
Summary: Nathalie Bernasconi-Osterwalder (Lead Author) with Daniel Magraw, Maria Julia Oliva, Marcos Orellana, Elisabeth Tuerk, Environment and Trade, London 2006, 219-222

Article III (and XX) of the GATT


Short summary and commentary

U.S. – Tuna/Dolphin I was the first dispute to involve an environmental non-product-related PPM-based measure. It addressed the PPM-issue primarily in its interpretation of Article III (on national treatment), and to some extent, in the context of Article XI (on the prohibition of quantitave restrictions). However, in contrast to Belgian Family Allowances, it also involved interpretations of Articles XX(b) and (g). At issue was a US regulation imposing an embargo on yellow-fin tuna (and products thereof) caught in a specific way that incidentally killed or injured dolphins. If the harvesting and exporting country proved that its incidental dolphin kill rates did not exceed, by a certain margin, the rate of the US fleet, however, that country was certified and not subject to the embargo. The regulations also banned yellow-fin tuna and products from ‘intermediary nations’ (secondary nation embargo) unless these countries proved that they also banned tuna and products produced in countries subject to the primary ban.
Mexico complained that this regulatory scheme violated Article XI of the GATT prohibiting quantitative restrictions on importation. The US, in turn, responded that the measures instead fell within the scope of Article III:4 (which permits the application of internal regulations on a non-discriminatory basis) and Note Ad Article III (which permits enforcement of such internal regulations at the time or point of importation). The panel ruled that Article III and Note Ad Article III only covered measures applying to products as such. *(US – Tuna/Dolphin I Panel report, paragraph 5.11).* Thus, because the panel found that the US regulation did not affect tuna as a product, it concluded that the regulation did not fall under the scope of Article III, but instead qualified as a quantitative restriction under Article XI.

The US argued that even if a violation of Article XI or III of the GATT were found, both the primary and the secondary embargo could be justified under Articles XX(b) and (g) of the GATT, which provide general exceptions to measures ‘necessary to protect human, animal or plant life or health’ and measures ‘relating to the conservation of exhaustible natural resources’. The US also argued that the secondary embargo was justified under Article XX(d), which covers measures necessary to enforce laws or regulations that are not themselves GATT inconsistent.

The panel concluded that the measure was not justified under Article XX(b) because that article should not be used to protect extraterritorial life or health. The panel found that if it were to justify the US measure under Article XX(b) of the GATT, it would allow a party to unilaterally determine life or health protection policies from which other parties could not deviate, without jeopardizing trading rights guaranteed by the GATT. For largely the same reason, the panel rejected justification under Article XX(g) as well. Since the primary embargo was inconsistent, the panel also found that the secondary embargo was not justified under Article XX(d). Discussions and excerpts regarding the panel’s interpretation of Article XX can be found in Chapter 2: General Exceptions Clauses and Chapter 5: Extraterritoriality.

Due to strong opposition by environmental groups and the US public, and the fear of jeopardizing the ongoing negotiations of the North American Free Trade Agreement (NAFTA), the Report was never presented for approval by the GATT Council and thus was never adopted. As a result, the European Economic Community (EEC) and the Netherlands initiated a subsequent challenge of the same US measures, which led the *US – Tuna/Dolphin II* ruling in 1994. In *US – Tuna/Dolphin II*, the PPM-issue was also addressed under Articles III, XI and XX of the GATT. The panel report confirmed that Article III did not apply to laws not affecting the product as such (*US – Tuna/Dolphin II* Panel report, paragraph 5.8). Furthermore, the ruling specified that the US bans distinguished between tuna products according to the harvesting practices of primary nations and the import policies of ‘intermediary’ nations, and that these practices and policies could not have any impact on the inherent character of tuna as a product, thus making Article III inapplicable *(Id. at paragraph 5.9).* Instead, the panel found a violation of Article XI of the GATT prohibiting quantitative restrictions.

In contrast to the previous panel in *US – Tuna/Dolphin I*, this panel found that Article XX(g) of the GATT applied to policies related to the conservation of exhaustible natural resources located within the territory of the party invoking the provision and to policies aimed at conserving dolphins outside its territory, but only by exercising its jurisdiction on its nationals and vessels *(Id. at paragraphs 5.15–5.17).* However, just as in *US – Tuna/Dolphin I*, the panel rejected justification for the embargo under Article
XX by concluding that measures taken to force other countries to change their policies, and that are effective only if such changes occur, could not be justified under Article XX(g) (Id. at paragraph 5.27).

Similarly, the panel found that a policy to protect the life and health of dolphins outside its territory was covered by paragraph (b), but rejected justification of the US measures for the same reasons as it rejected justification under paragraph (g).

US – Tuna/Dolphin II was not adopted by the GATT Council.

With respect to the PPM issue, the two US – Tuna/Dolphin disputes each looked at the scope of coverage of Article III and concluded that non-product-related PPMs did not fall under the scope of Article III (US – Tuna/Dolphin I Panel report, paragraph 5.11 and US – Tuna/Dolphin II Panel report, paragraph 5.8). The first of the two reports additionally noted that even if Article III were to apply, the US ban would not meet the requirements under Article III because Article III:4 required that the US accord Mexican tuna as a product treatment no less favourable to that accorded US tuna as a product, independent of the incidental dolphin kill rates (US Tuna/Dolphin I Panel report, paragraph 5.15). US – Tuna/Dolphin II, concluding that Article III did not apply, did not address the issue of ‘like products’ or the question of whether products can be distinguished based on factors not directly relating to the product as such.

Both reports concluded that the US measures fell under the scope of Article XI on quantitative restrictions. Commentators have noted that if Article III is viewed as not covering non-product-related PPM-based measures, it is possible that such measures, which do not fall under the scope of Article XI, would not be subject to GATT disciplines. This would result in a situation in which certain non-product-related PPMs – in contrast to product-related measures – would escape GATT strictures.

As of June 2005 there has been no subsequent decision explicitly addressing the issue of Article III’s scope and applicability to questions of PPM measures. In US – Shrimp/Turtle I, which challenged a measure similar to the measure at issue in the US – Tuna/Dolphin disputes, the WTO Appellate Body reviewed the challenged US measure again under Article XI, not Article III. However it is worth noting that the Appellate Body probably did not take a position on the scope of Article III because the treatment under Article XI had not been contested.

In concluding that the US measure failed to comply with the conditions set out in the Article XX exceptions, the US – Tuna/Dolphin I and II decisions led many to believe that the GATT system as a whole generally prohibited the use of non-product-related PPM-based measures. However, the reports did not explicitly take a position on the product-related/non-product-related distinction in the context of Article XX. Rather, as discussed above, the panels focused instead on extraterritoriality. Nonetheless, because the effects of many (or most) non-product-related PPM-based measures are extraterritorial, the prohibition of measures with extraterritorial effects under Article XX has a direct impact on the general treatment of non-product-related PPM-based measures under the same article.

The US – Shrimp/Turtle decisions that followed half a decade later under the newly established WTO (described below) took a more flexible approach to the interpretation of the Article XX exceptions, and, in US – Shrimp/Turtle 21.5, led to the first non-product-related PPM-based measure to be allowed under GATT rules.

Issues relating to extraterritoriality and Article XX are addressed separately in Chapter 5: Extraterritoriality and Chapter 2: General Exceptions Clauses. Although US
– *Tuna/Dolphin I* and *II*’s discussion of Article XX are (indirectly) relevant for the PPM-issue, the respective excerpts are not included here, but instead in Chapter 5: Extraterritoriality. Thus, the excerpts printed below only relate to Articles III and XI of the GATT, not to Article XX.