Environmentalism Confronts GATT Rules

Recent Developments and New Opportunities

Steve CHARNOVITZ*

INTRODUCTION

The purpose of this article is to discuss recent developments in the clash between environmental policies and GATT rules. Section I provides a summary of new environmental trade measures (ETMs) enacted by the United States last year. Section II discusses the GATT implications of these measures and notes the conflict with the unadopted Tuna-Dolphin report.[1] Section III puts these issues in the broader context of the "trade and environment" debate. With the advent of the Clinton Administration, there is likely to be greater American pressure on the GATT to upgrade the priority on these issues following (and perhaps even during) the Uruguay Round.

I. U.S. LEGISLATION IN 1992

The United States enacted three laws in 1992 that use trade measures for environmental purposes:

A. *International Dolphin Conservation Act*

The U.S. Marine Mammal Protection Act (MMPA) prohibits the importation of commercial fish (or fish products) from countries lacking a regulatory programme governing the incidental taking of marine mammals that is comparable to the regulatory programme of the United States.[2] In particular, the average rate of dolphin mortality in foreign countries must be no more than 25 per cent higher than the U.S. dolphin mortality rate during the same period. In 1991, Mexico, which had been embargoed under this provision, complained to the GATT that the MMPA violated international trade rules.

The ensuing GATT panel decided in favour of Mexico on the grounds that the U.S. law:

---

* Policy Director, U.S. Competitiveness Policy Council, Washington, D.C., U.S.A.

The views expressed should be attributed to the author only. The author wishes to thank William R. Cline and Gary Stanley for their helpful comments.

[1] *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R, reprinted in 30 I.L.M. 1594 (hereinafter the Tuna-Dolphin panel and report). The GATT Council has not adopted this report and seems unlikely ever to do so.

[2] 16 U.S.C. 1371(a).

(1) was a quantitative restriction in violation of GATT Article XI;
(2) did not constitute an internal regulation under Article III; and
(3) did not qualify for either of the "environmental" exceptions in Article XX.[3]

The first exception is Article XX(b), namely, measures "necessary to protect human, animal or plant life or health"; the second exception is Article XX(g), namely, measures "relating to the conservation of exhaustible natural resources . . .". Although many members of the GATT Council seem eager to adopt the panel's report,[4] Mexico has not formally sought its adoption due to the politics of the North American Free Trade Agreement (NAFTA). Thus, the report has remained in limbo since September 1991.

Although the broad-based support for the Tuna-Dolphin decision within the GATT Council rests, to some extent, on the legal principles involved, the widespread opposition to the U.S. position is not entirely altruistic.[5] The MMPA also requires an "intermediary nation" embargo of tuna from countries that do not act to prohibit their importation of tuna from countries under a "primary embargo" by the United States.[6] During 1992, twenty-two nations were hit by either the primary or intermediary embargo (for some time period)—a situation that increased opposition to the U.S. law. Although the Tuna-Dolphin panel ruled against the intermediary embargo as well, this ruling was also kept off the Council's agenda. After threatening to do so for several months, the EC filed a new complaint against the MMPA in mid-1992. This case is now pending before a GATT panel.

One of the arguments advanced in the Tuna-Dolphin report was that the exception in Article XX(b) is predicated upon a demonstration by the United States that it had first exhausted GATT-consistent approaches. Specifically, the panel suggested that before applying an import prohibition, the U.S. government should have tried to secure "international co-operative arrangements" on dolphin protection.[7] The panel's argument is nettlesome for several reasons: first, there is nothing in the drafting history of Article XX(b) to support the view that a party (relying upon it) must first seek voluntary agreements on sanitary, health or environmental standards.[8] Second, the panel ignored the fact that the United States has exhaustively sought an international agreement on dolphin protection; the first MMPA of 1972 mandated such negotiations, and this mandate was renewed by the Congress in 1988 and again in 1990.[9] Third, in pursuit of these legislative mandates,

[3] For a critique of the Tuna-Dolphin panel's interpretation of Article XX, see Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?* 49 Washington and Lee Law Review, Fall 1992, at 1407, 1415–21; Peter L. Lallas, Daniel C. Esty and David J. van Hoogstraten, *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 The Harvard Environmental Law Review (2), Fall 1992, at 271, 281–85 and 337–38.

[4] See Frances Williams, *GATT Members Set to Oppose U.S. on Tuna Import Curb*, *Financial Times*, 19 February 1992, at 6.

[5] For the discussion in the GATT Council, see GATT Doc. C/M/254 at 21–35.

[6] 16 U.S.C. 1371(a)(2)(C).

[7] Tuna-Dolphin report at 5.28. It is unclear whether the panel would view an international agreement enforced by trade controls as a measure "consistent with the General Agreement".

[8] See Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J.W.T. 5, at 37.

[9] See 86 Stat. 1038 and 102 Stat. 4766, codified at 16 U.S.C. 1378. See also 104 Stat. 4467, codified at 16 U.S.C. 1385(h).

the United States worked with other countries to achieve an intergovernmental agreement in January 1991 on dolphin protection (the La Jolla Agreement), but *Mexico did not join the Agreement.*[10] It is interesting to note that the GATT panel was quick to criticize the United States for not achieving "co-operative arrangements", but offered no criticism of Mexico for stonewalling such arrangements for many years.

Nevertheless, after the Tuna-Dolphin decision, the U.S. Department of Commerce renewed its determination to negotiate international agreements to protect dolphins. It soon became apparent, however, that the inability of the U.S. government to promise relief from the embargo upon achievement of an agreement would impede such negotiations. Thus, the Bush Administration sought, and the Congress enacted, amendments to the MMPA last year.

This new law, called the International Dolphin Conservation Act (IDCA) of 1992, authorizes the Secretary of State to enter into international agreements to establish a global moratorium (lasting at least five years) on harvesting tuna through the use of purse seine nets deployed on or encircling dolphins.[11] Relatedly, the IDCA also mandates that the Secretary of the Treasury (i.e. the U.S. Customs Service) not enforce the MMPA tuna ban against any country that commits to the following actions:

(1) implementing the above moratorium by March 1994;
(2) requiring observers on large vessels; and
(3) reducing dolphin mortality in 1993 to a level that is lower than 1992 levels by a "statistically significant" margin.

The IDCA also includes three new enforcement provisions. First, if the Secretary of Commerce determines that a foreign government is not honouring its commitments, then the Secretary must ban the importation of all yellowfin tuna from that country. Second, if the country does not take remedial action within sixty days, the President must then set a quota providing for a 40% reduction of the fish or fish products (by value) from that country based on the imports of the previous year. Third, after May 1994, no tuna may be sold or transported in the United States that is not "dolphin-safe".[12]

No international agreement along the lines suggested in IDCA has yet been achieved. Furthermore, no country under a primary embargo has made the new commitments needed to gain release.[13] Thus, the MMPA embargoes remain in effect for four harvesting nations: Colombia, Mexico, Panama and Venezuela. A country contemplating the making of such commitments would face a considerable downside risk. If the Secretary of Commerce adjudges it to be out of compliance, then a new

[10] The La Jolla meeting was held under the auspices of the Inter-American Tropical Tuna Commission. The Commission began in 1950. Mexico dropped out in 1978, but attended the La Jolla meeting as an observer. But see Tuna-Dolphin report at 3.34.

[11] P.L. 102-523 §302(a), codified at 16 U.S.C. 1412(a). U.S. acceptance of such a moratorium is contingent on the participation of Mexico and possibly Venezuela. See 16 U.S.C. 1416.

[12] Dolphin-safe tuna is tuna that is not caught by a vessel engaged in driftnet fishing or by a vessel intentionally using purse seine nets to deploy on or to encircle dolphin. This determination is made using written certifications from the ship's captain (and in some cases also by approved observers).

[13] See *Mexico Slams New U.S. Law Designed to Resolve Tuna-Dolphin Dispute*, Inside U.S. Trade, 20 November 1992.

embargo would be imposed followed by a mandatory trade sanction. Such trade controls would be more costly to any country than the current embargo which applies only to yellowfin tuna harvested with purse seine nets.

In June 1992, an international agreement on dolphin conservation was reached under the auspices of the Inter-American Tropical Tuna Commission.[14] The Agreement sets an annual dolphin mortality limit for the eastern Pacific Ocean and then apportions that limit to qualified fishing vessels.[15] The annual limit goes down each year through 1999, at which time it must not exceed 5,000 dolphin deaths. This Agreement does not meet the requirements of IDCA, however, because it does not provide for a moratorium on dolphin encirclement.

There was widespread expectation last year that the impending U.S. legislation would defuse the conflict within the GATT over U.S. dolphin protection efforts.[16] While the Congressional action makes it possible to remove the tuna embargo on a nation complying with IDCA's terms, the law is unlikely to eliminate foreign opposition to the MMPA.[17]

B. *Driftnet Enforcement Act*

In 1987, the U.S. Congress enacted legislation threatening unilateral trade sanctions against countries that did not enter into international agreements to monitor driftnet fishing practices and enforced their own driftnet fishing laws.[18] In 1990, the Congress enacted legislation threatening unilateral trade sanctions against countries whose nationals engage in large-scale driftnet fishing in a manner inconsistent with international agreements governing driftnet fishing.[19] On two occasions, the Secretary of Commerce threatened "Pelly Amendment" actions against Korea and Taiwan.[20] Following ameliorative actions in three of these instances, no sanctions were imposed by President Bush.[21]

As a result of efforts by the United States and many other countries, the UN General Assembly passed resolutions in 1989, 1990 and 1991 dealing with driftnet fishing. The most recent resolution (46/215) calls for a global moratorium on all large-

[14] Inter-American Tropical Tuna Commission, Summary Minutes of the 50th Meeting, 1992, Appendix 10.

[15] In 1993, the total quota is 19,500 dolphin deaths, or no more than 183 per existing fishing vessel. Observers are required for each ship with a carrying capacity greater than 400 tons.

[16] For example, see John Maggs, *Mexico, Venezuela and U.S. Reach Tuna-Dolphin Accord*, The Journal of Commerce, 18 June 1992, at 3A.

[17] Some relief might be forthcoming for nations under the intermediary embargo (currently there are four). The criteria for the intermediary embargo were relaxed in IDCA §308(c). Specifically, the Commerce Department will no longer require that other nations act affirmatively to ban the importation of tuna from those countries targeted by the U.S. ban. Rather, other nations will only have to certify (and provide reasonable proof) that they have not imported any such tuna during the preceding six months.

[18] 16 U.S.C. 1822.

[19] 16 U.S.C. 1826(f).

[20] The Pelly amendment authorizes the President to impose trade sanctions for certain environmental reasons. These are: (1) when foreign nationals conduct a fishing operation which "diminishes the effectiveness of an international fishery conservation programme"; and (2) when foreign nationals engage in trade or taking which "diminishes the effectiveness of any international programme for endangered or threatened species". See 22 U.S.C. 1978.

[21] In the fourth instance, in 1991, President Bush did not impose sanctions on Taiwan despite the fact that Taiwan had not taken ameliorative actions.

scale pelagic driftnet fishing on the high seas. According to a study by the U.S. Department of Commerce, the threat of U.S. sanctions was "effective" in achieving "adequate driftnet agreements and agreement compliance".[22]

Last year, the U.S. Congress acted again to discourage the use of driftnets. The new law—the High Seas Driftnet Fisheries Enforcement Act—imposes a mandatory U.S. sanction on any nation whose nationals or vessels violate the UN driftnet moratorium.[23]

This determination is made by the Secretary of Commerce.[24] Following such determination, the President must consult with any nation so named for the purpose of obtaining an agreement to terminate large-scale driftnet fishing.[25] If no agreement is reached within ninety days, the President must direct the Secretary of the Treasury to prohibit the importation of fish, fish products and sport fishing equipment from that nation.[26] In addition, the Treasury Department must deny port privileges to vessels from that nation if such vessel engages in large-scale driftnet fishing.

If, at the end of six months, these trade sanctions prove "insufficient" to improve the foreign fishing practices, then the Secretary of Commerce must certify the nation under the Pelly Amendment.[27] The nation must also be "Pellied" if it retaliates against an American trade sanction. To make this threat more potent, the new law expands the range of potential Pelly trade sanctions to include all products.[28]

It should be noted that the President has complete discretion under the Pelly Amendment as to whether to take action following a Commerce Department certification. Although there have been about twenty Pelly certifications since the Amendment was first enacted in 1971, no President has ever imposed a sanction. Of course, Pelly sanctions have regularly been threatened, and these threats have usually proved successful. For example, in 1991, Japan agreed to stop importing Hawksbill and other endangered sea turtles in the face of near-certain U.S. trade sanctions.[29] Japan had been importing about twenty tons a year of such turtles in order to convert their shells into jewelry, combs and eyeglass frames.

Although U.S. legislation has permitted trade sanctions against violations of international fishery agreements for many years, the new driftnet sanctions are significant because, for the first time, trade sanctions have become mandatory.[30] As

[22] Report (1991) of the Secretary of Commerce to the Congress *Concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing Pursuant to Section 206 of the Magnuson Fishery Conservation and Management Act*, at 13.

[23] P.L. 101–582 §101, codified at 16 U.S.C. 1826a.

[24] A special exception is provided during 1993 for certain fishing practices in the north-east Atlantic Ocean if such practices are in accordance with applicable EC regulations. Id., at 16 U.S.C. 1826(c).

[25] No nations were named during 1992.

[26] The law is vague, but presumably all such products must be banned.

[27] P.L. 101–582 §101(b)(4). This is six months after the nation is named, not after the sanctions commence.

[28] Id. at §201. Previously, the Pelly Amendment had provided for trade sanctions against fish products when the problem was fishery conservation and wildlife products when the problem was wildlife conservation.

[29] See David E. Sanger, *Japan, Backing Down, Plans Ban on Rare Turtle Import*, The New York Times, 20 June 1991, at A1. See also *Message to the Congress on Japanese Importation of Sea Turtles*, 27 Weekly Compilation of Presidential Documents, 20 May 1991, at 621.

[30] The mandatory sanctions are the denial of port privileges and the import bans on fish, fish products and sport fishing equipment. The Pelly sanctions remain discretionary.

the House Ways and Means Committee explained: ". . . since the UN [driftnet] Resolution does not include any enforcement mechanism, it is appropriate to provide for effective enforcement of the Resolution under U.S. law through the use of a combination of mandatory and discretionary import sanctions."[31] In the absence of any regular international process for determining when nations are violating the UN Resolution, the new sanctions are triggered by a determination of the U.S. government.

C. *Wild Bird Conservation Act*

Admitting a responsibility as the world's largest importer of exotic birds, the United States passed legislation in 1992 to curtail its wild bird trade.[32] This legislation is designed to be supportive of the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973.[33] The provisions in CITES do not affect the right of a party to adopt stricter measures regarding conditions for trade than are provided for under the Treaty.[34]

The new law bans the importation of ten species of exotic birds (e.g. the green-cheeked parakeet) named in a recent CITES report as being threatened by continued trade.[35] This import ban can be lifted by the Secretary of the Interior if certain findings are made about the conservation programme of the country of origin and about the species in question.[36] Specifically, the country must:

(1) "effectively" implement CITES;
(2) develop and enforce a management plan for the species which ensures that its use is biologically sustainable well above the level at which the species might be threatened; and
(3) minimize the risk of inhumane treatment during capture and transport.

After 22 October 1993, the Interior Secretary must ban the importation of every exotic bird species listed under a CITES appendix *unless* the above findings can be made.[37] The law also empowers the Secretary to suspend the importation of a species of exotic bird from a particular country upon his determination that remedial measures recommended by the CITES Standing Committee have not been implemented by that country.[38]

---

[31] U.S. House of Representatives Report 102–262, Part 2, at 4.

[32] Wild Bird Conservation Act of 1992, P.L. 102–440, Title I, codified at 16 U.S.C. 4901.

[33] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243.

[34] Id., Article XIV:1(a). Actually, CITES says stricter "domestic" measures. While this could be interpreted to mean measures relating to internal commerce, the definition of "trade" in Article I(c) would suggest that "domestic" should be read as "national". In addition, CITES obligates parties to "take appropriate measures to enforce the provisions of the present Convention", including measures to "penalize" trade. Id., Article VIII:1. But it seems unlikely that such a vague obligation in a more recent treaty would supersede GATT obligations.

[35] Eight of these are Appendix II birds for which commercial trade is not currently banned under CITES. Two species have since been moved to CITES Appendix I. See 57 F.R. 57510.

[36] The Interior Department may grant exceptions for research, breeding, zoos and personal pets.

[37] This rule applies only to wild-caught birds. No import ban is required for captive-bred birds if certain criteria are met.

[38] 16 U.S.C. 4904(b)(1). The Secretary of the Interior may also suspend importation when trade is detrimental to a species or when there is insufficient information about the effect of trade on a species.

In addition to protecting birds covered under CITES, the Act requires the Secretary of the Interior to embargo (or set a quota on) imports of other exotic birds—not currently protected under CITES—if the findings listed above cannot be made. Furthermore, the Secretary must ban or limit the importation of all exotic birds from a particular country if that country has not developed and implemented a management plan to ensure both the conservation and humane treatment of exotic birds.

The significance of this new law for the trade and environment debate may not be readily apparent. Certainly, there is nothing new in using trade controls to safeguard birds in other countries. The United States has been doing that since 1913. There is also nothing new in imposing standards tighter than CITES. Many countries have done that for years. What makes the new law important is that it embraces recent theories of environmental protection which attempt to harness the power of the market. As the House committee explained:

> "The Bill is designed to allow the continuation of sustainable use of exotic birds, based on the premise that such use has the potential to create economic value in the birds and their habitats and can contribute to their conservation."[39]

Indeed, the new law is paradigmatic in violating so many key GATT principles without even a brush of protectionism. (After all, the United States is not a major producer of exotic birds.)

The next section will consider the GATT-legality of these three laws. They present more difficult issues than were considered by the Tuna-Dolphin panel.

II. GATT IMPLICATIONS

Before assessing the GATT implications of the new U.S. legislation, it is useful to denote three categories of ETM.[40] Import prohibitions are a ban on the importation of a specific product. Sanctions are the use of trade measures to penalize other countries for environmentally harmful actions. The difference between these two categories is that prohibitions affect only environmentally sensitive products, while sanctions target unrelated and unimplicated products.[41] Process standards are regulations on domestic commerce (i.e. sale or transportation) that apply equally to goods whether produced indigenously or imported.[42] One reason why participants in the trade and environment debate seem to misunderstand each other is that these categories are commonly confused.

Another way to classify ETMs is by certain decision factors. First, the import (or export) may be a defiled item, that is, implicated in an environmental transgression.[43]

[39] U.S. House of Representatives Report 102–749, Part 1, at 8.

[40] This is the author's categorization. For a discussion of these and five other categories of ETMs, see *The Environment Versus Trade Rules: Defogging the Debate*, 23 Environmental Law (2), 1993.

[41] The distinction is based on Kym Anderson and Richard Blackhurst (eds.), *The Greening of World Trade Issues*, Harvester Wheatsheaf, London, 1992, at 18, 140 and 261.

[42] For example, governments often impose process or plant certification requirements on meat. This category is termed "processes and production methods" (PPMs) in the GATT Standards Code. See Agreement on Technical Barriers to Trade (BISD 26S/8), at 14.25.

[43] A defiled item could be implicated in three ways. First, it could itself be inimical to the environment (e.g. pesticides); second, it could be a product, say, of an endangered species (e.g. ivory); third, it could be the product of a process which is bad for the environment (e.g. a chip cleaned with a CFC).

Second, the import may originate in a country that uses bad environmental production practices (in making that import). Third, the import may originate in a country whose government policy is environmentally weak. It should be noted that the defiled-item factor is product-specific while the other two factors are country-specific. It should also be noted that these determinations are subjective (based on terms like "biologically sustainable") and are often made solely by the government of the importing country.

A. *Import Prohibitions*

Two of the new U.S. laws make use of import prohibitions. The IDCA re-imposes a tuna import ban when previously embargoed nations do not honour their commitments. This determination is based on both foreign production practices and government policy. The Wild Bird Act also uses import bans based on those two factors.[44] For example, the United States may embargo birds from a country that has not followed a CITES recommendation. Relief from such an embargo would be linked to conservation policy reforms by that country.

Import prohibitions violate GATT Article XI. Because they rely on trade discrimination, the prohibitions discussed above would also violate Article I. Thus, if these laws are to be consistent with the GATT, they must meet Article XX(b) or (g). But qualifying these laws under Article XX has been complicated by the unadopted report of the Tuna-Dolphin panel which states that "extrajurisdictional" ETMs are outside the reach of Article XX(b) and (g). Since the new U.S. laws are unabashedly extrajurisdictional, conventional GATT doctrine would brand them all as GATT-illegal.

It is beyond the scope of this article to present a systematic critique of the Tuna-Dolphin panel's findings on "extrajurisdictionality".[45] But let us assume that the panel is wrong, for otherwise there would be nothing left to say here. Recall the terms of Article XX:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> . . ."

[44] The requirement to ban all exotic birds from nations that do not have an adequate management plan comes close to being a sanction because it may involve unimplicated birds.

[45] In the opinion of this author, the panel's arguments are deeply flawed on historical, logical and legal grounds. For an eleboration of this position, see Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 International Environmental Affairs, Summer 1992, at 203, 208–211. But consider the views of GATT exegete John Jackson who apparently sees forty years of GATT practice limiting Article XX(b) and (g) to a country's own jurisdiction; John H. Jackson, *World Trade Rules and Environmental Policies; Congruence or Conflict?* 49 Washington and Lee Law Review, Fall 1992, at 1227, 1241–42.

One issue is whether the new laws constitute "arbitrary or unjustifiable discrimination". For instance, can an import ban be based on whether a foreign government is ensuring that the use of a bird species is "biologically sustainable"? Can an import ban treat captive-bred and wild-caught birds differently when they are otherwise indistinguishable? Certainly, such provisions are discriminatory in the GATT sense of the word (since most-favoured-nation (MFN) is violated).[46] But assuming that the importing government applies these bans consistently among countries, this would not seem to constitute arbitrary discrimination. Resolving this question is important since "sustainability" standards (especially recycling) are a coming issue in environmental policy.

Determining whether discrimination is "unjustifiable" is a more difficult matter. For some commentators, any unilateral measure is unjustifiable. Yet a more sophisticated view would acknowledge that almost all trade decisions (e.g. anti-dumping duties and countervailing duties) are unilateral.[47] Thus, the issue is not whether unilateralism is justified, but rather when it is justified.[48] The strongest justification for environmental unilateralism is to implement a treaty obligation, undertaken (voluntarily) by a nation.[49] For example, parties to CITES are required to ban commercial trade in endangered species. Another strong justification is the enforcement of a multilateral recommendation (e.g. by the CITES Standing Committee), particularly when the multilateral institution lacks enforcement tools. The re-imposition of an import ban against a country for violating its multilateral or bilateral commitments (e.g. IDCA) presents a less strong, but still excellent, justification for unilateral action.

The IDCA may raise an interesting Article XX(g) case if an international agreement is attained regarding dolphin encirclement. Under that scenario, a U.S. embargo against a non-party would seem to meet the terms of Article XX(g) since the Agreement's conservation provisions would apply *pari passu* to the United States. One issue would be whether the agreement specifically requires embargoes against non-parties.

B. *Process Standards*

The new dolphin-safe tuna requirement is a defiled-item process standard. It is

[46] The term "discriminatory" is confusing because it has a different meaning in the GATT sense than in the ordinary sense. Although the U.S. Congress describes the new ETMs as "non-discriminatory measures that are necessary for the conservation of exotic birds", the measures clearly are discriminatory in treating "like products" differently. See 16 U.S.C. 4901(14).

[47] See comments by J. Michael Finger in Patrick Low (eds.), *International Trade and the Environment*, World Bank discussion papers: 159, 1992 (hereinafter Low (1992)) at 341 and 343.

[48] Everyone prefers multilateral agreements to unilateral action. At issue is whether unilateralism can serve as a catalyst to such agreements. Or, in other words, would we anticipate more and better agreements if no country had the power to impose unilateral ETMs?

[49] But as Cameron and Robinson point out, "a restriction which is contrary to the GATT does not become compatible with the GATT merely because done by more than one State pursuant to an international agreement". See James Cameron and Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, in *Yearbook of International Environmental Law*, 1991, Vol. 2, at 3, 28.

unclear whether this type of provision fits GATT Article III. The orthodox view—expounded by the Tuna-Dolphin panel—is that such a standard does not involve the produce "as such" and, therefore, fails to qualify under Article III.[50] But a defiled-item process standard would present a different case than that which exists in the Tuna-Dolphin dispute, which is about a production practice process standard.[51] The applicability of Article III to a defiled-item standard has apparently never been considered in dispute settlement.

In determining the GATT-validity of a dolphin-safe regulation, it may be useful to distinguish between a domestically written standard and an internationally written one. The IDCA standard is domestic; it is written solely by the United States. If the definition of dolphin-safe tuna had been taken from an international authority, there would be less room to allege that the U.S. standard was written to "afford protection to domestic production", in violation of the GATT Article III:1 rule.

C. *Sanctions*

There are two new sanctions in the 1992 legislation. (A third sanction applies to port privileges, but it is unclear whether that is a GATT violation.) Under IDCA, there is a mandatory sanction on fish and fish products against countries that commit to an international dolphin conservation agreement and then renege.[52] Under the Driftnet Enforcement Act, there is a mandatory sanction against nations that do not meet the terms of the UN driftnet moratorium.

Environmental trade sanctions violate GATT Articles I and XI. Since no such sanctions have been imposed, their validity under Article XX has never been adjudicated.[53] This author is skeptical as to the applicability of Article XX to sanctions. The problem is not the terms of Article XX(b)—one can imagine a situation in which sanctions might be "necessary". The problem is the inherent arbitrariness of any targeting of unrelated products, since that could contradict the terms of Article XX's headnote. For instance, why should sport fishing equipment be hit to penalize driftnet fishing? The punitive impact of this sanction will depend upon the extent to which a nation exports sport fishing equipment.

But, for the sake of discussion, let us assume that sanctions may be legal under Article XX(b) or (g). In contrast to the dolphin conservation standard, where the United States is both law-giver and judge, the new driftnet sanctions are more defensible because the law-giver is multilateral (i.e. UN Resolution 46/215).[54] But the

[50] Tuna-Dolphin report at 5.8–5.16.

[51] In the MMPA, the embargo is triggered not by dolphin-unsafe tuna, but by tuna from a country whose fishing vessels (in the eastern tropical Pacific) during the prior year killed more than 125 per cent of the dolphins that U.S. fishing vessels killed.

[52] This is a sanction because it goes beyond fish that are implicated in the environmentally harmful practices. Indeed, fish embargoed for environmental reasons cannot be included in the 40 per cent quota reduction. See 16 U.S.C. 1415(b)(2)(A).

[53] See Tuna-Dolphin report at 5.20–5.21 for an inconclusive judgment about the U.S. Pelly Amendment.

[54] This is not to say that the UN either requires or calls for such trade sanctions. Rather, my point is that the environmental *standard* is written by the UN.

United States is still the judge in administering the sanctions. If the new U.S. law had instead declared that the sanctions would be triggered by a *UN finding* that a country was violating Resolution 46/215, then subsequent U.S. ETMs would be more palatable.

In summary, the United States has recently adopted a series of ETMs that will generally be perceived as GATT-illegal. The next section will address how this could happen.

III. TRADE POLICY AND THE ENVIRONMENT

Leaving aside the fact that the Tuna-Dolphin report remains unadopted, it is reasonable to ask why the report has had so little impact on U.S. policy. For the United States to enact *three* new laws that directly contravene the report could reasonably be construed as acts of defiance. Why is the United States—which has been trying to strengthen dispute settlement in the Uruguay Round—so blatantly defying the GATT?

There are two ways to answer this question. The tactful response is that the U.S. government has taken account of the Tuna-Dolphin report in crafting the new laws. All three laws are linked to international agreements (where they exist). Moreover, IDCA will allow a removal of the tuna embargo criticized by the panel if appropriate international or bilateral agreements can be attained.

The politically realistic response is that the United States is not going to conform its ETMs to the Tuna-Dolphin report because the Congress thinks that the report is wrong. For example, in August 1992, the U.S. House of Representatives took up a non-binding resolution calling upon the President:

> ". . . to initiate and complete negotiations, as part of the current Uruguay Round GATT talk, *to make the GATT compatible* with the Marine Mammal Protection Act and other U.S. health, safety, labour, and environmental laws, including those laws that are designed to protect the environment *outside the geographic borders* of the United States . . ." (emphasis added).[55]

This resolution passed 362 to 0!

So, one should restate the question: given that the United States firmly believes that the GATT must permit legitimate ETMs, why is there such a sharp divergence between the U.S. position and that of the rest of the world? In point of fact, however, this divergence is not as wide as it may appear to be. The United States is not the only user of extrajurisdictional ETMs. Many other countries use them too. The EC regulation banning imports of fur from any "country where the leg-hold trap is still used" is a unilateral, extrajurisdictional ETM.[56] New Zealand prohibits the *landing*, transportation, or processing of "any fish or marine life taken *using* a driftnet" (emphasis added).[57] Indeed, any country that is implementing CITES is engaging in

[55] H. Con. Res. 246, Congressional Record, 6 August 1992, at H7699.
[56] E.C. Regulation on the Importation of Certain Furs, 3254/91. This is a production practice standard.
[57] Driftnet Prohibition Act of 1991 §7–9, reprinted in 31 I.L.M. 218.

behaviour that can only be GATT-legal if Article XX(b) or (g) cover extrajurisdictional measures.[58] Furthermore, the preservation of dolphins is not purely an American preoccupation. In November 1991, the European Parliament called on the EC Commission to develop legislation prohibiting the importation of tuna caught by purse seine nets or driftnets.[59]

Still, there is a divergence. Why? One explanation may be the sometimes incoherent nature of U.S. government. The MMPA was written by the U.S. Congress without much (or any) attention to the GATT implications. The law's implementation has been dictated by Federal court orders.[60] Had the law been more artfully written, other countries might not have objected so much. The divergence can also be explained by the lack of diplomatic efforts by the Bush Administration to gain support for the U.S. position on ETMs. Instead of defending the GATT principles at stake in the Tuna-Dolphin conflict, the U.S. Trade Representative chose to make a deal with Mexico to deep-six the panel's report. A third explanation may be that trade policy-making in the United States is more open to non-commercial influence than in other countries. The United States may be more willing to use trade policy for environmental purposes because its large domestic market guarantees more impact. A fourth explanation is that the Tuna-Dolphin report presented an easy opportunity for America-bashing, especially in response to the ill-advised intermediary embargo requirements of the MMPA.[61] A fifth explanation is that richer countries, like the United States, demand more environmental protection.[62]

The American position should not be a surprise to anyone. The U.S. government has a good legal argument for believing that Article XX(b)—which was drafted by the U.S. Department of State in 1945—is extrajurisdictional.[63] The U.S. government has a good environmental argument for believing that unilateral ETMs can foster multilateral agreements.[64] Furthermore, the U.S. government cannot ignore the political pressure from environmentalists who view ETMs as an essential and valuable tool.[65] These forces are likely to have as much influence during the Clinton Administration as they have had over the past few years.

---

[58] See Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 American Journal of International Law, October 1992, at 700 and 720.

[59] See *European Parliament Calls for EC Ban on Imports of Tuna Caught in Purse Seines*, International Trade Reporter, 27 November 1991, at 1739.

[60] *Earth Island Institute v. Mosbacher*, 785 F. Supp. 826.

[61] The intermediary embargo is based on a government policy standard. See 16 U.S.C. 1371(a)(2)(C). The Commerce Department tried to implement it as a defiled-item process standard—aimed at tuna "laundering"—but there was no statutory basis for doing so. See Tuna-Dolphin report at 3.30.

[62] Marian Radetzki, *Economic Growth and Environment*, in Low (1992) *op cit.*, footnote 47, at 121, 132–134.

[63] One infirmity of the thesis that Article XX is purely jurisdictional is that Article XX(e)—"relating to the products of prison labour"—is clearly extrajurisdictional. Article XX(e) was included in the GATT to allow unilateral measures aimed at the method of production in a foreign country.

[64] Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 Washington and Lee Law Review, Fall 1992, at 1373, 1380–81.

[65] For example, see Bob Davis, *Free-Trade Pact Spurs a Diverse Coalition of Grass-Roots Foes*, Wall Street Journal, 23 December 1992, at A1.

A. *GATT's Environment Group*

The year 1992 was an active time for the GATT on environmental issues. The GATT Secretariat issued a major report on trade and the environment.[66] The recently reconstituted GATT Group on Environmental Measures and International Trade finally got underway.

It is difficult to assess the progress being made by the GATT Group. Unfortunately, its meetings are not open to the public and no working papers are being published. Thus, even if the Group is taking a constructive approach, the GATT is gaining no credit for it among environmentalists.

The little information that has been revealed casts doubt on the fruitfulness of the Group's debate. A key issue recently has been whether a provision from Agenda 21 opposing unilateral ETMs should or should not be specifically quoted in the Council Chairman's statement announcing GATT's future work programme on the environment.[67] More troubling is the recent submission by the EC which evinces no recognition of any flaws in the Tuna-Dolphin report.[68] Perhaps the most revealing point in the EC paper is the suggestion that the word "environment" *not* be incorporated into Article XX, "since *this could imply broadening the scope* for unilateral extrajurisdictional trade restrictions." (emphasis added).[69] This obsession with anti-unilateralism—also a fixation in the GATT Secretariat's Trade and Environment report—is impeding progress toward reaching a consensus. As legal scholar Edith Brown Weiss points out: "It is an anachronism that at a time when people are focusing on changing development practices to make them sustainable, the trading community is forbidding the use of trade measures to assist in this process."[70]

The job of the GATT Group has been complicated by the rapid evolution of ETMs. The first-generation ETMs were simple prohibitions or product standards (e.g. no hazardous waste imports). The second-generation ETMs are complex prohibitions or standards that require a judgement about foreign practices (e.g. sustainability) or policies (e.g. ratification of the Basle Convention). The third-generation ETMs are likely to be market-based incentives rather than direct regulations. For example, a country might levy a domestic tax on a certain production practice (e.g. generating a hazardous waste) and then impose the same tax on imports produced using that practice.[71] (Tradable permits might also be used.) Any GATT discipline on ETMs will need to take account of the changing nature of these measures.

---

[66] *GATT Trade and the Environment*, in GATT, International Trade 90–91, Volume I, 1992, at 19.

[67] *GATT Environment Work Delayed by Dispute over Unilateral Action*, Inside U.S. Trade, Special Report, 13 November 1992, at S-1.

[68] See *EC Proposal on Trade and Environment*, Inside U.S. Trade, Special Report, 27 November 1992, at S-2.

[69] *Id.*, at S-4.

[70] Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 American Journal of International Law, October 1992, at 728 and 731.

[71] For a proposal to use a tax for dolphin conservation, see David Palmeter, *Supporting Dolphins and GATT*, The Journal of Commerce, 1 October 1991, at 12A.

B. *Revival of the Uruguay Round*

With the revival of the Uruguay Round in October, the trade-environment linkage has emerged as a much more potent issue than it was when the European Free Trade Association (EFTA) countries initially raised it in 1990 at the GATT Brussels Ministerial.[72] There is a broad agreement that this politically divisive issue has not been well managed. Yet there is little consensus on how GATT can do a better job.

Since 1991, environmental activists have focused their criticisms of the GATT. First, there is a belief by some groups that the GATT is a myopic, parochial institution bent on interfering with environmental protection.[73] A second criticism is even more radical. It questions the basis for comparative advantage when trade is based on production with negative environmental externalities.[74] From this perspective, the GATT should be concerned not just with trade restrictions and distortions, but also with whether the trade itself (and the production underlying it) is environmentally sound.[75]

The disconnect between the "environment" and "trade" perspective on the Uruguay Round will not be easy to resolve.[76] For example, an environmentalist textbook on the GATT explains that:

> "While environmentalists struggle to win international treaties and protocols, trade negotiators are quietly enacting rules that could doom species to extinction, eviscerate fuel-efficiency laws, and create regulatory havens for polluters."[77]

Yet a GATT Secretariat official recently declared that:

> "Concluding the Uruguay Round offers by far the most valuable contribution that the multilateral trading system can make at present to environmental protection."[78]

Bridging these disconnected views is essential to the continued viability of the GATT.[79] Because trade liberalization needs a very broad base of political support (to counter the narrow base of trade losers who have strong views), the defection of environmentalists would be a devastating blow. Such a defection is unnecessary and

---

[72] EFTA Statement on Trade and the Environment, MTN.TNC/W/47, December 1990.

[73] See the newspaper advertisement, *SABOTAGE! of America's Health, Food Safety, & Environmental Laws*, The Washington Post, 14 December 1992, at A20. See also Kristin Dawkins and William Carroll Muffett, *The Free Trade Sellout*, 57 The Progressive, January 1993, at 18.

[74] According to the U.S. National Commission on the Environment, "On its own, free trade will encourage the continuation of unsustainable and inequitable development . . . The United States should support free trade, with safeguards to ensure that all countries move toward high environmental standards." See *Choosing a Sustainable Future*, Report of the National Commission on the Environment, Island Press, Washington D.C., 1992 (pre-publication edition), at 76.

[75] For example, see Walter Russell Mead, *The New Global Marketplace*, in Mark Green (ed.), *Changing America*, Newmarket Press, New York, 1992, at 196–204.

[76] For some recent attempts, see Hilary F. French, *Reconciling Trade and the Environment*, in Lester R. Brown *et al.*, *State of the World*, New York, W. W. Norton, 1993, at 158 and C. Ford Runge, *Incorporating Environmental Considerations in Trade Policies: Protocols, Conflicts and Dispute Settlement*, June 1992.

[77] Thomas A. Wathen, *A Guide to Trade and the Environment*, Environmental Grantmakers Association, New York, 1992, at 6.

[78] Richard Eglin, *Environmental Protection and International Trade—Genuine Concern or Disguised Protectionism*, 31 August 1992, unpublished. Eglin spoke for himself only.

[79] Bruce Stokes, *Organizing to Trade*, 89 Foreign Policy, Winter 92–93, at 36 and 41.

illogical—particularly when the cutting edge of environmentalism is increasingly market-oriented.

Two events which transpired during 1992 have bolstered the critics of the Dunkel Text.[80] First, there is the "NAFTA Effect". Although some U.S. environmental and consumer groups began voicing concern about the Standards Code and the Sanitary and Phytosanitary (S&P) negotiations a few years ago, the Bush Administration had taken the position that the Dunkel Text did not threaten national health and safety regulations. But by leaving most of the troublesome Dunkel Text language out of the NAFTA (and by seeking political credit for securing new "green" provisions), the Bush Administration inadvertently undermined the acceptability of the Dunkel Text.[81] American environmentalists are now pressing (at a minimum) for the substitution of NAFTA's environmental reforms into the Uruguay Round.[82]

The most significant NAFTA reform relating to health standards is the abandonment of the "least trade-restrictive" test formulated in the Uruguay Round agreements on Standards and S&P measures.[83] The NAFTA also drops the perplexing provision in the Dunkel Text which suggests that each nation achieve consistency in its level of protection by taking into account the "exceptional character of human health risks to which people voluntarily expose themselves".[84] Furthermore, the NAFTA advances the principle that environmental standards should be harmonized upward.[85] Although the Dunkel Text does not mandate downward harmonization, its Standards and S&P disciplines could push in that direction.[86]

The second event of 1992 might be called the "Rio Effect". In view of the hundreds of pages of agreements reached at the UN Conference on Environment and Development about the need to incorporate ecological concerns into national and international policy-making, environmentalists are questioning the appropriateness of establishing a new Multilateral Trade Organization (MTO) that gives no consideration to the environment.[87] Although a box for a "Committee on Trade and Environment" has been added to the MTO's organization chart in an attempt at appeasement, it seems clear that such window-dressing will not be enough to secure environmental support for the MTO.[88]

---

[80] GATT, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA, December 1991. This is known as the Dunkel Text.

[81] For a detailed review of the environmental provisions in NAFTA, see Steve Charnovitz, *NAFTA: An Analysis of its Environmental Provisions*, 23 Environmental Law Reporter, February 1993, at 10067.

[82] See *National Wildlife Federation Says GATT Must Be as Green as NAFTA*, Inside U.S. Trade, Special Report, 13 November 1992, at S-8.

[83] In analyzing a "least trade-restrictive" test, one must inquire: least trade-restrictive way to accomplish what? Is it: (1) the same environmental objective? (2) the same degree of regulation? or (3) a result in which the benefits exceed the costs. The Dunkel Text is unclear about this.

[84] Dunkel Text, Section L, Part C, para. 20.

[85] NAFTA Articles 713.1, 714.1, 906.1 and 906.2.

[86] For a detailed review of the environmental provisions in the Dunkel Text, see Steve Charnovitz, *Trade Negotiations and the Environment*, 15 International Environment Reporter at 144, 11 March 1992.

[87] *Citizen Groups Around the World Declare Opposition to Creation of MTO*, Inside U.S. Trade, Special Report, 18 December 1992, at S-7. For the proposed MTO, see the Dunkel Text, Section Y, Annex IV.

[88] For a detailed critique of the MTO, see WWF, *The Multilateral Trade Organization: A Legal and Environmental Assessment*, May 1992.

Some changes to the Dunkel Text will be necessary in response to these developments. What remains unclear is whether deeper reforms will also be needed now, or whether promises of future action on the environment will be sufficient. In the recent Driftnet Enforcement Act, the Congress called upon U.S. trade negotiators to seek modifications in GATT Articles to take into consideration national environmental laws and international environmental treaties.[89]

The hardest issue for the GATT involves rules on trade. Far easier, conceptually, are rules regarding trade restrictions and distortions—currently the domain of the GATT. Dealing with this easier issue will require two major changes. First, many GATT members and the Secretariat must recognize that it is their own inflexibility that is the main cause of the problem, not American zeal. Although *The Economist* wryly notes that "cetaceans spell trouble for trade", the issue is not just the emotional appeal of dolphins. People also feel strongly about parrots, whales, turtles, elephants, tropical forests and the ozone layer, and are not going to be dissuaded by the GATT's mind-your-own-business approach.

The GATT Secretariat has tried to proselytize environmentalists by pointing out the complementarity of trade liberalization and sustainable development.[90] But these theoretical arguments have not made much of a dent in the opposition. Instead, GATT's actions have spoken louder than its words. The Tuna-Dolphin panel and GATT's closed-door policies have done far more to radicalize environmentalists about international trade rules than a barrage of economic studies could ever possibly counter.

The second change needed is that the GATT Council must admit the errors in the Tuna-Dolphin report, and in previous environmental cases that sought to narrow the use of Article XX for ETMs.[91] What recent GATT panels have failed to comprehend is that constricting Article XX will not make environmental trade measures go away. Instead, the effort to de-legitimize ETMs has increased the pressure for radical reform of the GATT. If the Tuna-Dolphin panel is right, so the argument goes, then the GATT is fundamentally flawed.[92] While one cannot hold the Tuna-Dolphin panel responsible for its political blunder, those GATT members (like the EC) who continue to clamour for the report's adoption are knowingly making it harder for the GATT to extricate itself from its Tuna-Dolphin predicament.

There is no need to amend the GATT (which would be difficult in view of the voting requirements) to deal with environmental concerns. Instead, the CONTRACTING PARTIES should utilize the least GATT-inconsistent way to permit legitimate ETMs—that is, a return to the original intent of Article XX.[93] This

[89] 106 Stat. 4905. This provision declares the sense of the Congress.

[90] For a recitation of this view, see *Don't Green GATT*, The Economist, 26 December 1992, at 15.

[91] See Charnovitz, Exploring the Environmental Exceptions in GATT Article XX, 25 *op. cit.*, footnote 8 at 47–51. A subsequent case, involving U.S. alcoholic and malt beverage laws, narrowed Article XX(d).

[92] For an early development of this argument, see *Trade and the Environment*, Hearing Before the Subcommittee on International Trade of the Committee on Finance, U.S. Senate Hearing 102–566, October 1991.

[93] See Charles F. Sills, *Draft-Horse, Not Dragon, Observations on Trade and the Environment*, 27 Columbia Journal of World Business (No. III), at 84–87.

approach would allow the GATT to avoid further confrontations with environmentalists that it cannot win. Furthermore, it might protect the GATT from being given new sustainable development responsibilities that it would be ill-equipped to handle.[94] The proper role for the GATT is to combat protectionism. That is a full-time job.

Of course, the United States is also at fault in the current controversies. The U.S. Congress needs to pay more attention to GATT rules in writing trade laws. With the trust of environmentalists and strong support in Congress, the Clinton Administration will be well positioned to exert leadership in the Trade and Environment debate. The most important new initiatives for the United States would be:

— Establishing more positive environmental policies on issues like global warming and biodiversity. Many countries saw hypocrisy in the way the U.S. government champions dolphins but denigrated some of the key issues at the Rio Conference.
— Repealing or revising U.S. ETMs that violate the GATT (e.g. certain provisions of the MMPA and IDCA.)
— Seriously participating in GATT talks (once full Article XX rights are restored) to develop new disciplines for regulating unilateral ETMs, particularly sanctions, and to achieve better policing of disguised trade restrictions.[95]

CONCLUSION

The GATT stands at a crossroads on environment. One option is to continue the battle against environmentalists, hoping that they will lose interest or see the error of their ways. The other is for the GATT to steer off its slippery slope toward ultracrepidarianism[96] and avoid any interference with national environmental policies, so long as they are not protectionist. It is this second option that offers the greater hope for a world that enjoys both sustainable development and free trade.

[94] Organizations do not often shun expanded responsibilities however—especially international organizations.

[95] As the Tuna-Dolphin panel correctly noted, such disciplines should be attained through deliberations by the CONTRACTING PARTIES, not by panels. See Tuna-Dolphin report at 6.3.

[96] From the Latin phrase *ultra crepidam* "beyond the sole" in allusion to the reply of Appelles to the cobbler. *The Oxford English Dictionary*, 2nd Edition, Clarendon Press, Oxford, 1989, Vol. XVIII, at 820.