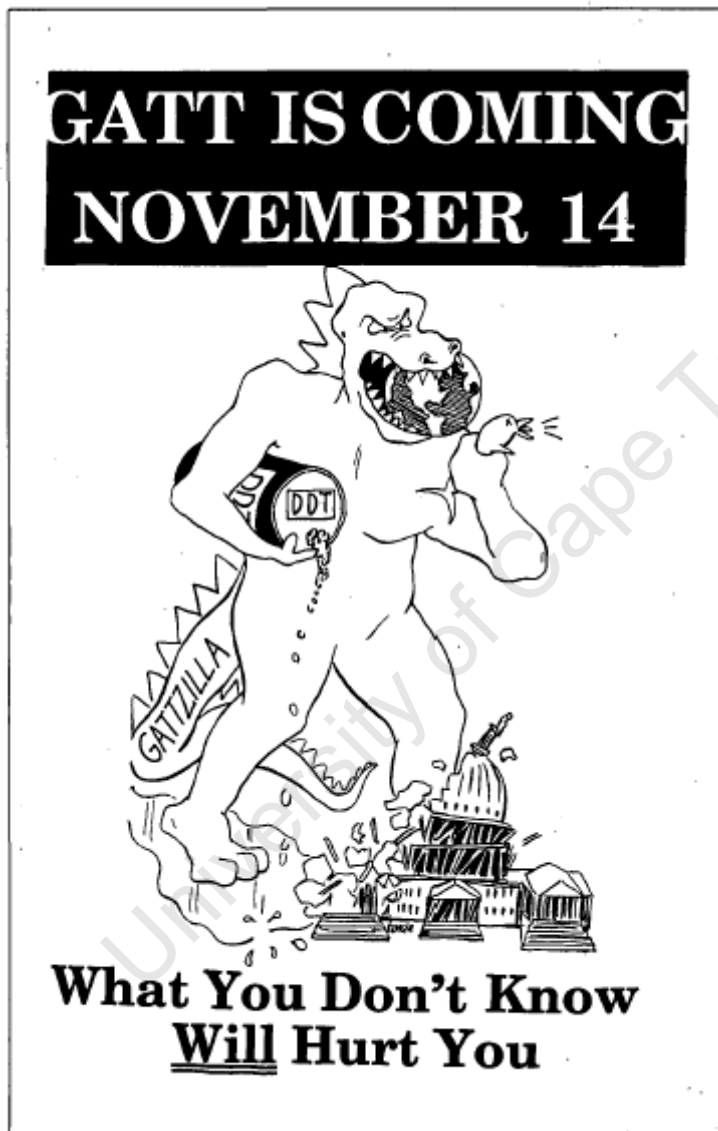


Figure 3: The GATT-zilla cartoon⁷

⁷ Esty, *Greening the GATT*, 34

Appendix 4:

Excerpts from the Vienna Convention on the Law of Treaties

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32.

Supplementary means of interpretation

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

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

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Appendix 5: Sea Turtles⁸

Family: Dermochelyidae



Leatherback (*Dermochelys coriacea*)

Critically Endangered

The largest of all turtles, the leatherback can reach over six feet in length and weigh over 2,000 pounds (907 kg). Leatherbacks swim the greatest distances and regularly dive to depths greater than 1,000 meters (3,281 feet). Unlike the plated shells and scaled surfaces of the other sea turtles, the leatherback's shell is a single piece with five distinct ridges.

Family: Cheloniidae



Kemp's Ridley (*Lepidochelys kempii*)

Critically Endangered

The Kemp's Ridley is the smallest of the sea turtles and has a very restricted range, nesting only along the Caribbean shores of northern Mexico and in Texas, USA. Fifty years ago the Kemp's Ridley was near extinction. This species now (as at 2008) shows signs of recovery, although much work remains before it can be considered "in the clear."



Hawksbill (*Eretmochelys imbricata*)

Critically Endangered

Named for its sharp, pointed beak, the hawksbill feeds primarily on reef sponges, invertebrate organisms whose bodies contain indigestible glass spicules. The hawksbill has a beautiful, translucent shell, which has been used in tortoiseshell jewellery for centuries, which has contributed to their sharp population declines in recent decades.

⁸ Pictures and information from

<http://www.seaturtlestatus.org/Main/Why/AboutTheTurtles.aspx>



Green (*Chelonia mydas*)

Endangered

The most widespread of the seven species, the green sea turtle earns its name from the colour of its body fat. Its cartilage, called calipee, is the main ingredient in green turtle soup, once highly sought in Europe. Though now illegal to trade in many areas of the world, the green turtle and its eggs continue to be consumed by many coastal peoples.



Loggerhead (*Caretta caretta*)

Endangered

Loggerheads are named for their large heads, with jaws powerful enough to crush an adult queen conch. Like most sea turtles, loggerheads are famed for their vast migrations; for instance, loggerheads that mate and nest in Japan regularly cross the Pacific to feed in Mexican waters.



Olive Ridley (*Lepidochelys olivacea*)

Endangered

Olive Ridleys are the most abundant of the sea turtles. These turtles nest synchronously en masse in a phenomena known as an arribada, Spanish for "arrival." At their largest nesting population in Orissa, India, hundreds of thousands of females nest each year.



Flatback (*Natator depressus*)

Data Deficient (Status Unknown)

The flatback is the least studied of the sea turtles and has one of the smallest geographic ranges. Although they travel into adjacent national waters, flatbacks stay within a relatively small area around northern Australia, southern Indonesia and southern Papua New Guinea.

Appendix 6: The shrimp trawler & the Turtle Excluder Device

The TED is one of a number of Bycatch Reduction Technologies employed in the shrimping industry to reduce the problem of bycatch (marine animals incidentally captured) and make the industry both more environmentally sound and economically efficient. The TED is an angled hatch or grating in the net through which turtles may escape when caught in the net as it is pulled behind a boat. Shrimp and prawns are small enough to pass between the bars and are directed into the closed back of the net by the flow of water⁹.

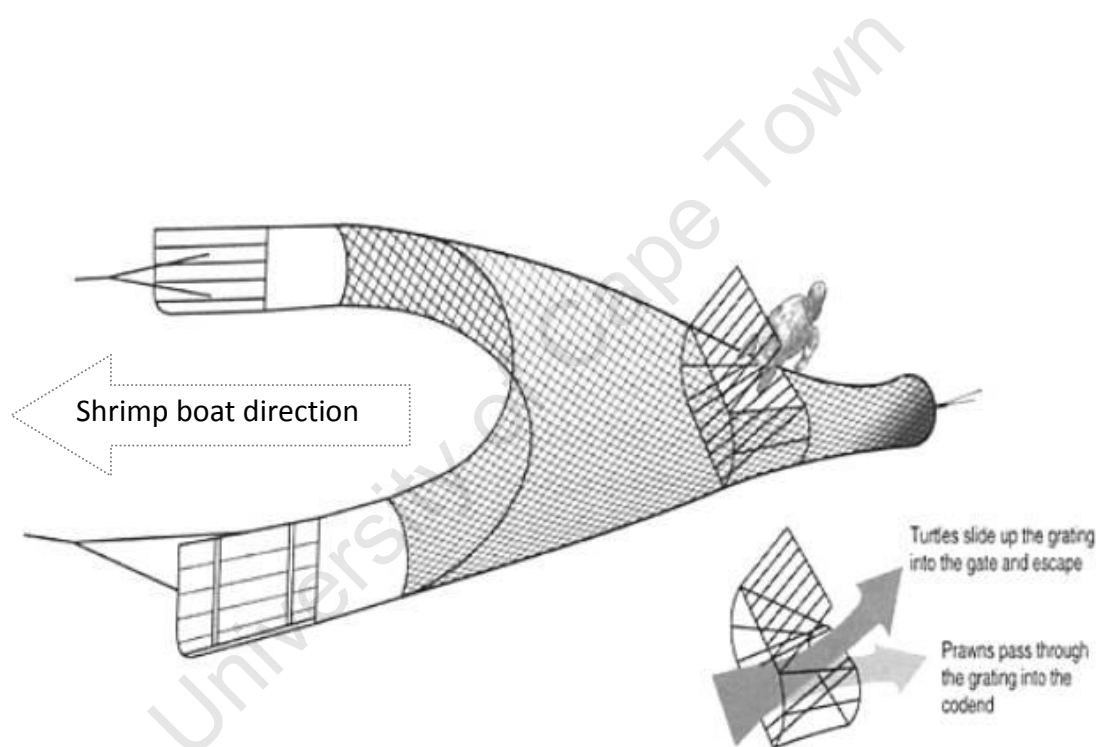


Figure 4: Turtle Excluder Device in a trawl net¹⁰

⁹ <http://www.nmfs.noaa.gov/pr/species/turtles/teds.htm>

¹⁰ Image source: <http://www.arbec.com.my/sea-turtles/art34julysept01.htm>

ARBEC is the "ASEAN Review of Biodiversity and Environmental Conservation"

Appendix 7: Sea-Turtles as form of protest



Figure 5: In Seattle [1999] there were mass anti-globalisation protests¹¹



Figure 6: Sea turtles stick their necks out in the Seattle streets [1999]¹²



Figure 7: Sea turtles march against the World Bank and IMF in Washington, D.C. 2000 (Jenny Pike)¹

“Why We Marched as Turtles.

At the WTO meeting in Seattle, AWI helped lead 240 people dressed as sea turtles in protest against the WTO’s rejection of U.S. law requiring turtle excluder devices on boats of any country wishing to export shrimp to America. Several countries refused employing these inexpensive devices, insisting that our law unfairly restricted trade. The WTO struck down our law. ... The

turtles have been a tremendous hit—symbolically protesting the WTO’s usurpation of American sovereignty, including enforcement of our animal protection laws, and the ecological destruction wrought by the World Bank and IMF.”

¹¹ <http://www.treehugger.com/BBC-WTO-Seattle-Protest-Turtles-thumb.jpg>

¹² <http://www.grist.org/news/maindish/1999/11/29/mckibben-wto/>

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