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Environmental trade sanctions and the GATT:

An Analysis of the Pelly Amendment on Foreign Environmental Practises

- Steven Charnovitz[1]

Policy Director, Competitiveness Policy Council, USA

Is it appropriate to use trade sanctions to achieve environmental goals? There are good arguments for and against. The question became less academic in 1994 after the United States government imposed the first environmental trade sanctions under the so-called «Pelly amendment». This occured in a case involving endangered rhinos and tigers. As used here, the term trade «sanctions» means an import ban on an unrelated product.

Trade Sanctions and Environmental Cooperation

It has long been recognized that international cooperation is essential for solving many environmental problems. Because many environmental problems cross national boundaries or involve areas beyond the regulatory authority of any one country, the environment is even more of an international issue than others. As Jozo Tomasevich, a professor at Stanford University, pointed out fifty years ago:

> *if the concept of conservation is taken in its broad sense, meaning the most rational use of natural resources at the disposal of mankind over a period of time, the whole theory becomes closely related to the theory of international economic relations. Without doubt, conservation policies in various countries have international implications and repercussions that need to be taken into account in an appraisal of particular conservation policies.*

Reasons for Cooperation

Countries have sought international cooperation on many issues of environmental policy. For analytic purposes, one can divide these issues into three categories: the global commons, regional matters, and non-physical issues with moral or competitiveness implications. Each issue is briefly discussed below.

The global commons is one area of longtime concern, and longtime frustration. For example, in 1972, a League of Nations committee adressed the need for international rules regarding the exploitation of products of the sea. The committee pointed out that:

> *the riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race. To save this wealth, which, being to-day (sic) the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence, not on the defective legislation which has failed to see justice done but on the scientific and economic considerations which, after all the necessary data has been collected, may be put forward, compared and discussed at a technical conference by the countries concerned. In this way, a new jurisprudence will be created of which to-day (sic) we have no inkling, owing to the fact that the necessary which now arouses our legitimate apprehensions was never contemplated.*

Whale hunting was of special concern to the Committee. Although its recommendations did not have immediate impact, a group of whale hunting countries agreed to a limited treaty regulating whale hunting in 1931[2]. Although the Committee was overly optimistic about its ability to achieve agreement based on scientific and economic considerations, its forecast of a new jurisprudence, «of which today we have no inkling», may yet prove to be correct.

Another noteworthy attempt to achieve international cooperation occurred in 1922 when the U.S. Congress authorized the president to call for an international conference to prevent the pollution of navigable waters. The conference reached a common accord on preventing pollution by oil or oil mixtures, but its draft treaty never entered into force. Among the proposed rules, the treaty stated that tonnage duties «shall not be charged in respect of any space rendered unavailable for cargo by the installation of any device or apparatus for seperating oil from water». This was one of the earliest recognitions of the linkage between tariffs and pollution control.

Regional matters involving shared resource or trans-border damage is a second area of longtime concern. Although an initial proposal for a European convention for the protection of animals useful to agriculture came in 1868, it was not until 1902 that

such a convention was signed. This convention only involved birds: they were viewed as a shared resource because of their migratory nature in Europe. The earliest focus on trans-border damage involved the transmission of human, animal and plant disease. In many instances, international cooperation led to agreements using trade controls.

A third area of concern has been problems in other countries which were not global or regional in scope. Very often, these problems involved more moral or competitiveness concerns. For example, in 1906, an international conference in Bern devised a treaty to regulate the use of phosphorous in match production and to prohibit trade in phosphorous matches. Even though the production was dangerous to workers, no country would confront this problem alone because phosphorous substitutes were more expensive. Acting collectively, however, concerned nations could protect workers in each country and move jointly to strengthen labor standards.

It is important to recognize the difference between a bird protection treaty and an occupational safety treaty. Bird protection requires international cooperation because one country cannot save migratory birds on its own. By contrast, one country can protect its own workers from phosphorous. Political and economic factors, however, may often prevent a country from adopting a more salutary policy. In such situations, international agreements will allow nations to upgrade their standards collectively.

Barriers to Cooperation

International cooperation is often unattainable. There are several reasons for this. First, nations often place different values on protecting the environment vis-à-vis other goals. Second, even countries sharing the same general environmental values will have different interests on particular issues. Third, some governments may not reflect the views of their populace. Fourth, some governments pursue policies that are not in their national interest.

In some cases, differences between countries could lead to situations where there is no zone of agreement. In most cases, however, the non-attainment of international cooperation results from bargaining failure. There are potential agreements that could make participants better off, but the countries do not reach them because of bluffing. On many issues, countries do not even commence serious negotiations..

Tools to Promote Cooperation

Methods for countries and individual citizens to overcome barriers to international agreements is a core issue in environmental policy. Ignoring military tools, a country wanting to raise international environmental standards can influence the policies of other countries in two ways. First, countries can use political tools. For example, diplomats can try to persuade one another of the need for cooperation. Media attention plays an important intermediary role in this approach. Second, countries can use economic tools. A government, for instance, might condition its foreign aid or support for World Bank projects on the environmental policy of a country. Groups of individuals can also launch boycotts.

Another common economic tool is the use of trade measures[3]. While this approach theoretically can include trade liberalization as an inducement for cooperation, the trade tools most often called upon are trade restrictions.

In considering environmental trade restrictions, it is important to distinguish between import prohibitions and sanctions. An import prohibition is a ban on a product that has a direct nexus to an environmental harm. By contrast, a sanction is a trade ban on unrelated products for the purpose of influencing a foreign country's policies or actions. Because sanctions are often import prohibitions, one can view sanctions as a discrete type of import prohibition rather than as a distinct instrument.

Both instrument prohibitions and sanctions can be applied by treaty to other parties. They also can be applied be treaty to non-parties to encourage nations to become parties. In the absence of a treaty, or when treaties do not have adequate enforcement mechanisms, both import prohibitions and sanctions can be applied unilaterally to prevent environmental harm. This study will examine such a unilateral trade sanction, the Pelly Amendment.

Objections to Sanctions

Before proceeding with a detailed discussion of the Pelly Amendment and an analysis of its GATT implications, it is useful to consider the following queries: 1) whether unilateral trade measures achieve positive environmental results, and 2) whether unilateral measures improve the prospects for multilateral solutions. The conventional wisdom is that both considerations should be answered in the negative. For example, the GATT Secretariat has pronounced that «negative incentives - in particular, the use of discriminatory trade restrictions on products unrelated to the environmental issue at hand - are not an effective way to promote multilateral cooperation».

II. PELLY AMENDMENT LEGISLATIVE HISTORY

The Pelly Amendment of 1971 is named after Congressman Thomas M. Pelly, who proposed the law at the end of his twenty year career in the U.S. House of Representatives.

Congress enacted the Pelly Amendment in response to unsuccessful U.S. efforts to persuade Denmark, Norway and West Germany to comply with the ban on high seas salmon fishing that was promulgated by the International Commission for the Northwest Atlantic Fisheries. All three countries agreed to phase out their salmon fishing after Pelly became law. As enacted, the Pelly Amendment provided that:

> *(when) the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminishes the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President. Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the bringing of the importation into the United States of fish products of the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.*

The Pelly Amendment process is linked to acts of foreign persons, not foreign governments.

In 1978, Congress added a new track to Pelly for «engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species whether or not such conduct is legal under the laws of the offending country.» As a result of the 1978 law, Pelly was divided into two tracks: diminishing the effectiveness of an international fishery program[4] could lead to sanctions against fish products; and diminishing the effectiveness of an international endangered species program could lead to sanctions against wildlife products. Although the goal pursued is a multilateral one, the determination under Pelly of when actions diminish the effectiveness of international programs is solely unilateral.

A test based on «diminishing the effectiveness» is rather vague. Many factors could trigger a finding of diminished effectiveness. These factors include non-ratification of a treaty, non-observance of a treaty or even actions related to a treaty such as domestic sales of an endangered species. Pelly is not predicated on the violation of a treaty. For example, the Whaling Convention permits member nations to avoid being bound by a quota by entering an objection to it. Such an objection is legal under the treaty and international law. It could still, however, trigger an adverse Pelly ruling.

In 1988, Congress modified the fishery penalties to include «any aquatic species» exported from that country regardless of whose nationals caught the fish.

In 1992, Congress revised the Pelly Amendment to expand the range of products against which a president could invoke countermeasures.

Deemed Pellys

There are several U.S. environmental laws linked to the Pelly Amendment. Under these laws, various official determinations about foreign government policies or production practices are «deemed» certifications under Pelly and are handled like any other certification. Some of these determinations involve international treaties and some do not.

Under the Fishery Conservation and Management Act of 1976, also known as the Packwood-Magnuson Amendment, a certification by the Secretary of Commerce that foreign nationals are «engaging in trade or taking», which diminishes the effectiveness of the International Whaling Convention, is deemed a Pelly certification. The only way this provision expands potential application of Pelly is by mandating certification for trade in whales even though they may not be endangered.

Under the Marine Mammal Protection Act (MMPA) amendments of 1988, the Secretary of Commerce must certify under Pelly any nation whose yellowfin tuna is embargoed whenever the embargo continues for more than six months.

Under the Fishery Conservation Amendments of 1990, if the Secretary of Commerce finds that a nation is engaging in trade in unlawfully taken anadromous fish or fish products, that finding is deemed a Pelly certification.

Pelly Episodes

This section provides a short case history of a few Pelly episodes related to fishery agreements. If an episode is rated as successful, the Pelly threat led to a significant concurrent change in the target country's policy in the direction sought by the U.S. Government[5]. Thus, a commitment to greater adherence to international standards by a foreign government would be deemed succesful.

1974 - W - Japan and Soviet Union

In 1974, the Secretary of Commerce certified Japan and the Soviet Union for exceeding the International Whaling Commission's (IWC) quota for 1973-74 with respect to the minke whale. Both countries had objected to the IWC quota, however, and were therefore not legally bound by it. In announcing that he had decided against imposing sanctions, President Ford explained that both countries had voted for the 1974-75 quotas which incorporated conservation improvements. He also explained that imposing sanctions against Japan would result in higher prices for American consumers. These episodes are rated as successful because the two countries agreed to the IWC quota for the next year.

1986 - W - Norway

In 1986, the Secretary of Commerce certified Norway for violating the IWC moratorium on commercial whaling. Norway had objected to the zero quotas and was therefore not bound by them. Less than a month after the Pelly certification, Norway announced that it would suspend commercial whaling after the 1987 season and would reduce its catch for that year. President Reagan then decided not to impose sanctions. This episode is rated as succesful because Norway agreed to suspend commercial whaling after that season.

1990 - W - Norway

In 1990, the Secretary of Commerce certified Norway for taking minke whales in violation of IWC research criteria. In announcing that he would not impose sanctions, President Bush stated that Norway was making progress in its «program and presentation» and noted current efforts to improve U.S.-Norwegian scientific consultations. This episode is rated as unsuccesful because Pelly did not affect Norway's whale-hunting behavior.

1993 - W - Norway

In August 1993, the Secretary of Commerce certified Norway for violating the IWC zero catch limit on minke whales by killing 157 whales. Norway argued that the minke whale was not endangered. The IWC, however, included this whale in its zero catch limit. Moreover, the minke whale is on CITES Appendix I. Norway also argued that it was not legally bound by the zero catch limit since it had entered a reservation under IWC procedures. In October 1993, President Clinton stated that although «Norway's action is serious enough to justify sanctions», he would nevertheless not impose them. This episode is rated as unsuccessful because Pelly did not affect Norway's behavior.

Assesment of the Pelly Amendment

Because no Pelly penalties have ever been imposed, this section only evaluates the effectiveness of threatened countermeasures, that is, the extent to which Pelly led to policy reform or

commitments to reform. It should be noted that a number of countries took action following a threat of Pelly certification, and thus were never certified. These «successes» are not tallied here. It should also be noted that there are only a handful of data points, based on admittedly subjective judgements. Accordingly, the conclusions drawn here should be viewed as suggestive only.

Utilization of the Pelly Amendment increased in recent years. The average success rate has been fifty-eight percent. This is impressive, particularly in the absence of any actual sanction. The rate of success is also noteworthy when compared to the effectiveness of other economic santions[6].

The second certification of a country for a particular issue has almost always been less successful than the initial one. This pattern of declining effectiveness suggests that the «shock» of certification wears off quickly. One also might expect the Pelly Amendment to be less effective over time given the absence of any imposition of sanctions. Whether the Pelly reforms of 1992, expanding potential sanctions to all products, will increase the success rate remains unclear. So far it has not; at least three of the certifications under the new law have failed.

Several objections are commonly raised against «pellying», in addition to the potential GATT violation. The principal objection is that Pelly is unilateral. Indeed, Pelly can be unilateral in three ways: setting the standard countries should apply; judging whether countries have met that standard; and determining what penalty should be impose.

Critics claim that the «diminish the effectiveness» standard is too broad. It is one thing to pelly a country for violating a treaty, and another thing to pelly it for actions that may undermine the treaty but are, nonetheless, legal under the treaty. It can be argued that such non-violation pellys may reduce the incentive for joining a treaty.

This discussion of Pelly points to several possibilities for reform of the legislation. First, Congress should make a distinction between countries that fail to join a treaty, join but not violate, and join and adhere, but nonetheless «diminish the effectiveness». Second, Pelly could have closer ties to international standard-setting and international decision-making about violations. Third, Congress might reduce the discretion of the president not to impose trade sanctions. Fourth, the United States should attempt to get other countries to impose similar actions by joint agreement. The United States would be less vulnerable to charges of arbitrary action if environmentally-necessary sanctions were coordinated by a group of countries.

III. GATT IMPLICATIONS OF THE PELLY AMENDMENT

Because of the vagueness of the GATT provisions and the lack of authoritative rulings, it is impossible to provide a definitive answer to the question of Pelly's GATT consistency. Whether or not it is consistent depends largely in the disposition of the controversial GATT Panel decision in the dolphin-tuna case of 1991 (Dolphin I Report). The Dolphin I Report has not been adopted by the GATT Council.

GATT Rules

Because the Pelly Amendment is either a trade sanction, or countermeasure, it runs afoul of a basic GATT rule prohibiting trade discrimination - the most-favored-nation (MFN) principle in Article I. GATT applies its non-discrimination rule in a discriminatory fashion because it permits discrimination against non-parties to the GATT.

If the trade sanction were an import ban, it would also violate GATT Article XI - the general elimination of quantitative restrictions. Article XI forbids prohibitions or restrictions other than certain duties and taxes. Article XI provides for three exceptions, but none of them are applicable to typical environmental trade measures. Because a trade measure under Pelly applies exclusively to imported goods, such a sanction could not qualify as an internal measure under GATT Article III. Additionally, because no treaty requires Pelly sanctions, there is no way that U.S. action under Pelly could supersede U.S. obligations to other GATT members as a more recent treaty. The only way that a Pelly sanction could be GATT-legal, therefore, is through one of the general exceptions in GATT Article XX.

Article XX[7]

Article XX provides exceptions for certain kinds of trade restrictions. The GATTs authors intended Article XX to provide an exception for existing and future environmental laws. Article XX cannot be invoked by a country merely because an imported product fails to meet an environmental standard, whether domestic or international. It can be invoked only if commerce in, production of, or consumption of the traded good leads to a situation specifically covered by one of the listed exceptions. Unlike the GATT, other international trade conventions explicitly yield to existing or future international agreements intended to preserve the health of human beings, animals, or plants.

Article XX is not administered on the honor system. It is up to the GATT Contracting Parties to determine whether an Article XX exception is available for specific environmental trade measures[8].

Article XX does not state which party has the burden of proof when a dispute arises. In recent cases, GATT Panels have assigned the burden to countries whose trade measures are the subject of the complaint. The provisions in the headnote can be viewed as gateway requirements to gain access to the exceptions in the Article XX subsections.

Professor John Jackson has described the provisions in the headnote as a «softer» form of GATT's rules regarding non-discrimination and national treatment. The «arbitrary or unjustifiable» proviso is softer in two ways. First, non-arbitrary or unjustifiable discrimination is permitted. Second, there is no «like product» requirement in Article XX. Rather than considering whether like products from different countries have equal opportunities in the domestic market, Article XX examines whether countries «where the same conditions prevail» are treated in an arbitrary and unjust fashion. If so, that violates the headnote. In countries where the same conditions do not pre-

vail, arbitrary or unjust discrimination is not contrary to the headnote.

Under Article XX, the conditions considered in the headnote must be pertinent to the specific exception being implicated. In other words, under Article XX(b), the conditions considered in a trade measure have to relate to the health of humans, animals, or plants.

The «disguised restriction» prerequisite looks at the intent of the trade provision. It applies whether or not the same conditions prevail. This prerequisite is important because it enables the GATT to distinguish between legitimate environmental trade measures, which are GATT-legal, and contrived or veiled measures, which could be GATT-illegal. Because every trade measure - a tariff, tax or regulation - is qualified in some way, GATT can look at any questionable limitation to ascertain its relevance to health or conservation. Despite this broad authority, this anti-protectionism rule has been virtually ignored by the GATT.

Article XX (b)

Although at least one commentator has suggested that Article XX (b) is too limited to cover many important environmental trade measures, Article XX(b) could reach almost anything which affects the health of a living organism. Every critical international environmental issue would appear to be incorporated.

It is generally agreed that under Article XX(b), GATT members «may give priority to human health over trade liberalization». Whether Article XX(b) permits governments to give priority to animal or plant health over trade liberalization is somewhat in dispute.

The term «necessary» in Article XX(b) means necessity in a scientific sense. Despite this, in the Dolphin I case, the GATT Panel announced that so-called «extrajurisdictional» trade measures were not «necessary». The Panel did not, however, define exactly what it meant by an «extrajurisdictional» trade measure. One can infer that it is a trade restriction relating to the life or health of organisms outside the country imposing the measure. The lack of a clear definition has led to many uncertainties. For example, it is unclear whether a trade measure aimed at maintaining global bio-diversity would be considered jurisdictional or extrajurisdictional[9].

To assist in determining whether an environmental provision is necessary under Article XX(b), GATT panels have formulated a broad interpretation of this provision known as the-least-GATT-inconsistent requirement. Under this requirement, a defendant government must use the least-GATT-inconsistent alternative it «could reasonably be excpected to employ to achieve its' overriding public policy goals.» Such an alternative must be «available» to the government. What is not clear is the range of options a government must consider. Certainly, the armchair theorist will always be able to conceive of less-GATT-inconcistent alternatives that «might» achieve environmental goals - especially if one is not constrained by practicality.

The Dolphin I Panel opined that «international cooperative arrangements» could be a GATT-consistent approach and, therefore, held that the alternative of a national arrangement failed the least-GATT-inconsistent test. The Panel did not, however completely follow its test. It offered no analysis as to whether the United States could «reasonably be expected to employ» such arrangements. Nor did it consider whether such arrangements were «available» to the United States. The Panel ignored the long history of efforts by the United States, since the mid-1970s, to attain such international arrangements. Returning to the issue of science, it is unclear when a scientific basis exists for nature protection. Even if everyone accepted the goal that a maximum harvest could be permanently sustained, there may be various opinions on what constitutes a maximum harvest. On the one hand, because future generations do not participate, there may be a bias in current judgements toward under-protection. On the other hand, both CITES and the IWC require the same super-majorities, two-thirds and three-fourths respectively, to downlist a species from CITES Appendix I to Appendix II or to remove species from a whaling quota schedule. Thus, a species may retain protection longer than «scientifically» justified.

There is no consensus that a sustainable harvest should be the goal. There is an increasing aversion, at least in the United States, to the taking of certain species, such as whales, in any amount. This results, in part, from skepticism that regulators have enough information to know when whales are endangered. It also results, however, from a view that humans should not be predators of whales.

A preference for banning whaling is no less scientific than a preference for the maximum sustainable harvest. Actually neither preference is «scientific». Both are based on certain values as are all public policy choices. Similarly, some commentators have suggested that a desire to save all whales or dolphins is not an «environmental» objective, but rather a moral preference or a value judgement. Certainly, one can define «environmental» to include species protection and exclude animal welfare issues; but the notion that protecting animals as a species rests upon science, while protecting animals as individuals rests «only» upon morals, misses the fundamental point that science does not supply values.

Article XX (g)

The scope of Article XX(g) is potentially as broad as that of Article XX(b). Most of the world's serious environmental issues - such as climate change, driftnet fishing, waste dumping, and bio-diversity - can be viewed as natural resources lacking conservation. Although the authors of the GATT saw a clear need for this exception, they wanted to prevent nations from using it as a restriction on market access or as an excuse for favoring domestic producers. Thus, to guard against abuse, the GATT required parallel restrictions on domestic production or consumption.

A panel could justify its refusal to allow Article XX(g) to protect natural resources, such as animals living in other countries, on policy grounds that those governments are responsible. It is difficult, however, to see any justification for not applying Article XX(g) to protect natural resources in the global commons, such as dolphins living in the ocean. If the Dolphin I Panel is correct, then no country can act unilaterally to safeguard the global commons. Such an anti-environment stance by the GATT is neither required, nor even suggested, by the actual language in Article XX(g). Moreover, no coun-

try attempting to constrict Article XX through interpretation has come forward with any evidence that GATT's authors intended to disallow import measures relating to endangered species in foreign countries, let alone the global commons.

A fair reading of Article XX(g) points to a requirement for parallel restrictions in domestic production *or* consumption and some link between the import restriction and the domestic measure. Commentators have argued that the restricted import must be the same as the product subject to the domestic restrictions.

In summary, the applicability of Article XX to environmental trade measures largely depends on whether the Dolphin I decision becomes GATT law. In relying on its broad interpretation of GATT disciplines, the Panel warns that if Article XX(b) and (g) were extrajurisdictional, each importing country could unilaterally determine the environmental policies from which other contracting parties could not deviate. The Panel's conclusions could jeopardize the Article XX «rights» of countries to prohibit certain kinds of traffic.

Analysis of Pelly Amendment

For illustrative purposes, let us assume that the United States imposes a Pelly ban on all widgets in response to actions by Country A, a GATT member, that diminishes the effectiveness of international conservation efforts such as programs involving whales or tigers. Because widgets are unrelated to whales, the Pelly ban is a trade sanction.

GATT has never addressed the issue of the GATT-legality of a sanction because there has never been an environmental trade sanction imposed. The Dolphin I Panel did consider a complaint by Mexico regarding the Pelly Amendment, but the Panel issued no decision on that matter because no Pelly action had occured. In the dolphin-tuna dispute the U.S. import ban on tuna was accompanied by restrictions on domestic harvesting of tuna.

Unlike Article XX(g), Article XX(b) does not require a parallel domestic provision. Therefore, it may permit sanctions. In determining whether Pelly sanctions would meet Article XX(b), one should start with the headnote and then consider the requirements of the subsection.

First, one must consider if the hypothetical widget sanction qualifies as a disguised restriction. The Pelly Amendment is clear in this regard. Nothing in its legislative history suggests a commercial motivation. One factor that needs consideration, however, is whether the United States has a large widget industry that the Pelly action might help. Second, one needs to consider whether the trade sanction is justifiable. It is unclear from GATT's drafting history what this condition means. Perhaps a panel might inquire as to whether the United States is a party to the Whaling Convention. In addition, the Panel could ask whether the United States meets the standard it imposes on other countries. A Panel might also look at the «diminish the effectiveness» standard imposed by the Pelly Amendment. As noted above, this is a rather vague test. One question, therefore, is whether it is justifiable to use a test so vague that other countries cannot reasonably predict the outcome.

Third, one must consider whether the trade sanction would be arbitrary. Here, two issues arise: One is whether the target *country* is being singled out arbitrarily.

The other issue presents more difficulty - the arbitrariness in the selection of the target product. Any unrelated product could be viewed as arbitrary simply because it is unrelated. Another factor in the adjudication of «arbitrary» would be the extent of the countermeasures. For commercial retaliation (e.g., Section 301[10]), the extent of the countermeasures can be matched to the lost exports because of the foreign trade restriction; but for environmental countermeasures, there is no obvious benchmark for «making the penalty fit the crime», or for deterring future actions that undermine an international agreement.

If trade sanctions are imposed, they could presumably be applied so long as the target country continued its alleged misbehaviour, but not longer. In 1989, the GATT Council suggested some guidelines for the use of Article XX(b), recommending tha «(a) measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b).»

When countervailing or anti-dumping duties are imposed under GATT Article VI, they must be withdrawn as soon as the dumping or subsidizing ceases. These duties are not meant to punish, but rather to offset certain advantages. The GATT does allow the Contracting Parties, acting jointly, to authorize trade retaliation «as they determine to be appropriate in the circumstances». This retaliation, however, has been authorized only once in the history of the GATT.

If two nations are «pellyed» at the same time for the same reason it may be difficult to make the countermeasures non-arbitrary. If one country is much smaller than the other, the smallest country might view banning an equal amount of trade from each country as unfair. Calibrating a trade ban relative to gross domestic product or to total exports, however, could be attacked by one or both of these countries as arbitrary. Another issue is whether the government's administrative capacity should be taken into account in calibrating countermeasures. A final issue is whether a country whose government may be complicit should draw a more stern penalty than a country where the violations occur in the private sector.

The specified countermeasure under Pelly is an import ban. This differs from the environmental sanction provided for in the Trade Expansion Act of 1962[11]: a tariff increase. Such tariff increases would violate the GATT. Nevertheless, governments on both ends may prefer tariffs to import bans because tariffs, at least at low levels, tend to be less disruptive. From an environmental perspective, this virtue is a bane. Low penalty tariffs may not change foreign behavior because commerce adjusts too easily to them.

The purpose of a law like the Pelly Amendment is to send a message to other countries that the United States wants them to take international conservation issues seriously. If a tariff is used as an environmental countermeasure, the country being targeted may misperceive the measure as simply disguised protectionism. By using an import ban, Pelly has a potential of sending a clearer signal to other countries

about U.S. motives. Nevertheless, much of Pelly's impact depends on the target products. Certainly, the president must select a product that the United States imports; it would not signal seriousness to other countries by banning a product that the United States doesn not import. If the president selects an import that competes with U.S. domestic production, however, his actions would look like protectionism. Thus, the ideal target product is something which is not produced in the United States and may be imported from other countries that are not rendering environmental treaties less effective.

With regard to the «necessary» requirement in subsection (b), a panel might ask whether a measure has to be efficacious to be necessary. It would seem illogical, however, to make the illegality of sanctions under GATT depend on the obduracy of the country violating the spirit, if not the letter, of an international environmental treaty. Moreover, this approach seems to invalidate sanctions against large countries that could resist such pressure.

The least-GATT-inconsistent test could also present an obstacle to the use of Article XX(b). A panel might suggest the use of a financial inducement instead of a trade penalty. If a treaty has dispute settlement mechanisms, a panel might suggest that they be used first before resorting to unilateral measures. Because the IWC lacks such mechanisms, this consideration should not be a hurdle for a Pelly action related to that treaty. On the other hand, CITES provides that disputes can be referred to the Permanent Court of Arbitration by mutual consent of the parties. Thus, a panel might suggest that the country levying Pelly sanctions first make an offer to go to arbitration.

The Panel might also take into account the irreversibility of species loss in determining the necessity of a sanction. Thus, although GATT panels might prefer that the least-GATT-inconsistent approach be used, a panel might defer to the solution chosen by a government given the time-sensitivity involved. On the other hand, GATT panels may not want to treat emergencies differently than normal trade rules because that could encourage other countries to use trade sanctions to prevent species extinction. If the GATT were to adopt the Precautionary Principle, panels would have a basis for making this kind of judgement.

Different Justifications

The analysis so far presumes that a panel reviewing a Pelly sanction would follow the existing GATT precedents. A GATT Panel, however, is not actually bound by precedent. It is, practically speaking, free to devise an entirely new line of reasoning to justify or oppugn an environmental trade sanction.

Consider a situation where an international environmental agreement requires or calls upon its parties to impose a trade sanction against Country A. Although Country A, assuming it is a GATT member, has a right under GATT not to be discriminated against, the GATT Panel might overlook this right in defence to an *erga omnes* treaty[12]. For whales, the IWC has not called for any trade sanctions[13]. A GATT panel might characterize a trade sanction targeting wildlife products as GATT-consistent due to the multilateral support for such action. This rationale, however, could not apply to a trade sanction targeting non-wildlife products.

Alternatively, the GATT might consider whether the trade of wildlife products violates an international conservation regulation. In 1971 the U.S. Department of State told a congressional committee, during the drafting of the Pelly Amendment, that trade sanctions against nations breaching international conservation regulations would not violate GATT obligations.

From a GATT-only perspective, it is difficult to defend these potential new interpretations[14]. There is nothing in Article I or Article XX which suggests that discrimination is more acceptable based on a multinational standard than a national one. Thus, it would seem difficult for the GATT to yield to CITES.

Because CITES does not require trade sanctions against violators, there is no way that it could supersede GATT as a more recent treaty. CITES does not authorize trade sanctions, it provides that the treaty «in no way affect(s) the right of Parties to adopt... domestic measures restricting or prohibiting trade of species not included» in a CITES Appendix. The purpose of this provision was to make clear that CITES did not preclude the protection of the species not on a CITES list. It was not meant to authorize unilateral or multilateral action against those who disregard treaties.

Nevertheless, the CITES Conference has advocated action against nations that do not follow the treaty. Perhaps the provision in CITES that empowers the Conference of the Parties to «make whatever recommendations it deems appropriate» after reviewing a situation where the provisions of the treaty «are not being effectively implemented.» Because CITES does not require parties to adhere to such recommendations by the CITES Conference, there is a questionable basis for a GATT panel to overlook a basic GATT rule like MFN.

The same countries that are members of the CITES and approve recommendations calling for trade sanctions are the same countries that are members of the GATT and regularly denounce the U.S. environmental trade measures, even the non-sanctions, as being GATT-inconsistent. The explanation for this apparent paradox is that trade ministries are represented at the GATT while wildlife management agencies are represented at CITES. Accordingly, officials from the same country can and do take contradictory positions in the two organizations.

The Pelly Amendment is not limited to CITES and the IWC. It applies to any international program for fishery conservation or for endangered or threatened species. Some of these treaties might present better cases for GATT consistency. One option for transcending the GATT would be where a country has violated an environmental treaty. A panel might find that unilateral countermeasures are permitted under the principles of international law as long as they are not disproportionate to the violation and injury suffered. Following this approach, there would be a need to show injury.

One difficulty with the «violation-based» approach is that it is not clear when a country has violated an environmental treaty. A GATT panel would presumably want to defer to the judgement of the CITES or IWC parties on this point. Unfortunately, neither treaty organization has a judicial mechanism for making such findings.

Because Norway has taken a reservation on the minke whale, it is not violating the Whaling Convention. Norway also could have been pellyed on the wildlife track for diminishing the effectiveness of CITES. Norway is neither importing whales nor introducing them from the sea. Considering the migratory nature of whales, one can argue that Norway is diminishing the effectiveness of CITES and the IWC by not joining in whale conservation.

Another road a panel might take is to acknowledge the GATT violation, but to state that the trade regime must yield to the environment regime. Berlin and Lang recently suggested that «GATT should almost give way to international environmental agreements because, compared to the GATT, these environmental provisions are... most of all, popular.» Whether such a «more popular» rule will supplement the «more recent treaty» rule of international law remains to be seen.

Authority to Use Pelly

If the Pelly Amendment violates the GATT, there are grounds for questioning the authority of the president to impose Pelly sanctions. Because GATT is an international agreement, the president has an obligation to follow GATT rules. Under the U.S. Constitution, a more recent law trumps a treaty obligation in the event of an inconsistency. The Pelly Amendment of 1971, revised in 1992, is far more recent than the GATT of 1947, revised in 1965. Because Pelly is completely discretionary, however, trumping may not occur. Thus, one could argue that because the executive has discretion in applying Pelly sanctions, the president should yield to the GATT, which is an executive agreement.

This view is further bolstered by the unusual language in the Pelly Amendment which appears to condition the president's countermeasure authority «to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade». There are three ways to view this provision: the president can use Pelly only if the GATT approves; the president can use Pelly only if he thinks it GATT-legal: or the president can use Pelly unless the GATT contracting parties disapprove. No U.S. president has ever taken the first view.

The recent sanctions by the Clinton Administration that it will seek Senate to approval for U.S. accession to the U.N Convention on the Law of the Sea (UNCLOS) raise a new issue regarding trade sanctions under the Pelly Amendment. According to one recent commentator, Professor Richard J. McLaughlin, «The United States may have to relinquish its use of unilateral economic sanctions as a method of protecting dolphins, sea turtles, and whales if it chooses to become a party to UNCLOS....» In exclusive economic zones, UNCLOS gives coastal states jurisdiction over marine conservation policies (e.g. whaling). On the high seas, UNCLOS may be read as suggesting that conservation measures must be multilateral. UNCLOS also states that conservation measures «shall not discriminate in form or in fact against the fisherman of any State.»[15]

If a dispute arises about a U.S. trade sanction, the affected nation can invoke the compulsory dispute settlement procedure of UNCLOS. Decisions under this procedure are final. Parties have an obligation to comply with them. Thus, even if a GATT panel concludes that an environmental trade measure fits under Article XX, an UNCLOS tribunal may rule that the measure violates UNCLOS.

None of this applies to the United States at this time since it is not a party to UNCLOS. If, however, the United States were to become a party, the president might have an obligation to cease using (or threatening) his discretionary powers under the Pelly amendment. This obligation would be more compelling if U.S. ratification of UNCLOS is more recent than the Pelly amendment (or changes to it).

The potential relationship between UNCLOS and the Pelly amendment will undoubtedly be considered by the U.S. Senate. According to McLaughlin, «Support among some members of the executive branch for U.S. membership in UNCLOS may take on added urgency if they believe it may stop or slow the environmental matters.» The possibilities for using UNCLOS to name the United States may be one factor in the recent rush of nations to accede to the treaty. As McLaughlin notes, «Many foreign nations will be inclined to support any institutional mechanism that prevent the United States from imposing unilateral economic trade sanctions.....»

Conclusion

The trade and environment debate is often framed as a choice between unilateralism and multilateralism. One reason that so little progress has been made over the past few years is that this dichotomy is a faulty specification of real alternatives. For many environmental problems, such as saving whales or the ozone layer, the only workable solutions are multilateral ones. Yet workablity does not assure the political feasibility of a potential solution.

No one who favors the solution of international environmental problems opposes multilateralism. No one writing about the trade and environment conflict has advocated unilateral measures as the first resort or the first-best option. The problem facing the world, however, is what to do if the multilateral approach fails to achieve a desirable agreement.

One view is that environmental proponents should just continue using reasoned persuasion. It would also be acceptable for a nation preferring greater whale protection to provide financial compensation to nations with different preferences. From this absolutist perspective, nations should not pressure each other. Only purely consensual actions are legitimate.

Another view is that actions speak louder than words and sometimes non-consensual actions are needed. From this perspective, a mix of carrots and sticks is likely to be more effective than just carrots. Negotiators who have only carrots at their disposal will soon run out of carrots[16].

The problem with a multilateral-only rule is that it defaults to inaction. While national governments have rules that require the minority to adhere to the decision of the majority, no such rule obtains at the supranational level. It is easy to support multilateralism as an ideal.

One wonders, however, how many Americans would want the U.N. General Assembly to decide whether the United States could use the Pelly Amendment. For that matter, one wonders how many Norwegians would want the General Assembly to decide whether

Norway should resume commercial whaling.

There is a wide divergence of views on the efficacy of a unilateral environmental trade measure. Some commentators state that it can encourage cooperation and improve the environment, while others predict it can lead only to disunity.

This article looked at one program, the Pelly Amendment, from the perspective of one country. Nevertheless, after nineteen years of operation, there is now sufficient data to begin to formulate some tentative conclusions. This analysis shows that the Pelly Amendment has been reasonably effective in increasing adherence to certain international conservation standards. As with any trade sanction, there is always a question as to whether past experience can continue in the future or be replicated in other countries.

This Article also considered whether the environmental trade sanctions are consistent with the GATT. This is different from, but not related to, the efficacy of such sanctions. If environmental trade sanctions contributed to a deterioriation of the international trade system, that could have negative consequences. Conversely, the conventional wisdom that Pelly sanctions are GATT-illegal may increase the resistance of the country being pellyed. As one commentator has noted: «(m)ultilateral environmental agreements will be greatly weakened if signatories are unable to use trade measures to protect against free riders, and the (Dolphin I) Panel decision increases the incentive for nations to free ride.»

Because the interpretation of GATT Article XX is in flux, the status of the Pelly Amendment remains unclear. This Article showed many ways in which the use of the Pelly Amendment could violate the GATT. This Article also showed, however, that a well-crafted Pelly action could perhaps fit under the Article XX(b) exception. In offering this analysis, whether a GATT panel is likely to affirm Pelly's legality under the GATT remains undermined. In all likelihood, a GATT panel would condemn a Pelly action by the United States. The mind-your-own-environment attitude is very strong in GATT today. In 1937, countries approving the Whaling Convention were confronted with the problem of what to do if enough nations did not join the new whaling controls. The Final Act noted:

> (t)he Conference recognises (sic) that the purpose of the present Agreement may be defeated by the development of unregulated whaling by other countries, in which case it would be a matter for consideration whether the present Agreement should be continued in force, or whether the contracting Governments should.... permit their nationals to pursue whaling without regulation, so that they may derive from its pursuit such benefit as may be had before the stock of whales has been reduced....

These countries saw a stark dilemma - either attain sufficient cooperation or consider abandoning the new regulations.

Statesmen do not need to accept this dilemma stoically. They can resort to a third alternative by using economic pressure, such as the Pelly Amendment, on non-cooperating nations. These sanctions will be consistent with an even higher law assigning mankind a special responsibility to protect the creatures who inhabit the Earth. ❑

Notes

[1]The views expressed are those of the author only. This Article is based on a longer study published in the American University Journal of International Law and Policy, Spring 1994.

[2]Convention between the United States of America and other Powers for the Regulation of Whaling, Mar. 31, 1932, 49 Stat. 3079 (1935).

[3]See Steve Charnovitz, Encouraging Environmental Cooperation Through the Pelly Amendment, J. Env. & Dev., 3, 5-9 (Winter 1994) (discussing the use of trade carrots and sticks to influence the policies of other nations).

[4]See 22 U.S.C.A. § 1978(h)(3) (West Supp. 1994) (defining a fishery conservation program as one that protects the living resources of the sea, and thus including whales and other marine mammals).

[5]Strictly speaking, we are not really scoring Pelly but rather the effectiveness of various administrations in using it. For purposes of simplicity, however, this score will be treated as representing the effectiveness of the Pelly law.

[6]Hufbauer, Schott, and Elliot found the overall success rate for foreign policy sanctions since World War I to be thirty-four percent. For foreign policy sanctions imposed by the United States since 1973, coincident with the period of the Pelly Amendment, the success rate has been only seventeen percent. The threatened use of Pelly sanctions also compares favorably to the threatened use of Section 301 trade penalties (designed to respond to foreign trade practises that are unjustifiable, discriminatory, or unreasonable). Data compiled by Bayard and Elliot show that since 1975, the overall success rate for Section 301 has been thirty-seven percent.

*[7]**Article XX provides:***

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

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

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

[8]Although Article XX does not state this explicitly, the intent of the drafters is evident by comparing Article XX to the national security provisions of Article XXI. Under Article XXI, a GATT member may use any trade restriction it considers necessary.

[9]See Peter L. Lallas et. al., Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies, 16 HARV. ENVTL. L. REV. 271, 315 (1992) (commenting that distinctions between jurisdictional and extrajurisdictional interests and rights become blurred as the effects of activities affecting the global commons are recognized).

[10]Section 301 of the Trade Act of 1974 is designed to respond to foreign trade practises that are unjustifiable, discriminatory, or unreasonable.

[11]The Trade Expansion Act of 1962 authorizes the president to raise tariffs on fish from countries that do not negotiate in good faith for fishery conservation agreements.

[12]The safeguarding and preservation of the human environment has been treated as en erga omnes *obligation by the International Law Commission.*

[13]The IWC has requested parties to refrain from importing whale products from non-members, but no sanctions have been suggested. IWC Resolution, App. 7 (1978).

[14]Although defendant countries have occasionally raised other treaty obligations in defense of their disputed measures, GATT panels have avoided consideration of other treaties. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 37S/86, at 154.

[15]While UNCLOS governs the national regulation of fisheries, it is unclear whether UNCLOS also governs the use of trade restrictions.

[16]The author recognizes that this answer is not the same for all countries. Some countries, particularly small ones, may not be in a position to offer carrots or threaten sticks.

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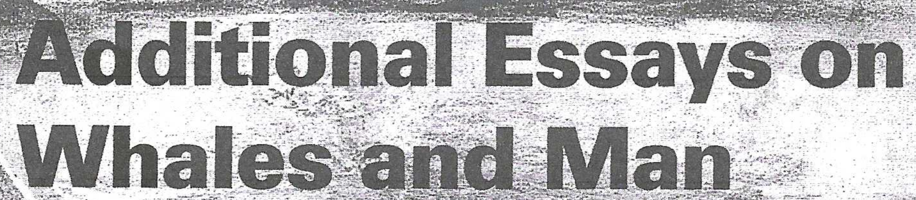

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