CASE 7–2

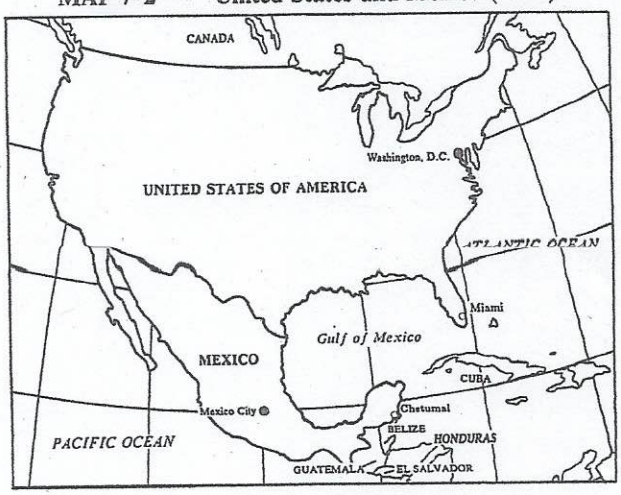
In the Matter of United States' Restrictions on Imports of Tuna

General Agreement on Tariffs and Trade, Dispute Settlement Panel, 1991.
GATT, *Basic Instruments and Select Documents, Thirty-ninth Supplement*, p. ___ (1991); *International Legal Materials*, vol. 30, p. 1594 (1991).

In 1988 and 1990, the United States revised its Marine Mammal Protection Act (MMPA) of 1972 with the intent of reducing the level of marine mammals killed or seriously injured by commercial fishing vessels. In particular, the revised MMPA set special standards for the Eastern Tropical Pacific Ocean (ETP), where dolphins and tuna are known to associate, and where fishermen for a long time located underwater tuna by chasing dolphins on the ocean surface and then intentionally encircling them with nets (called purse-seine nets) to catch the tuna underneath. These standards limited the number of dolphins that could be incidentally taken by American vessels fishing for tuna in the ETP.

Section 101(a)(2) of the revised MMPA also allowed the Secretary of the Treasury to ban the importation of "commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals" in excess of United States standards. In August 1990, pursuant to a court order, the US government imposed an embargo on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets in the ETP until the Secretary of Commerce could determine that the effected foreign fishing fleets had brought their catches into compliance with the MMPA standards. Mexico, among other states, was exempted from this embargo in September, but then a second court order reimposed the embargo in October. An appeals court stayed the embargo in November, but it removed its stay (and reimposed the embargo again) in February of 1991.

MAP 7–2 ▫ United States and Mexico (1991)



Pursuant to still another court order, the US Customs Service issued guidelines for a new embargo in April 1991. This prohibited the importation into the United States of any yel-

lowfin tuna or yellowfin tuna products harvested in the ETP with purse-seine nets by vessels from Mexico, Vanuatu, and Venezuela.

In November 1990, shortly after the US government implemented the first of these embargoes, Mexico requested consultations with the United States. When the consultations proved unsuccessful, Mexico asked the GATT CONTRACTING PARTIES *to establish a dispute settlement panel, and in March the* CONTRACTING PARTIES *did so. Mexico asked the panel to find that the American embargo on yellowfin tuna or yellowfin tuna products was a violation of Article XI of the General Agreement.*

REPORT OF THE PANEL: . . .

[*Article III*]

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

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

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

[The interpretive note explaining] Article III provides that:

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

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

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

A previous panel had found that Article III(2), first sentence, "obliges contracting parties to establish certain competitive conditions for imported *products* in relation to domestic *products*."[12] Another panel had found that the words "treatment no less favorable" in Article III(4) call for effective equality of opportunities for imported *products* in respect of the application of laws, regulations or requirements affecting the

[12] Panel Report on "United States—Taxes on Petroleum and Certain Imported Substances," adopted 17 June 1987, *Basic Instruments and Select Documents, Thirty-fourth Supplement*, p. 136 at p. 158, para. 5.1.9 (1987).

sale, offering for sale, purchase, transportation, distribution or use of *products*, and that this standard has to be understood as applicable to each individual case of imported *products*.[13] It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products. . . .

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

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

Article XI . . .

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

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

> No prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party of the importation of any product of the territory of any other contracting party. . . .

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

The Panel held that United States Marine Mammal Protection Act and its related regulations prohibiting the importation into the United States of yellowfin tuna and yellowfin tuna products were inconsistent with Articles III and XI of the General Agreement on Tariffs and Trade. It recommended that the CONTRACTING PARTIES *ask the United States to bring its laws into compliance with the General Agreement.*

[13] Panel Report on "United States—Section 337 of the Tariff Act of 1930," adopted 7 November 1989, *Basic Instruments and Select Documents, Thirty-sixth Supplement*, p. 345 at pp. 386–7, paras. 5.11, 5.14 (1989).